REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 108 OF 2018

IN THE MATTER OF AN APPLICATION BY OLIVER COLLINS WANYAMA KHABURE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

and

IN THE MATER OF THE ENGINEERS ACT, THE FAIR ADMINISTRATIVE ACTION ACT AND ARTICLE 47 OF THE CONSTITUTION OF KENYA

REPUBLIC.....APPLICANT

-VERSUS-

ENGINEERS BOARD OF KENYA.....RESPONDENT

AND

OLIVER COLLINS WANYAMA KHABURE.....*EX PARTE* APPLICANT

JUDGMENT

The Parties.

1. **Oliver Collins Wanyama Khabure** *(*hereinafter referred to as the *ex parte* applicant) is a professional Engineer duly licensed by the Respondent. He is also a Director of Interphase Consultants Limited, a limited liability (hereinafter referred to as **Interphase**).

2. **Engineers Board of Kenya** (hereinafter referred to as the Board) is a statutory body with a common seal and perpetual succession established pursuant to section **3 (1) (2)** of the Engineers Act[1] (hereinafter referred to as the Act).

The relief's sought.

3. Pursuant to leave of this court granted on **9th** March 2018, the ex parte applicant filed a Notice of Motion dated **21st**March 2018 seeking:-

*a) An order of **certiorari** to remove into this honorable court and quash the decision of the Respondent dated **27th** February 2018.*

*b) An order of **Prohibition** to prohibit and restrain the Respondent from publishing in the Kenya Gazette or in any newspaper its decision dated **27th** February 2018.*

*c) An order of **Prohibition** to prohibit and restrain the Respondent from proceeding further and or recommending any Disciplinary Proceedings against the applicant in respect of the charge sheet annexed to the Respondent's letter to the ex parte applicant dated **20th** December 2017.*

d) That the costs of and incidental to this application be borne by the Respondent in any event.

e) Such further or other relief as this Honorable Court may deem just and expedient to grant.

4. On **18th** April 2018, I directed the Board to file its Replying Affidavit within **21** days from the said date with leave to the ex parte applicant to file a supplementary Affidavit (if need be) together with his submissions within **7** days from the date of service by the Board. Further, I directed the Board to file their submissions within **14** days from date of service and scheduled a mention date for directions on **3rd** May 2018. On **15th** May 2018, the parties recorded a consent granting the ex parte applicant leave to amend his statutory statement and an order staying Gazette Notice Nos. **2098** of **9th** March 2018 and No. **3518** of **13th** April 2018 pending the hearing and determination of this suit.

5. The amended statutory statement dated **3rd** May 2018 seeks the following reliefs:-

*a) An order of **certiorari** to remove into this Honorable Court and quash the decision of the Respondent dated **27th** February 2018.*

*b) An order of **certiorari** to remove into this Honorable Court and quash Gazette Notice Number **2098** of **9th** March 2018 and Gazette Notice Number **3518** of **13th** April 2018.*

*c) An order of **Prohibition** to prohibit and restrain the Respondent from publishing in the Kenya Gazette or in any newspaper its decision dated **27th** February 2018.*

*d) An order of **Prohibition** to prohibit and restrain the Respondent from proceeding further and or recommencing any Disciplinary Proceedings against the Applicant in respect of the Charge Sheet annexed to the Respondents' letter to the applicant dated **20th** December 2017.*

e) Spent.

f) Spent.

*g) **That** the costs of and incidental to this application be borne by the Respondent in any event.*

h) Such further or other relief as this Honorable Court may deem just and expedient to grant.

Grounds in support of the application.

6. In my view, the following is a proper evaluation and summary of the grounds and facts relied upon by the ex parte applicant as far as I can distil them from the Statutory Statement and his Affidavits. The ex parte applicant states that he is registered as a professional Engineer within the meaning of section **2 (1)** of the Act. He also states that at all material times, he was a Director of **Interphase** whose primary business is to carry out the business of an engineering consultancy company.

7. The ex parte applicant states that the Board, without prior notice of a complaint against him, by its letter dated **11th** December 2017 informed him that it suo motto commissioned an inquiry on the collapse of Sigiri Bridge in Busia County (herein after referred to as the Bridge), and, that the inquiry revealed that the ex parte applicant was involved in the works, and, that, he failed to provide adequate design and sufficient information to the contractor as stipulated under the contract dated **1st** July 2015 between **KeRRA** (the employer) and **COVEC.**

8. Further, he states that the letter also required him to appear in person before the Board's Disciplinary Committee to defend himself against charges of professional misconduct and breach of professional obligations as stipulated in the act and the Engineers Code of Ethics and Conduct, 2016. Also, he states that the Board also forwarded a charge sheet and required him to file his response within **7** days from **11th** December 2017 to respond to the following offences:-

