REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 271 OF 2019

IN THE MATTER OF ARTICLES 20, 22(1), 23, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONER'S FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

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

AND

IN THE MATTER OF SECTIONS 4, 5, AND 5A OF THE BETTING, LOTTERIES AND GAMING ACT

BETWEEN

ADVANCED GAMING LIMITED.....PETITIONER

VERSUS

BETTING CONTROL AND

LICENSING BOARD.....1ST RESPONDENT

LITI WAMBUA.....2ND RESPONDENT

CYRUS MAINA.....3RD RESPONDENT

AND

SAFARICOM LIMITED.....INTERESTED PARTY

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 a statutory body established under section 3 of the Betting, Lotteries and Gaming Act [2](herein after referred to as the Act).

3. The second and third Respondents are the Acting Director and Chairman of the first Respondent respectively.

4. The Interested Party is a limited liability company carrying on telecommunication business. Its systems support the Petitioner's businesses through business Pay Bill Numbers.

Court's directions.

5. At the request of the parties, the court directed that this Petition be heard alongside two other Petitions, namely, Petition numbers 256 of 2019 and 252 of 2019, which involved similar issues.

6. In addition to the similarity in the issues raised in the three Petitions and the submissions made by the respective advocates, the Respondents' and the first Interested Party's pleadings are strikingly identical in the three Petitions. Inevitably, the three judgments will be identical in many respects.

Factual Matrix

7. It is uncontested that the Petitioner was licensed to carry on the business of entertainment facilities including promotion of betting and gaming under Bookmakers and Public Gaming Licenses issued by the first Respondent, which licenses expired on 30th June 2019. It is common ground that prior to the expiry of the said licenses, on 18th March 2019 and 21st May 2019, the first Respondent wrote to the Petitioner requiring it to apply for renewal of the licences and to comply with all conditions for the renewal.

8. It is not in dispute that on 12th April 2019 and 3rd June 2019, the Petitioner send its applications for renewal of its licenses to the first Respondent annexing:-

i. Receipts for Application fees.

ii. Copies of current bookmakers and public gaming licences.

iii. Audited accounts.

iv. Software license agreement.

v. KRA tax payment slips as proof of payment of tax.

vi. Tax Compliance Certificate.

vii. Nairobi City County business permit.

viii. Certificate of Incorporation.

ix. Directors Particulars Form CR 12.

9. The Petitioner states that on 18th April 2019, the first Respondent wrote to it asking for two other documents to enable it process its application, and, on 28th June 2019, it supplied the said documents. The Petitioner further states that without any further communication and barely 3 days later, that is on 1st July 2019, the Respondents rejected its applications citing alleged unspecified pending investigations. The Petitioner states that by a letter dated 3rd July 2019, it sought clarification on the alleged pending investigations, and requested time to comply in case of any issues. It also requested for maintenance of the *status quo* to enable it operate, but the said letter elicited no response.

10. In addition, the Petitioner states that prior to the Respondents' letter dated 1st July 2019 rejecting its applications, it was not aware of any investigations being undertaken on its business operations and no statement or representations have been sought from it relating to the purported investigations.

Legal foundation of the Petition

11. The Petition is anchored on the provisions of Articles 2, 3, 10, 20, 21, 22, 23, 40, 47, 50, 159, 165 (3) (d) and 259 of the Constitution and section 4(3) of the Fair Administrative Action Act[3](hereinafter referred to as the FAA).

12. The Petitioner states that the purported rejection of its applications on account of alleged unspecified pending investigations which it was not aware of and the failure to provide reasons violates its right to Fair Administrative Action under Article 47 of the Constitution and its right to information under Article 35 of the Constitution.

13. Further, the Petitioner states that the rejection of its applications for renewal of its licenses without any prior notice contravenes section 4(3) (a) of the FAA Act. In addition, the Petitioner states that the rejection of its applications without according it an opportunity to be heard or to attend the proceedings and to make representations in that regard contravenes its rights under section 4(3) (b) of the FAA Act.

14. Additionally, the Petitioner states that the provisions of section 5(3) of the Act, which permits the first Respondent to "*…refuse a licence or permit or renewal or variation thereof WITHOUT REASON given"* contravenes not only Article 47 of the Constitution and section 4 of the FAA Act and the very notion of fairness and natural justice.

15. It also states that the rejection of its applications without according it an opportunity to be heard and make representations violates Article 50(1) of the Constitution and its right to legitimate expectation that its licenses would be renewed upon application and compliance with all set conditions.

16. The Petitioner also states that the timing of the rejection of its applications is highly suspect and smacks of ill motive, bias and premeditated decision coming just the next day after the expiry of its licenses on 30th June 2019. In addition, it states that the decision to reject the application a day after its expiry, citing alleged UNSPECIFIED non-compliance with license conditions is an attempt by the Respondents to steal a match from the Petitioner.

17. The Petitioner also states that the first Respondent's direction to the Interested Party to suspend its Pay Bill numbers effectively halting its business and illegally holding its clients' money held therein violates its right to property under Article 40 of the Constitution.

18. The Petitioner avers that it has invested heavily in its business and the unjustified rejection of its application violates its legitimate expectation and unless stopped by this court, it will have to close operations, which will irreparably hurt its business due to substantial losses.