*a. Professional Misconduct contrary to section **45** of the Engineers Act, in that the applicant being licensed as a professional or consulting engineer, deliberately failed to follow the standards of conduct and practice of the engineering profession set by the Board and that the applicant committed gross negligence in the conduct of his professional duties.*

*b. Reach (sic) of professional obligations in that the applicant breached Rule **4 (d)** of The Code of Ethics and Conduct of Engineers 2016 in that the applicant did not act as the employer or client as a faithful agent or trustee.*

c. The particulars of the offence were set out as follows:-

*"on diverse dates between the years 2015 to 2017, you were involved in the design and construction of Sigiri Bridge across river Nzoia on Road **R43**, Busia County. You failed to provide adequate design and sufficient information to the contractor as stipulated under the contract dated **1st** July 2015 between **KeRRA** and **COVEC** to enable him execute the works. You entered into a memorandum of understanding with **COVEC** on **1st** December 2014 which formed part of the aforesaid contract.*

*Further, you vacated the site before completion of the project and the last time you were on site was on **21st** July 2016. The work proceeded without your input and there was no formal communication between yourself and the employer or his absence. As a result of your professional misconduct, the Bridge collapsed occasioning the employer a loss to the tune of **Ksh. 992,546,146.28***

In particular, the Final Detailed Design and Drawings presented had the following inadequacies/omissions:-

Bridge design

a. Had some elements of the Bridge designed to BS 8110 rather than BS5400, including piers and abutments.

b. Omitted design for key loads including construction loads.

c. The design was not comprehensive and lacked design particulars of the following items:-

- *Lamination for mid span bottom flange was not considered;*
- *No clear stud design was done;*
- *No bearing design was done;*
- *The design and detailing of bolted splice was different;*
- *Fatigue analysis was not undertaken;*
- *Piles were designed as in pure axial loading, no bending loads were considered;*
- *Deck expansion analysis was not undertaken.*

Bridge Drawings.

- *Did not indicate construction sequence;*
- *HSFC bolt details were not given;*
- *Steel protection details not provided.*

9. The ex parte applicant states that as he was preparing his response to the aforesaid allegations, by a letter dated **20th** December 2017 addressed to him, the Board forwarded to him a revised charge sheet (without informing him the reasons for the amended charge sheet), and required him to appear for a disciplinary hearing on **25th** January 2018 and submit a response to the charge sheet by **8th** January 2018. The new charges against the applicant:-

*i. Professional misconduct contrary to section **45** of the Engineers Act in that the applicant being licensed as a professional or consulting engineer deliberately failed to follow the standards of conduct and practice of the engineering profession set by the Board and that the applicant committed gross negligence in the conduct of his professional duties.*

*ii. Operating Interphase firm without prior registration by the Board contrary to section **29 (a) (vii)** of the Engineers Act.*

*iii. Breach of professional obligation in that the applicant breached rule **4 (d)** of the Code of Ethics and Conduct of Engineers 2016 in that the applicant did not act as the employer or client as a faithful agent or trustee.*

iv. The particulars of the offences were:-

*"On diverse dates between the years 2015 to 2017, you were involved in the design and construction of Sigiri Bridge across river Nzoia on Road R43, Busia County. You failed to provide adequate design and sufficient information to the contractor as stipulated under the contract dated **1st** July 2015, between **KeRRA** and **COVEC** to enable him execute the works. You entered into a memorandum of understanding with **COVEC** on **1st** December 2014 which formed part of the aforesaid contract. You operated Interphase firm without having it registered by the Board hence contravening section **29 (a) (vi**) of the Engineers Act.*

*Further, you vacated the site before completion of the project and the last time you were on site was on **21st** July 2016. The work proceeded without your input and there was no formal communication between you and the employer on your absence. As a result of your professional misconduct, the Bridge collapsed thus occasioning the employer a loss to the tune of **Ksh. 992,546,146.28**.*

*In particular, the final detailed design and drawings presented had the following inadequacies/omission**:- NOTE: Details as per the earlier charge sheet.***

10. The ex parte applicant also states that in his detailed response he explained all the issues raised by the Board. In particular, the applicant states that he explained that Interphase was not privy to the contract dated **1st** July 2015 between **KeRRA** and **COVEC,** and that he is not a director in a company known as Interphase Firm, the subject of the charges against him and that that he was a director in a company known as Interphase Consultants Limited. Further, he explained that he has been licensed every year since he started practice as a professional engineer. Further, states that he clarified that Interphase has been licensed every year by the Board to carry out the business of Engineering Consultancy and he provided the Board with license numbers for every year, hence, it could not have violated section **29 (a) (vi)** of the act.

11. He also stated that in the Memorandum of Understanding dated **1st** December 2014 entered into between Interphase and COVEC, Interphase was sub-contracted by **COVEC** to provide design engineering services the scope of which was a "Project Manager":-

i. To co-ordinate all the consulting services and the consulting team;

ii. To direct responsibility for the day to day consulting activities;

iii. To discuss with the employer and its team on the requirements for field survey, planning and design;

iv. Overall responsibility in the field survey, planning and design of the Project;

v. Overall responsibility and presentation of the reports to the employer.

12. He also explained that the scope of the services, the subject of the Memorandum of Understanding was as a Structural Engineer:-

i. To clarify design standard/codes;

ii. To carry out basic and detailed design of bridge works;

iii. To prepare the technical specifications and bills of quantities for structural works;

iv. To prepare basic and detailed design reports and drawings.

13. Further, in his response to the Board's letter, the ex parte applicant also stated that neither himself nor Interphase were contracted by **COVEC** to carry out supervision of the Project and no duties on site were assigned to him at any stage of the Project. He stated that as a consequent, he did not take possession of the site, hence, he could not vacate the site as alleged by the Board. He further stated that **COVEC** in a letter dated **6th** February 2018 notified the Board that the scope of the services for which he was contracted did not include supervision works.

14. The ex parte applicant also stated that he carried out the detailed design in accordance with the Building Code and all issues raised by the Board were adequately addressed in the designs. He further stated that he forwarded to the Board all the designs for the Project and the detailed incident report for the Girder Collapse at Sigiri Bridge, hence, he did not commit any of the allegations contained in the charge sheet.

15. The ex parte applicant further avers that by a decision dated **27th** February 2018, the Board informed him without giving him a single reason for its decision, that after deliberations and after considering his response, it had found him "capable of professional misconduct." Further, he stated, having found him "capable of professional misconduct," the Board unilaterally proceeded to suspend his license for a period of two years with effect from **26th** February 2018, a date prior to the decision. He further avers that on **9th** March 2018, the Board caused it's decision of **27th** February 2018 to be Gazetted vide Gazette Notice No. **2098** thereby notifying the public that he was suspended and that his name removed from the engineers register. Further, he averred that on **13th** April 2018, the Board caused to be placed yet another notice Gazette Notice No. **3518** giving the names of engineers licensed to practice in the year 2018 and which notice his name was left out.

16. He further averred that the Board exhibited high handedness and complete disregard for any evidence he placed before it, and, that, it proceeded with pre-conceived intent of revoking his license, his sole right to work and earn a living. Further, he averred that the decision is an abuse office and breach of rules of natural justice because the Board acted without any complaint made to it by any person. Further, he averred that the Board was the complainant, prosecutor and the judge, in that it carried on the investigations, preferred the charges, prosecuted him and ultimately made a decision affecting his rights.

17. He also avers that the Board proceeded without any reference to him, to amend charges to include a charge of being in contravention of section **29 (a) (vi)** of the Act, yet, the said section was clearly and manifestly inapplicable as the applicable section was section **48** of the act.

18. He also averred that the Board's actions contravenes the cardinal principal that no one should be a judge in his own cause. Further, he averred that the Board deliberately refused to consider his response and the letter explaining the scope of the contract that was written to the Board by **COVEC** the contractor of the project. In particular, he states that by charging him with failure to provide adequate design and sufficient information to the contractor, and professional misconduct by vacating the site before completion of the project amounted to abuse of office since it aims at achieving a conviction against him for ulterior motives not related to the facts that existed. Also, he averred that the Board refused to consider the fact that section **48** of the Act allowed him to practice under the name of **Interphase**, since, as a director of the company, he was duly licensed as a professional engineer, hence, it was impossible for him to commit an offence under section **29 (a) (vi)** of the Act. He also averred that the Board was biased, it acted in bad faith and violated the presumption of innocence and the right to a fair hearing under Articles **47** and **50** of the Constitution and the right to be heard and violated the rules of natural justice.

19. He also averred that the Board failed to inform him in advance the evidence to be used against him before he was required to respond and that no evidence was adduced at the hearing. He states that save for the charge sheet, no complainant or witness was called to say in what manner the conduct of the applicant constituted professional misconduct. Further, he averred that the Board disregarded the presumption of innocence and shifted the burden of prove to him, and that he was not afforded an opportunity to defend himself.

20. The ex parte applicant also states that his right to legitimate expectation was violated in that he expects the Board to perform its duties lawfully, rationally, in conformity with the statute, the Constitution and in accordance with the rules of natural justice. Further, he states that

it is expected to know the applicable section was section **48** of the act, and, that it acted in bad faith and malice because: (i) it failed to consider his response and the explanation on the scope of the contract contained in his response and a letter from **COVEC** dated **6th** February 2018, (ii) by charging him with failure to carry out supervision of the Project, it acted in bad faith and maliciously by ascribing to the contract between Interphase and **COVEC,** matters which were not specifically and evidently contained in the said contract.