19. Further, the Petitioner states that the unreasonable rejection of its application renders its legitimate business illegal overnight and exposes it to penal sanctions, as it is now a criminal offence for it to operate without a licence.

20. In addition, the Petitioner states that the impugned decision is grossly unreasonable, lacks legal basis, it is malicious, arbitrary, and in bad faith. Lastly, the Petitioner states that in view of the foregoing violations, the impugned decision is null and void *ab initio.*

The Reliefs sought

21. As a consequence of the foregoing, the Petitioner prays for:-

i. A declaration that the 1st Respondent's decision rejecting the Petitioner's application for renewal of its licences contained in its letter dated 1st July 2019 without any valid reasons given violates the Petitioner's right to Fair Administrative Action under Article 47 of the Constitution and is therefore null and void ab initio.

ii. A declaration that the 1st Respondent's decision rejecting the Petitioner's application for renewal of its licences without any prior notice of that decision violates the Petitioner's right to Fair Administrative Action under section 4 (3)(a) of the Fair Administrative Action Act and Article 47 of the Constitution and is therefore null and void ab initio.

iii. A declaration that the 1st Respondent's decision rejecting the Petitioner's application for renewal of its licences without giving it an opportunity to be heard and make representations violates the Petitioner's right to Fair Administrative Action under Article 47 of the Constitution and is therefore null and void ab initio.

*iv. A declaration that section 5(3) of the Betting Gaming and Lotteries Act provides that the 1st Respondent can "…**refuse a licence or permit or renewal or variation thereof WITHOUT REASON** given" contravenes not only Article 47 of the Constitution and section 4 of the Fair Administrative Action Act and is therefore null and void.*

v. An Order of Certiorari to bring to this Honourable Court for purposes of quashing the decision of the 1stRespondent to reject the Petitioner's applications for renewal of its licenses contained in its letter dated 1st July 2019.

vi. An Order of Prohibition restraining the Respondents by themselves, their agents, servants, police or anybody whatsoever from in any manner intruding into or interfering with the Petitioner's lawful business operations and or stopping the Petitioners from carrying on their legitimate trade.

vii. An Order of Prohibition restraining the Respondents by themselves, their agents, servants, police or anybody whatsoever from unlawfully harassing or arresting any of the Petitioner's employees, agents or servants engaged in it its lawful business operations.

viii. An Order of Prohibition restraining the Interested Party from suspending and/or blocking the Petitioner's business Pay Bill numbers pursuant to the Respondent's directives.

ix. Costs of this Petition

Respondent's Replying Affidavit

22. Cyrus Maina, the third Respondent herein and the first Respondent's chairperson swore the Replying Affidavit dated 22nd July 2019. He averred that a registered company such as the Petitioner must lawfully authorize, by way of a resolution under its seal, 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.

23. He deposed that it is the statutory duty of the first Respondent to issue, renew, vary and/or cancel licences and permits required under the Act. He further averred that an application for a bookmakers licence is considered and/or determined by the first Respondent in accordance with *inter alia* the provisions of Sections 4, 5 and 5A of the Act. In addition, he averred that a bookmaker's licence issued under the Act at any particular time unless otherwise provided expires on the 30th of June next following the date of issue.

24. Mr. Maina further averred that under the law, the first Respondent is empowered to *inter alia* control and regulate betting and gambling in the country. He deposed that once a bookmaker's licence has expired, a party has to make a fresh application for its renewal in accordance with the law and such an applicant has to meet all the legal and regulatory requirements for it to be considered.

25. Mr. Maina also averred that the renewal after expiry is not automatic unless an applicant complies with all the necessary regulatory requirements. He added that the license cannot be renewed if an applicant has not complied with any of the requirements for renewal. He deposed that the Petitioner was well aware of the regulatory requirements, and, that, the conditions were brought to its attention at the time of obtaining the licence for the year 2018/2019.

26. He added that the renewal of the licence is also determined against an applicant's compliance with the conditions of the expired licence. He deposed the following regarding the Applicant's 2018/2019 licence and compliance issues:-

i. The Applicant was notorious with noncompliance with the requirement that it should submit weekly returns and it was notified and warned accordingly.

i. The Applicant has always been notified of the requirement and need for due diligence to be conducted and/or carried out before its licence could be renewed.

ii. In certain instances, the Applicant failed to comply with the licence conditions and it was warned and required to show cause.

iii. In most cases, the Applicant flagrantly ignored show cause letters and continued to operate in a manner contrary to the requirements of its licence.

iv. In the discharge of its statutory mandate, the first Respondent has at all times promptly informed the Applicant of the need to ensure compliance with the law and operating requirements that govern the betting and gaming industry.

v. Whenever the Applicant failed to adhere to the set operating requirements, the Applicant was well notified in advance and asked to comply.

vi. The Applicant continued to disobey and disregard the compliance requirements as a result of which the first Respondent issued further warnings and urged it to address the specific areas of noncompliance.

vii. On the issue of failure to submit weekly returns, the Applicant was always reminded to do the same despite having previously disregarded this requirement.

viii. Subsequently and after a period of back and forth with the applicant as regards the aforementioned compliance issues, the Applicant was eventually issued with a public gaming licence for the year 2018/2019.

ix. That the renewal process may at times take long depending on the compliance status by an applicant as a result of which a renewed licence will be issued way after it has expired on the 30th June.