21. He also states that the decision is unreasonable and irrational because it does not give reasons how it was arrived at, or the evidence it considered, and, that the decision is unreasonable because it affects his fundamental rights yet no reasons were given, and, it is not rationally connected to the information that was placed before it. Also, he avers that it failed to address its mind to the ground of proportionality considering its consequences, and, it defies logic because it found him "capable" of professional misconduct, but imposed a severe punishment.

Respondent's Replying Affidavit.

22. **Eng. Nicholas Mulinge Musuni,** the Board's Registrar swore the Replying Affidavit dated **14th** May 2018. He averred section **6** of the act the mandates of the Board to facilitate registration of engineers and regulation of engineering professional services, setting of standards, development and general practice of engineering. He also averred that on **26th** June 2017, the Board learnt about the collapse of the Bridge under construction from the media, and, being one of the agencies under the Ministry of Transport, Infrastructure, Housing and Urban Development its Principal Secretary, **Eng. John Mosoinik** directed the Board and other agencies to visit the site and investigate the incident. He averred that pursuant to section **7 (1)** of the Act, the Board commissioned into the incident and co-opted persons from outside the Board by virtue of their knowledge and expertise as provided under section **8 (3)** of the act.

23. He averred that the Inquiry report showed that the primary cause of the collapse was sequencing of the concreting of the Bridge deck which resulted in unbalanced forces that caused instability and failure of sections of the Bridge. He further averred that the wrong sequencing was as a result of the applicant's failure to provide adequate design and sufficient information to the contractor as stipulated under the contract dated **1st** July 2015 between **KeRRA** and **COVEC. Eng. Musuni** averred that the work proceeded without the ex parte applicant's input, and, that, there was no formal communication between the ex parte applicant and his employer about his absence, and, that the final design drawings presented numerous inadequacies/omissions on the Bridge design and Bridge drawings. Further, he averred that, upon inquiry, they found that the ex parte applicant operated **Interphase** firm without having it registered by the Board.

24. **Eng. Musuni** also averred that the Board notified the ex parte applicant about the charges against him by a letter dated **11th** December 2017 and required him to appear in person before the Board's Disciplinary Committee to defend himself against the charges and in the same letter, he was required to file his response within **7** days from the date of the letter. He further averred that the ex parte applicant responded as required through a letter dated **18th** December 2017 and requested that he be granted extension of time to **28th** December 2017 to enable him to respond to the charges. He further averred that in response to the applicant's request, vide a letter dated **20th** December 2017, the Board rescheduled the Disciplinary hearing to **25th** January 2017 and also the Board forwarded a revised charge sheet and extended the ex parte applicant's date of submission of response to **8th** January 2018. He averred that the ex parte applicant responded as required through a letter dated **5th** January 2018 and stated that it would form part of the hearing on **25th** January 2018.

25. **Eng. Musuni** also averred that on **4th** January 2018, the ex parte applicant wrote to the Board and stated that that **Eng. Paul Thanga Gichuhi** Reg No. **E016** and **Eng. Michael** Reg. No. **A 2484** were all Directors of Interphase and they did not play any responsibilities in the Sigiri Bridge project and as such the firm exonerated them from any responsibilities as they were not part of the project design team.

26. He also averred that the ex parte applicant was accorded a fair hearing by the Board on **25th** January 2018 as shown by that day's Special Board Disciplinary proceedings. He further averred that upon deliberations and considering the ex parte applicant's written response and oral interview, the Board found the ex parte applicant liable for professional misconduct, operating Interphase firm without registration by the Board and breach of professional obligations and suspended the ex parte applicant's license for a period of two years with effect from **26th** February 2018 and communicated the same through a letter dated **27th** February 2018.

27. **Eng. Musuni** in response to the contents of paragraph **9** of the ex parte applicant's verifying affidavit, averred that the pre-binding **MOU** also provided that **BAC-Interphase** Consultants would perform the task of design, construction and supervision for quality assurance, and, that, **BAC** would undertake or complete all necessary survey work for detailed design and construction of the works. Further, he averred that one of the deliverables of **BAC** was provision of technical personnel for the design and technical instruction for the construction and maintenance of the works which shows that the ex parte applicant was to be involved not only in the design works but also in the construction supervision.