27. Mr. Maina averred that the Petitioner's application was not renewed for want of compliance with the set conditions and regulatory requirements. He averred that the first Respondent established that the Petitioner had not fulfilled its licence renewal requirements being *inter alia* tax payment obligations amounting to billions of shillings it had collected from the gambling public.

28. He deposed that because of the foregoing, it was incumbent upon the first Respondent to notify the Interested Party, details of those who are not authorized to carryout trade within the meaning of the Act because only those with valid licences are permitted to maintain pay bill numbers and short codes. He averred that the interested party has already complied, and it should not be forced to break the law by allowing unlicensed operators to continue operating gambling without a valid license.

29. Mr. Maina deposed that the Petitioner wrote to the first Respondent requesting for a review of the said decision and to explain its compliance status vide a letter dated 3rd July, 2019, and, that, the first Respondent considered the contents of the said letter and clarified the areas of noncompliance. In particular, he averred that the Petitioner was advised that once its documents were authenticated, then its application will be reconsidered and if satisfied, the board will renew its licence.

30. He averred that the Petitioner does not have valid licences to enable it trade under the Act since the same expired on 30 thJune, 2019 in accordance with Section 9 of the Act. He also averred that the Petitioner was well aware of the consequences of not paying betting taxes and/or noncompliance with the applicable provisions of the Act and the conditions of its 2018/2019 licence would ultimately lead to non-renewal of the same for the period 2019/2020. He averred that despite the foregoing, the Petitioner failed to avail evidence of payment of applicable betting tax obligations, which was required by way of copies of the bank deposit, slips indicating payments at the applicable rates.

31. In addition, he averred that once an application for renewal of a bookmakers licence has been received, the first Respondent is also empowered by the act to conduct due diligence to determine and/or ascertain whether an applicant is fit and proper to hold a bookmakers licence.

32. He added that this Petition was filed before a decision on the Petitioner's application for renewal of its bookmakers licence was determined. He stated that the Petitioner's application was eventually determined and 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 the Petitioner vide a letter dated 1st July, 2019.

33. He deposed that any licensee who fails to pay the applicable betting/gambling taxes is not a fit and proper person to hold its licence as provided for under Section 5 of the Act, and, that, the first Respondent was not satisfied that the applicant is a fit and proper person whose bookmakers licence should be renewed.

34. Mr. Maina deposed that the instant Petition is solely intended to circumvent the renewal process for the bookmakers licence and to obtain a license without complying with the law and the set conditions thereof. He added that first Respondent has no objection to renewing the Petitioner's licence subject to compliance with all the legal requirements and issuance of security vetting clearance for directors.

35. He also averred that the investigations usually carried out by the security officers to determine fitness and applicant's suitability are usually intelligence and national security activities and as such, such information is exempted from disclosure within the meaning of section 6 of the Access to Information Act.[4]

36. In addition, he averred that all the applicants including the Petitioner whose licences were not renewed were kept informed of the status of their applications and that they have at all times been treated equally before the law.

37. He deposed that the Petitioner's constitutional rights have not been threatened and/or violated and that the Petitioner, as a global gaming company, knows too well the strict regulation and compliance levels required which are meant to protect the State and public interests in the legalization and operation of gambling/betting activities and for national security reasons.

38. 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, and, that, public interest must outweigh the private interest. In addition, he deposed that the rights alleged to have been violated are not absolute rights and any limitation imposed by the board by virtue of the challenged decision is reasonable in an open and democratic society.

39. He also deposed that the Petitioner could apply for a review of the decision once it is capable of demonstrating full compliance with the applicable laws, regulations and requirements; hence, this Petition should fail because of noncompliance with the doctrine of exhaustion of remedies. Alternatively, he averred that the Petitioner could present a fresh application for consideration by the first Respondent in accordance with *inter alia* Sections 4, 5 and 5A of the act.

40. He also averred that no orders have been issued against the first Respondent suspending the operation of Section 29A of the act, hence, the first Respondent's implementation of the said Section cannot be viewed as contemptuous, nor have the allegations of discrimination or denial of access to justice been proved.

41. Mr. Maina maintained that the impugned decision was arrived at in accordance with Sections 4, 5 and 5A of the Act, as well as other applicable requirements in relation to the same, hence, it did not violate Article 47 of the Constitution or the FAA Act as alleged or at all, or the alleged right to be heard.

42. He further averred that Section 5(3) of the Act enjoys a general presumption of constitutionality, and, that, the Petitioner has failed to rebut that presumption. He also averred that the impugned Section serves to protect parties especially the first Respondent from divulging information that might jeopardize national security in accordance with Section 6 of Access to Information Act.[5] He added that the Petitioner was given written reasons for the decision.

43. He added that Section 5(3) of the Act cannot be said to contravene Section 4 of the FAA Act or unconstitutional, because alleged unconstitutionality of a statute is measured only against the provisions of the Constitution. He also deposed that so long as the Petitioner does not comply with all the applicable laws and until such a time that it obtains a valid gaming licence, there would be no basis to quash the decision.

44. Lastly, he deposed that the Petitioner seeks to prevent the Respondents and the Interested Party from lawfully dealing with those that are illegally operating betting/gambling activities, which would impede the first Respondent from ensuring that only lawfully, authorized entities carry out betting/gambling activities. He also deposed that the Petition seeks to exempt the Petitioner from the application of the law.

Interested Party's Replying Affidavit

45. Isaac Kibe, the Interested Party's Legal Counsel, Financial Services swore the Replying Affidavit dated 23rd July 2019. He averred that the Interested Party 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. He deposed that the Petitioner was required at all material times to *inter alia* hold a valid license from the first Respondent.

46. Mr. Kibe averred that vide a letter dated 10thJuly 2019, the second Respondent informed the Interested Party 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.

47. He averred that the first Respondent directed the Interested Party to suspend the Petitioner's Pay bill account and other short codes until otherwise advised. He referred to Article 12 of the Gaming Terms and Conditions, which provided that the Petitioner was required to hold a valid license as a precondition to holding the account for purposes of betting and gaming.

48. He further averred that under the contract between itself and the Petitioner, the Petitioner bound itself to 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.

Petitioner's further Affidavit

49. **Anton Ogonian**, the Petitioner's Managing Director swore the Replying affidavit dated 25th July 2019. He averred that contrary to the Respondent's assertion, by granting the orders sought, this court would not have taken over the Respondents' statutory function.

50. He averred that the statutory and regulatory requirements adverted to by the Respondents, which were allegedly not complied with leading to rejection of its application for renewal of license were never disclosed or communicated to the Petitioner.

51. He also averred that no proper and lawful decision has been made to grant or deny the renewal of the license, and, that, the impugned decision is in fact a non-decision as it was made without according the Petitioner an opportunity to be heard and without giving any reason for the adverse decision.

52. On the question of failure to exhibit authority to swear the supporting affidavit, he averred that the requirement for authority to swear an affidavit before filing a petition is archaic and completely out of touch with the constitution which places no pre-requisite whatsoever to a person bringing a Petition for enforcement of rights under Article 22.

53. In addition, he averred that the Respondent's duty to issue or renew licenses must be discharged in strict compliance with the Constitution and the law, and, that; the crux of the dispute herein is not the merit of the impugned decision.

54. Further, he averred that the Respondent attempted to portray the Petitioner as having a history of non-compliance but omitted to disclose the proceedings in *Judicial Review Miscellaneous Application No. 403 of 2018* in which this court quashed the Respondents' decision to cancel/suspend the Petitioner's license.

55. Mr. Ogonian also averred that the first Respondent cited absence of tax compliance yet in the impugned decision it stated that the application lacks merit because of pending investigations to compliance or otherwise with set conditions and regulatory requirement. He also averred that the tax issues were never disclosed to the Petitioner until the filing of the said affidavit and neither has the amount in arrears and tax period been disclosed.

56. He also averred that the Petitioner paid all its taxes and has in its possession the tax payment slips and a valid Tax Compliance Certificate, and, that it supplied the same to the Respondents, hence, there is no valid reason for the refusal.

57. Lastly, he averred that as a show of bad faith, weeks after the impugned decision, the Respondents purported to "seek clarifications" by way of the letter annexed as CM-16 on the last page of their affidavit. In addition, he averred that in the said letter, the first Respondent introduced totally new requirements as pre-requisites for renewal of license which were not part of what was initially required by the Respondent.

Issues for determination

58. Upon considering the diametrically opposed positions presented by the parties, including their respective advocates written and oral submissions, I am persuaded that the interests of justice will be met by distilling and addressing the following issues:-

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

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

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

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

e. Whether the first 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 second and third Respondents are 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. Whether the Petitioner is entitled to any of the prayers sought.

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

59. Mr. Mbugua Ngángá, the Petitioner's counsel argued that the Petitioner submitted its application for renewal of its 2019/2020 license, and attached all the required documents. He stated that the first Respondent acknowledged the application and requested for two more documents, which the Petitioner supplied but, the first Respondent replied stating that the application lacks merit on account of pending investigations. He argued that the Petitioner sought clarity regarding the alleged pending issues.

60. Mr. Ngángá argued that two weeks after the Petition was filed the first Respondent wrote to the Petitioner citing alleged tax issues for the first time. He submitted that the Petitioner never had a tax dispute, but it annexed a tax compliance certificate. It was Mr. Ngángá's position that allegations of outstanding taxes cannot form the basis of declining a license. He referred to section 4(1) (a) of *The Betting, Lotteries and Gaming Regulations*, and argued that there is no legal requirement that if a person has a tax dispute, he cannot get a license. It was his submission that the Commissioner of the Kenya Revenue Authority makes an assessment after which tax is deemed to be due and payable. To support his position, he referred to section 92 (a) and 73 of the Income Tax Act.[6] He submitted that it is the duty of the Commissioner to assess taxes and not the first Respondent and argued that there is a mechanism for recovering taxes; hence, it cannot be a basis for withdrawal of licenses.

61. Mr. Ogosso, counsel for the Respondents cited the first Respondent's mandate under section 4, 5 (a) of the Act. He cited the preamble to the Act, and argued that it is not possible to delink tax issues from the first Respondents operations, and, that, the first Respondent does not collect taxes, but only requires proof of payment.