28. He also averred that the contract dated **31st** July 2015 did not supersede the **MOU** but rather it formed part of the contract as one of the priority documents, and, that, there is no clause in the agreement that provides that supervision was to be carried out by **KeRRA** engineers. Further, he averred that since the contract was for Design, Build and Maintain, it was clear that the engineers involved in the design were to be involved in supervision as well. Also, he averred that in a Design, Build and Maintain approach/model, the supervision and maintenance aspect squarely vests with the contractor and not the employer.

29. **Eng. Musuni** also averred that according to International Federation of Consulting Engineers (FIDIC) conditions of contract, the engineer who designs the drawings has a duty of ensuring that he supervises his drawings until completion of the project, hence, the ex parte applicant was negligent in failing to supervise his drawings and thus he breached clauses **6.8** and **6.10** of FIDIC conditions of contract.

30. He further averred that the ex parte applicant failed to visit the site as required, and, also, he vacated the site before completion of the project. He averred that the last time he was at the site was **21st** July 2016, and, that the ex parte applicant has never produced any letter or confirmation from **KeRRA** or **COVEC** before the Board confirming that he was exonerated from any blame.

31. **Eng. Musuni** also averred that if **BAC-Interphase** had signed a design only contract as they allege, then, they had no business visiting the site, conducting investigations and preparing the report dated **12th** July 2017 which was done after the Bridge collapsed since their role would have ended at the point of submission of the designs. He further averred that the issue of the collapse of the Bridge was in public domain in the news, social media, and all the national newspapers. Further, he averred that, the Board's duties include regulating the general practice of engineering in Kenya, hence, it has a duty of ensuring that the respective engineers if found negligent are punished in accordance with the provisions of the act, and, that the ex parte applicant requested for extension of time to enable him to respond to the charges, and he was granted extension as evidenced by annexture **NMM4.**

32. He further averred that the new charge was in respect of operating Interphase Consultants without prior registration by the Board as required by section **20** and **29** of the act, and that the ex parte applicant has never produced any registration certificate to show that Interphase had been registered. Further, the Board considered the ex parte applicant's written response and oral interview as clearly captured in the Board's minutes dated **25th** January 2018.

33. **Eng. Musuni** also averred that the **MOU** between **Interphase, BAC** and **COVEC** dated **1st** December 2014 was not to provide engineering services only but was a Design, Build and Maintain Contract. Further, he stated that the ex parte applicant gave a detailed design proposal under clause **1.1** of the work plan. Further, he averred that they had organized for the detailed design, construction supervision of the Bridge, and, that the contract dated **31st** July 2015 between **BAC** and **COVEC** was a Design, Build, Maintain contract.

34. **Eng. Musuni** also averred that according to Article **2 (b)** of the **MOU,** the ex parte applicant was to undertake or complete all necessary site survey works for detailed design and construction of the works, which included but not limited to establishing survey control points, taking longitudinal cross-sections, obtain cadastral drawings and preparation of survey reports, hence, there is no way the ex parte applicant would have done the said activities without taking possession of the site. Also, he averred that if at all the ex parte applicant did not possess the site as he alleges, then he plagiarized the drawings and submitted the drawings that were not his to **KeRRA** as evidenced by the Book Drawings-Final Detailed Designs dated, March 2016 submitted to **KeRRA** which indicated that the drawings were designed by a **M. Mugo** and **WMM**, drawn by **M. Mugo** and **DKW** and checked by **Eng. O.C.K** without acknowledging original work by **Eng. Sylvester Abuodha**.

35. **Eng. Musuni** also averred that the Book Drawings, Final Detailed Designs dated March 2016 identified by the ex parte applicant as the document submitted for approval by **KeRRA** did not provide for the construction sequence for the Bridge deck as is best practice, hence, lack of construction sequence caused the collapse of the Bridge. Further, he averred that a qualified competent engineer cannot prepare any professional drawings without visiting the site to take the measurements and have a proper appreciation of the site, hence the issue of possession is inevitable.

36. He also averred that according to **FIDIC** terms of contract, an engineer who comes up with a design has a duty of carrying out supervision of those drawings up to completion of the works unless formally discharged from the responsibilities and therefore the ex parte applicant failed to comply with normal engineering practice of supervising ones designs. He further averred that the ex parte applicant failed to carry out the detailed designs in accordance with the Building Codes in that he used software based on **BS8100** to analyze the Bridge without checking for adequacy with **BS5400** design procedures.

37. **Eng. Musuni** also averred that if the ex parte applicant's involvement was ending at the point of submission of the designs to **KeRRA** as alleged, the contract should have provided so, alternatively, he should have received confirmation from **KeRRA** that his work had come to an end and he would not be involved in any way in the project. Further, he averred that the Board found that the ex parte applicant had committed professional misconduct, and supplied him with reasons for its decision in letter dated **27th** February 2018.