62. The elephant in the house is the question whether tax compliance is a relevant consideration while considering an application for the licenses in question. With tremendous respect, the parties did not address this question with sufficient detail yet it was one of the reasons cited for the refusal. Mr. Ogosso's position was that the first Respondent does not collect taxes, but only requires a tax clearance certificate from the Kenya Revenue Authority. Mr. Mbugua Ngángá on the other firmly stated that payment of tax was not a requirement under the Act. He also argued that it is not the mandate of the first Respondent to collect taxes. Lastly, he argued that the Petitioner presented a Tax Clearance Certificate and payment receipts for the taxes.

63. 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.

64. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings*[7] in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[8]

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.

65. 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.

66. The Singapore case of *City Developments Ltd. v. Chief Assessor*[9] 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."[10]

67. The duty of the court 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 the 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.

68. 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*,[11] 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 weighing the relevant considerations was a matter for the Commission, not the courts.[12]

69. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment,*[13] 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."[14] 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. "*

70. 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.

71. 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.

72. Our Constitution requires a purposive approach to statutory interpretation.[15] In this regard, I find useful guidance in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[16] 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."*

73. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[17] 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."* ***[18]***

74. 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.[19] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others****[20]*** 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."*

75. 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 material and a relevant consideration while determining whether to grant or refuse to grant a license under the act. To conclude otherwise is to me an unfaithful construction of the statute.

76. I find it fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who remarked "... we must always side with the Rule of Law." [21] 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 an instrument of social change.[22]

77. Before existing the above 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*[23] in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[24] 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).*

78. 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 reason is defendable under the enabling statute. The converse is whether the argument propounded by counsel for the Petitioner that tax payment is not a relevant consideration in considering an application for the license is defendable in law. 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.* 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*

79. 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 scope 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, and bearing in mind the preamble statement discussed above.

80. 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 successful. What is relevant is the materiality of compliance with the application requirements.

81. 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.

82. Consistent with the above approach, the first question is whether an irregularity occurred in this case. At the centre of this contest is a letter dated 17th July 2019 requiring the Petitioner to submit proof of withholding tax payment for January 2019 to May 2019. I have diligently searched the entire file and I am unable to find evidence that the Petitioner provided proof of payment of the withholding tax.

83. Also relevant 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*.

84. In addition, section 29A of the Act provides as follows:-

> *(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.*

85. Bearing in my the preamble to the Act and the above sections, it is my finding that 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 and the purposive interpretation of the enabling statute. In addition, from the annexures to the Petitioner's Affidavit, it is evident that from the outset, the Petitioner was fully aware that proof of tax payment was among the requirements. The Petitioner states that it provided a Tax Compliance Certificate. That may be so. However, proof that it had paid Withholding Tax was not provided. In view of my analysis herein above, it is my conclusion that proof of payment of withholding tax was not only a relevant consideration, but also a requirement under the Act. It follows that the assault of impugned decision on this ground fails.

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

86. Mr. Ngángá submitted that the letter declining the licence is not clear and that the Respondents had an obligation to provide reasons. In

addition, Mr. Njenga, appearing with Mr. Ngángá stated that denial of a license must be grounded on an objective decision, not a belief as alleged, and, that, the decision must be specific. Mr. Njenga argued that the letter communicating the decision does not meet the criteria of Article 47 of the Constitution.

87. Mr. Ogosso argued that the Petitioner moved to court before it could be supplied with reasons, hence, the reason why the information was supplied in court. He pointed out that there is a distinction between issuance of a license and a renewal, and, in the instant case, the license had expired. Responding to the allegation that the Petitioner became aware of the decision after filing this Petition, Mr. Ogosso invited the court to look at the prayers sought in the Petition and pointed out that the Petitioner seeks to quash the letter dated 1st July 2019. It was his submission that the Petitioner did not become aware of the decision after coming to court as alleged.

88. On the allegation that the decision was not communicated in time, Mr. Ogosso referred to the Replying Affidavit of Mr. Maina, para 30 and in particular the correspondence annexed thereto.

89. 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*.***[25]*** However, cases are context sensitive. The Petitioner moved to court on 11th July 2017. Among the prayers sought is a declaration seeking to declare the decision contained in the first Respondents letter dated 1st July 2019 null and void *ab initio*. The Petitioner also seeks orders to quash the decision contained in the said letter. The argument that the Petitioner was not aware of the decision or that the decision was not communicated fails.

90. The Petitioner also states that the first Respondent wrote on 1st July 2019 and rejected its application citing alleged unspecified pending investigations. I have already reproduced section 5A of the act, which permits the first Respondent to *inter alia* undertake investigations before considering grant of a license.

91. As 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. In addition, on 21st May 2019, the second Respondent wrote to the Petitioner reminding it to submit its application together with the documents listed in the said letter. Those were the requirements upon which the application was to stand or fall. 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.

92. Annexed to the Respondent's Replying Affidavit is a letter dates 17th July 2019 referenced proof of withholding tax payment January 2019 to May 2019 asking the Petitioner to submit its operation returns from 1st July 2018 to 30th June 2019 in the prescribed format to enable the Respondent to authenticate its submissions. The Petitioner submits that it was not provided with reasons. The Respondents position is that the Petitioner moved to court before it could be provided with reasons. I have already held earlier that tax payment is a relevant consideration while determining whether to grant the license in question. It is also a legal requirement under the Act as appears in the preamble to the Act and sections 29A and 55A of the Act.