38. Further, he averred that all the evidence showed that the ex parte applicant was involved in the project, and, that, the decision to remove him from the register of engineers was reached on **26th** February 2018 being the date he was removed, while the Board communicated the decision vide a letter dated **27th** February 2018. Further, he averred that:- (i) the ex parte applicant was given the opportunity to be heard, (ii)the Board was not the complainant, (iii) the ex parte applicant was found guilty of an offence under section **29 (i) (vi)** of the act, (iv)

39. the Board considered all the evidence before reaching its decision.

Ex parte applicant's Further Affidavit.

40. The ex parte applicant filed a further affidavit dated **11th** June 2011 in which he admits the primary cause of the collapse was the wrong sequencing of the concreting of the Bridge, but adds that the same conclusion was arrived at in his incident report dated **27th** July 2017 which **BAC** and **Interphase** submitted to **KeRRA.** Also, he averred that the ad hoc committee formed by the State Department and Association of Consulting Engineers of Kenya, an independent professional body arrived at the same decision. He further averred that sequencing of concreting of a Bridge is a construction issue and not a design issue, hence, a matter solely within the control of the contractor. He also averred that the drawings provided by **KeRRA** and adopted by **BAC** and **Interphase** detailed the sequencing to be undertaken, and, whether the contractor followed the sequencing or not is an issue that has not been explained by the Board before apportioning blame.

41. The ex parte applicant also averred that supervision of sequencing was to be undertaken and approved by the site engineers who according to the contract were to be appointed by the contractor (**COVEC)** and the client (**KeRRA)**, and, that **KeRRA** did not complaint but the Board opted to complain, prosecute and judge.The ex parte applicant also averred that at the project site, **KeRRA** had the following project engineers whose duty was to supervise the construction of the project, namely:-Project Manager---**Eng. Mwamba**; Resident Engineer--**Eng. Mbogori**; Assistant Resident Engineer--**Eng. Okech.** He also stated that the report marked **NMM1** was never availed to him nor was he aware it was to be used in the hearing to enable him prepare his defense. Further, he averred that from the contract marked **GAO4** annexed to his Replying Affidavit, the scope of work for **BAC** and **Interphase** was solely limited to design, and in any event, **COVEC** has not complained of failure on his part, and that the Bridge design had no errors as it was carried out by a well designed, experienced and seasonal design team.

42. The ex parte applicant also averred that the minutes were not supplied to him to confirm accuracy nor do they not show his accuser, the nature of the complaint, save that, the Board was the investigator, prosecutor and the judge, and that the minutes do not show that **COVEC** had written to the Board the letter marked **GAO-7.** He also averred that **COVEC** admits that **BAC** and **Interphase** were sub-contracted to design engineering services and their scope was to assist the contractor to implement the project smoothly through carrying out the necessary surveys and detailed design. He also averred that **COVEC** admits the construction supervision was not included in the scope of services and that the support that was required was for design clarification and modification.

43. The ex parte further averred that the decision was based on speculation and rumors and not on evidence adduced before it and there is no way he could have plagiarized the drawings. Further, he averred that the Board convicted him on matters he was not called to answer and whose evidence was produced by the Board and relied on it to convict him without affording him an opportunity to rebut the same, hence, the Board was biased and acted in bad faith. He averred that the Board's decision of **27th** February 2018, found him 'capable of professional misconduct" which words cannot be a finding of guilty and cannot attract a punishment, and further, he is a stranger to "Interphase firm."

44. He also averred that when forming a consortium, there is a pre-binding contract, and, such contracts come to an end when the entities forming the same either win or lose the tender, and that, if the tender is lost, the contract terminates, but in the event of winning, the parties enter into a new contract which comes into effect. Further, he stated that whatever is not provided in the new contract cannot be inferred from the pre-existing contract or the pre-bidding contract. He further stated that upon award of the tender, to **COVEC**, the parties entered into a fresh contract.

45. The ex parte applicant also averred that there are many types of an International Federation of Consulting Engineers contracts and the applicable one is Engineering Procurement and Construction (EPC) contract. He averred that the supervision of the project was to be carried out by engineers from **KeRRA** and that it is not true that he visited the site on **21st** July 2016. He also averred that **COVEC** before the hearing wrote to the Board and admitted it's error in public, and undertook to repair the Bridge at their own cost. Also, he averred that the Board admitted that it was the complainant, prosecutor and judge, and, that, it failed to consider his evidence which shows malice, bad faith and abuse of office.

Respondent's Supplementary Affidavit.

46. **Eng. Nicholas Mulinge Musuni** swore the Supplementary Affidavit dated **2nd** July 2018 in response to the ex parte applicant's further Affidavit which basically reiterates his earlier affidavit. Additionally, he averred that the ex parte applicant in the said affidavit argues substantive issues, yet this court's jurisdiction is limited to administrative and procedural issues.