93. The Petitioner was requested to submit returns for authentication of its submissions on withholding tax. It has not availed evidence to show that it complied. The refusal was anchored on non-compliance with the withholding tax payment. I am unable to discern what other reasons the Petitioner wants, when it was told to provide prove of payment of withholding tax.

94. There is evidence of correspondence between the parties after the decision was rendered and even after this Petition was filed. 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 up hold 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 Petition, the Petitioner has given a detailed chronicle of the events leading to the rejection of its application culminating with paragraphs 53 and 55 of the Petition, which leave, me with no doubt that the Petitioner was aware of the reasons why its application was rejected.

95. In addition to the foregoing, section 5(3) of the Act permits the first Respondent to grant or refuse to grant a license without giving reasons. To the extent that the said section permits the first Respondent not to give reasons, the refusal to provide reasons has a statutory backing; hence, its legality is not in doubt.

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

96. Mr. Ngángá cited section 5(1) of the act and argued that the Petitioner applied for the license in the prescribed manner, and, that the first Respondent was required to consider and make a determination in accordance with the said provision. He argued that the criteria for issuing a license must flow from the statute, hence, the moment the Board is satisfied that the criteria in section 5 has been met, the license must be considered, and, that, an investor is entitled to certainty of the requirements. To buttress his argument, he cited *Republic v Kenya Ports Authority Ex parte Alice Wamaitha Mwangi*[26]a case involving a dispute relating to grant of a licence to a tour operator. In the said case, the court granted an order of *Mandamus*. I will discuss the said decision in later under the doctrine of legitimate expectation.

97. Mr. Ogosso submitted that section 5A of the Act provides the applicable criteria. He maintained that the criteria is a statutory requirement. He submitted that section 5(3) of the Act applies where a license has been suspended; hence, quashing the decision cannot grant the Petitioner an expired license. In his view, the applicant can submit a fresh application in accordance with the law.

98. 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 decisions to be allowed to stand, it must be demonstrated that the decision is grounded on the law. As such, the Respondents' actions must conform to the doctrine 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]

99. 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.

100. 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.

101. 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.

102. 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.

103. 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.

104. 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.

105. 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.

106. 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.

107. I find no contest that the enabling statute confers mandate upon the first 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 first 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.

108. 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 leaves 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 where conditions are not satisfied.

109. 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.

110. 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.

111. 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 first Respondent any discretion when evaluating compliance with the law unless the requirements imposed are immaterial, unreasonable or unconstitutional.

112. My reading of the Act is that it conforms with and gives effect to the obligation imposed by Articles **209** and **210** of the Constitution which requires taxes to be enforced by legislation and the duty of every person to pay taxes. Therefore, the licensing process in the statute must be construed within the context of Articles **209** & **210** while striving for an interpretation, which promotes 'the spirit, purport and objects of the said Articles. 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 first Respondent acted *ultra vires*.

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

113. Mr. Ngángá submitted that the impugned decision violated the Petitioner's right to legitimate expectation. To buttress his argument, he cited *Republic v Kenya Ports Authority Ex parte Alice Wamaitha Mwangi*,[34] a dispute which involved stoppage or suspension of a licence to a tour operator. In the said case, the court held that:-

> *"A tour operator such as the ex parte applicant who has been licenced over time to operate at the Port and who has faithfully met all the conditions for the carrying on tour business at the Port including paying the necessary licence fee has an expectation created by the long period of prior licensing and payment of applicable licence fee and meeting all conditions set by the respondent that her licence would not be stopped, cancelled or suspended and or his application for renewal refused or recalled without reasons given to her for the stoppage, cancellation or suspension and without giving her an opportunity to be heard on the matter. There is also legitimate expectation that meeting all the licensing requirements, an applicant will have her application for licence successfully processed."*

114. He further relied on *Republic v Baringo County Government & another; Stephen K. Cheptoo & 8 others (Ex Parte Applicants)* ***[35]*** in which the following passage from *R v Devon County ex parte P. Baker*[36] was cited:-

> *"It is in the interest rather than the benefit that is the substance of expectation. In other words, the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness, the law recognizes that interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."*

115. Mr. Ogosso's rejoinder to this submission 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.

116. 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.

117. 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.[37] 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.

118. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[38] 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.[39] 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."****[40]***

119. 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.[41] 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.[42] 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.

120. 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*.[43] 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.

121. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth****[44]*** 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)

122. 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 qualification. Earlier in this judgment, I reproduced the relevant provisions of section 5 of the act, which prescribes the legal requirements for the grant of the license. 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 absence of evidence that it paid withholding tax. In addition, the fact that it held similar licenses cannot confer legitimate expectation that once its license expires, it would be renewed automatically. This is because the renewal is subject to the conditions being met. It follows that the allegation of violation of the right to legitimate expectation fails.

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

123. The Petitioner's counsel submitted that other operators have been licensed under similar circumstances, hence, there is abuse of power and, the refusal is without a lawful cause. He argued that it was malicious for the first Respondent to wait until its license expired on 30th June 2019. Further, he argued that the issues of the alleged due diligence are not clear. He added that the Board wrote to the Interested Party asking them to suspend the Petitioners pay Bill Numbers, which he argued was in bad faith.

124. Mr. Ogosso submitted that JR No. 56 of 2019 cited by the Petitioner's counsel is distinguishable since it dealt with suspension of a trading license. In his view, the court cannot direct the Petitioner to continue trading on an expired license. He referred JR 21 of 2011 where the court faulted the Respondent for not affording the applicant a fair trial but since the license had expired, it dismissed the application.

125. A case is only an authority for what it decides. This is aptly stated in the following passage:-[45]

> *A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to*

the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

126. The ratio of any decision must be understood in the background of the facts of the particular case.[46]A case is only an authority for what it actually decides, and not what logically follows from it.[47] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[48]

127. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[49]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[50] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. The decision cited by the Petitioner's counsel related to suspension of a licence. The instant case relates to an application for a licence or renewal. The previous licence had expired. A renewal or a new application must be considered against the requirements.

128. The crux of the submissions by counsel for the Interested Party Mr. Ohaga was that it was a term of the contract between the Petitioner and the Interested Party that the Petitioner would hold a valid license as a precondition to maintain an account with the Interested Party. He submitted that it was the Petitioner's obligation to obtain the license in accordance with the law. He maintained that the relationship between the Petitioner and the Interested Party is contractual and is governed by the agreement between the parties. He cited *Lalji Karsan Rabadia & 2 Others v Commercial Bank of Africa Limited*[51] and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd*[52] for the proposition that it is not the business of a court to rewrite a contract made by parties.

129. It is against the foregoing background that this court is invited to find malice and abuse of powers in the manner in which the application was declined and suspension of the Pay bill numbers. 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. 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.[53]

130. 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.

131. 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.

132. A decision based on malice is usually one that is directed to the person.[54] The malice may arise out of personal animosity built up over a series of past dealings.[55] 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.[56] In another Canadian case it was held that a local authority cannot use its licensing power to prohibit lawful businesses of which it disapproves.[57] 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.[58]

133. 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.

134. Mr. Ng'ang'a argued that the Petitioner ought to have been heard before his legitimate expectation was adversely affected. To buttress this argument, he cited *Civil Service v Minister for Civil Service*[59] where Lord Diplock stated that for legitimate expectation to be thwarted the affected person has to *receive assurance from the decision maker that the expectation will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.*

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

136. 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.[60] 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.

137. In *Local Government Board v. Arlidge,*[61] 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."*

138. 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.[62] 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."[63]

139. However, what is important to be noted 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*,[64] 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*[65] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

140. 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. [66]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[67]

141. It is imperative to appreciate the distinction between the right to a fair hearing under Article 50 of the Constitution and the right to a fair hearing under Article 47 of the Constitution. In *J.S.C. vs Mbalu Mutava*[68] 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 of Appeal 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 duties 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.[69] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

142. The decision complained of is an administrative function. It is a 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 first 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 first Respondent to hear each applicant is impractical. This is because the application stands or falls on set statutory requirements. The basis for my 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*[70]

"*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

143. The Petitioner contended that the impugned decision is grossly unreasonable and lacks legal basis. Mr. Ogosso did not directly address this ground of assault.

144. 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[71] 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.[72]

145. 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*[73] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[74]This stringent test has been applied in Australia[75] 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 mandatory statutory requirements, I am not persuaded that a different body or tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion.

146. 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.

147. 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.

148. 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.

149. 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.[76]

150. 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.

151. Guided by the jurisprudence and legal principles and tests discussed above, and applying the same to the 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 conclusion.

h. Whether the Petitioners right to information was violated

152. The Petitioner states that its right to information was violated because it was not notified details of the investigations that were being undertaken against it.

153. 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.[77]

154. Access to Information Act[78] 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.

155. 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.

156. 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* [79] 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."*

157. 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 in the instant case are intelligence reports and security investigations. A reading of section 6 leaves me with no doubt that the information in question fall within the permitted exceptions. It follows that the first Respondent cannot be compelled to disclose the reasons.

158. More fundamental is the fact that section 5(3) of the Act provides that the first Respondent may decline to grant a license without giving reasons. Consistent with the said provision, the first Respondent is not bound to give details of the nature of the investigations it was undertaking.

i. Whether the second and third Respondents are improperly joined in this Petition

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

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

161. 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.

162. 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.

163. 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.

164. 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.

165. *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.

166. *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.[80]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[81] 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.

167. 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.

168. 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.[82] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[83] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

169. A proper construction of section **3 (12)** above leads me 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

170. Mr. Ng'ang'a argued that to the extent that section 5(3) of the Act provides that the first Respondent may reject an application for a license without giving reasons, the same is unconstitutional in that it offends Article 47 and section 4 of the FAA Act.

171. 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.

172. 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.[84] 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*:-[85]

> *"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."*

173. 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."*

174. 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.

175. 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?* ***[86]***

176. 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.'

177. The Canadian Supreme Court[87](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.

> *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.* ***[88]***
>
> *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.'* ***[89]***

178. 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.'* ***[90]***

179. 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 listed in the act. Some reasons fall under the exceptions provided for in section 6 of the Access to Information Act [91] 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.[92]

180. 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.

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

182. Third, the first 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, the information is exempted from disclosure by section 6 of the Access to Information Act. [93]

183. Fourth, Access to Information Act[94] flows from Article 35 of the Constitution, so, it has a Constitutional under pinning. Hence, the section cannot be unconstitutional because disclosure of the information is exempted under section 6 of the Act.