47. He also averred that sequencing of concreting of a Bridge is both a design and a construction issue, and, that the Board did not accept his Report because one cannot be a judge in his own cause. He also stated that it is immaterial that **KeRRA** did not lodge a complaint, but, what is material is that the Bridge collapsed and the cause is attributed to the ex parte applicant. Further, he averred that the engineers who were Project Manager, Resident engineer an Assistant Resident Engineer is not a matter in issue, and, the report was not relevant to the proceedings but was written after the investigation to inform the Board whether to proceed to charge the ex parte applicant or not.

48. **Eng. Musuni** also averred that the work of the ex parte applicant was expected to provide guidance through communication to **COVEC** which he did not do, and, that, it is immaterial that **COVEC** did not complain of any misconduct on the part of the ex pate applicant. Also, he averred that the ex parte applicant assertion that the term "firm" was used in the charge sheet is a technicality which does not affect the substance of the charge. Also he stated that the use of the word "capable" is an attack based on a technicality yet the said word does not change the decision.

Ex parte Applicant's Supplementary Affidavit.

49. The ex parte applicant filed a supplementary affidavit dated **15th** August 2018 essentially reiterating the contents of his earlier affidavits and stated that the Board rejected his report which was his defense, hence, it acted unfairly. Also, he averred that section **53** of the Act requires a specific written complaint.

Approach in determining Judicial Review matters.

50. This Court had the opportunity of discussing the applicable principles governing Judicial Review matters in Judicial Review Application No. **107** of 2018 in which similar issues as raised in this case arose. In fact the parties in this case at the earliest opportunity informed this court that the two cases raise similar issues. However, instead of applying for consolidation, they opined that it would be convenient to hear the two same day, which we did. The parties in both cases were represented by the same advocates. The similarity in the two cases is also reflected in the identical pleadings and submissions made by the parties in both cases. Inevitably, this determination will resemble the determination in the said case.

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

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

ensure that it has been lawfully exercised. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji:-[2]

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

53. **Lord Reid** in **Animistic -vs- Foreign Compensation Commission**[3] held that:-

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

54. An administrative decision can only be challenged for **illegality, irrationality** and **procedural impropriety.** *It is also important to mention that* Judicial Review in now entrenched in the Constitution. In Republic vs Speaker of the Senate & Another Ex parte Afrison Export Import Limited & Another this court observed that:-[4]

> *"The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[5]** that "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control….*
>
> *Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of the decision.**[6]** Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.*
>
> *Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."*

55. The principle of judicial review is well established in our Constitution. The Constitution clearly mandates the courts to review legislation, conduct, decision or any act that is inconsistent with constitutional provisions. The courts are mandated by constitutional provisions to ensure that the public and statutory bodies operate within the boundaries of the Constitution and the statutes establishing them. At the same time, courts must display a willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; admit the expertise of those agencies in policy-laden or polycentric issues; and accord their interpretations of fact and law due respect and be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[7]

56. It is essential that courts justify their intervention or non-intervention. It is also important that this be done candidly and consciously rather in a formalistic or coded style.[8] In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this duty that courts are more likely to confront the question of whether to venture into the domain of other branches of government and statutory bodies and the extent of such intervention. But even in these circumstances, courts must observe the limits of their power."

Issues for determination.

57. Upon analyzing the diametrically opposing facts presented by the parties and the respective advocates' submissions, I find the following issues fall for determination. Incidentally, I framed the same issues in the case referred to above.

a. Whether absence of a written complaint renders the proceedings the resultant decision flawed with illegality.

b. Whether amending the charges constituted an illegality which flawed the entire process.

c. Whether the ex parte applicant was accorded a fair trial.

d. Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

e. Whether the process and the impugned decision is tainted with bias.

f. Whether the ex parte applicant has established any grounds for the court to grant the Judicial Review Orders sought.

a. Whether the absence of a written complaint renders the proceedings and the resultant decision flawed with illegality.

58. **Mr. Nyiha,** counsel for the ex parte applicant submitted that the procedure adopted by the Board was tainted with illegality. He argued that the Board has a duty to follow a just procedure. He specifically cited Section **53** of the Act which he argued prescribes a written complaint. He submitted that there was no written complaint. He argued that section **53** is couched in mandatory terms that the complaint must be in writing, yet the Board acted without a complaint being made by any person.

59. The Board's counsels argument on this issue was that the Board is entitled to commence investigations suo motto, or upon receiving a complaint, and that section **7** of the act mandates the Board to carry out inquiries on matters pertaining to the registration of engineers and practice of engineering and hear and determine disputes relating to professional conduct or ethics of engineers.