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

184. The Petitioner's counsel argued that it has invested heavily in its business and that the impugned decision offends its constitutionally guaranteed right to property. The Respondent's counsel did not address this issue.

185. A violation of the right to property occurs when there is an unjustifiable interference with property rights. It follows from the above that the relevant 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?

186. First, the property in question in the instant case is alleged investment to undertake betting and gaming license. 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 cannot amount to unfair interference with property rights nor can it constitute an unjustifiable interference with property rights.

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

187. The Petitioner prays for several declaratory orders, among them a declaration that its rights under Article 47 of the Constitution, the right to legitimate expectation and the right to a fair administrative action have been violated. It also seeks a declaration that section 5(3) of the act contravenes Article 47 of the Constitution.

188. The tests for granting a declaratory relief were settled in *Durban City Council v Association of Building Societies**[95]*** and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd.**[96]***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.

189. 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 does it proceed to the second leg of the enquiry.

190. 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.

191. Applying the above factors to the present application, this court is not persuaded that the circumstances of this case warrant the granting of the declaratory reliefs sought.

192. The Petitioner seeks orders of *certiorari* to quash the impugned decision and an order *restraining the Respondents by themselves, their agents, servants, police or anybody whatsoever from unlawfully harassing or arresting any of the Petitioner's employees, agents or servants engaged in it its lawful business operations. It also seeks to prohibit the Interested Party from suspending and/or blocking the Petitioner's business Pay Bill numbers pursuant to the Respondent's directives.*

193. 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.

194. 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. It is important to point out that the Petitioner never sought an order of *Mandamus* to compel the Respondents to grant them the license nor do I find any basis to compel them in the circumstances of this case.

195. In any event, the Respondents are on record stating that the Petitioner can apply for the licenses afresh once they meet the set conditions. If applied, the same will be considered in accordance with the law.

196. The Petitioner also seeks an order of *Prohibition* restraining the Respondents or any person acting on their behalf from intruding into or interfering with its lawful business operations or stopping them from carrying on their legitimate trade or arresting them. They also seek an order of prohibition restraining the Interested Party from suspending and or blocking its business Pay bill numbers.

197. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling

an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondents acted illegally or in excess of their powers nor has the decision refusing to grant the license been shown to be illegal, irrational or a nullity. The Petitioners cannot seek an order of *Prohibition* to enable them to operate on an expired license. An order of Prohibition cannot issue against clear provisions of the law.

198. The Petitioner also seeks an order or *Prohibition* to restrain the Interested Party from suspending their Pay Bill numbers. The uncontested material presented to this court leaves me with no doubt that possession of a valid licence is a condition precedent for the Interested Party to grant the Petitioner the Pay Bill numbers. The contract is clear that it is the Responsibility of the Petitioner to obtain a valid license. This court cannot grant a prohibition, which will defeat or frustrate contractual terms voluntarily entered into by parties as in this case.

Disposition

199. In view of my analysis of the facts, the law and my conclusions herein above, I find and hold that this Petition fails in its entirety, and, that, the same is fit for dismissal. Accordingly, I hereby dismiss the Petition dated 11th 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] Act no. 17 of 2015.

[2] Cap 131, Laws of Kenya.

[3] Act No. 4 of 2015.

[4] Act No.31 of 2016.

[5] Act No.31 of 2016.

[6] Cap 470, Laws of Kenya.

[7] {1995} 1 W.L.R. 1037, Court of Appeal (England and Wales).

[8] Ibid, pp. 1049–1050.

[9] {2008} 4 S.L.R.(R.)

[10] p. 159, para. 17.

[11]{1983} Q.B. 600, C.A. (England and Wales).

[12] Ibid, pp. 635–637.

[13] {1995} 1 W.L.R. 759, H.L. (UK).

[14] Ibid, p. 780.

[15] 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.

[16] {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

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

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

[19] *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.

[20] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[21]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.

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

[23] {2018}eKLR.

[24] Published in Just Law {2004}.

[25] {2016} eKLR.

[26] {2016} eKLR.

[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] {2016} eKLR.

[35] {2018} eKLR.

[36]{1995}ALL ER.

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

[38] 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).

[39] Ibid.

[40] Ibid.

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

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

[43] 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.

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

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

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

[47] Ibid

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

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

[50] Ibid.

[51] {2015} e KLR.

[52] {2017} e KLR.

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

[54] *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.

[55] *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.

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

[57] *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).

[58] *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).

[59]{1984} ALL ER 935 at P 949, Lord Diplock.

[60] 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.

[61] {1915} AC 120 (138) HL.

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

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

[64] (1980), at page 161.

[65] (1977) at page 395.

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

[67] 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).

[68] {2015}eKLR.

[69] Ibid.

[70] (335/2004) [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) (19 September 2005).

[71] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

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

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

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

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

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

[77] Act No. 31 of 2016.

[78] Ibid.

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

[80]*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).

[81] Ibid.

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

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

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

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

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

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

[88] Ibid.

[89] Ibid.

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

[91] Act No. 31 of 2016.

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

[93] Act No. 31 of 2016.

[94] Act No. 31 of 2016.

[95] 1942 AD 27 at 32

[96] 2005 (6) SA 205 (SCA) at para 15 to 17.