*60. My understanding of **Mr. Nyiha's** submission on this issue is that a written notice is a mandatory requirement for a complaint to be initiated, hence, its absence taints the entire process and the ultimate decision. His argument is hinged of the provisions of section **53(1)** of the Act which provides that "A person who being dissatisfied with any professional engineering services offered or alleging a breach of the standards of conduct, specified by the Board from time to time, by a registered or licensed person under this Act, **may make, in a prescribed manner, a written complaint to the Board.**"*

61. I addressed a similar issue in JR No. **107** of 2018, and I proposed to adopt what I stated:-

*"The operative phrase in the above provision is "**may make, in a prescribed manner, a written complaint to the Board.**" This phrase warrants interpretation. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.**[9]***

In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

*It is trite law that in interpreting the provisions of a statute the court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.**[10]***

*The Supreme court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others**[11]** observed that:-*

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

*The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.**[12]**To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.**[13]** Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.**[14]** If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. 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.

The word "may" appearing in the above phrase has been the subject of judicial construction by our superior courts and indeed literarily in all jurisdictions in the world. I prefer the construction rendered by the Supreme Court of India ***[15]*** *where the Apex Court construing the meaning of the word "may" in a statutory provision it stated:-*

"This word, however, always signifies a conferment of power. That power may, having regard to the context in which it occurs, and the requirements contemplated for its exercise, have annexed to it an obligation which compels its exercise in a certain way on facts and circumstances from which the obligation to exercise it in that way arises. In other words, it is the context which can attach the obligation to the power compelling its exercise in a certain way. The context, both legal and factual, may impart to the power…

Thus, the question to be determined in such cases always is whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfillment of certain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are fulfilled… Where the power is wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it is directory or discretionary. It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it." (Emphasis added)

The principle laid down in the above case has been followed consistently by courts whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner. ***[16]***

Considerable attention has been given to the way in which the word "may" should be interpreted. The Constitutional Court of South Africa indicated that the use of the word "may" clearly showed an intention to grant a discretion. ***[17]*** *The majority in the Supreme Court of Appeal of South Africa, however, pointed out that the word "may" could simply signify an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances were present.* ***[18]*** *Therefore, the word "may" may be construed in one of two ways:-either to give a complete discretion, or simply to give authorisation together with the duty to act where the circumstances permit.*

It is also important to bear in mind the contextual scene. Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, we should also examine the context in which the word "may" is used. The importance of context in statutory interpretation was underlined by Schreiner JA. ***[19]*** *as follows:-*

"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. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

Schreiner JA went on to point out that whatever approach is adopted, the court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is "the risk of verbalism and consequent failure to discover the intention of the law-giver." ***[20]*** *He emphasised that "the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."* ***[21]***

Contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework. ***[22]*** *The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society. Account must be paid to the structure and design of the Constitution, and, the role of different organs of government and statutory bodies, the role law enforcement must play and the value system articulated in Article* ***10*** *of the Constitution and the Bill of Rights.*

Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.

Also important while interpreting statutory provisions is to bear in mind what I would call the legislative intent. The provisions of the statute in question must be read in the context of not one but three different imperatives. First is to enable the Board to effectively carry out its specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for the Board to resolve disputes through the application of the law and to perform its statutory mandate. Second, at the same time, however, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the decisions of the Board affect the ex parte applicant, the Board is obliged not to act unfairly. The act must accordingly be construed so as to promote respect the Bill of Rights. A third dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body. ***[23]*** *Put differently, it could not have been the intention of the legislature to contemplate a situation*

whereby the Board would preside over an unfair and flawed process.

The Court has a duty to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. 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.

*Our Constitution requires a purposive approach to statutory interpretation.**[24]**The technique of paying attention to context in statutory construction is now required by the Constitution.**[25]**A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. The words of the section under consideration provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning.**[26]** One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene.**[27]***

My reading of the word may in the above provision, bearing in mind the purpose of the entire legislation and the context within which it is used and avoiding what has been described as "excessive peering of legislation" leads me to the conclusion that the provision is discretionary. In fact to suggest that a complaint must be in writing would in my view amount to adopting a restrictive approach as opposed to achieving the real purpose and intention of the legislature. Taking the instant case as example, where a Bridge in a public road collapsed and the matter was published in the media, it would be absurd to suggest that the Board had to sit back, ignore their statutory mandate and wait for a written complaint. There is merit in the argument that the Board can suo motto in the discharge of its statutory functions institute a complaint or commence investigations. In fact a reading of the enabling statute supports this view. In such cases, the Board will be performing its statutory functions. It cannot be expected that it will "formally write a complaint in the prescribed form addressed to itself" to perform its legal mandate. If Parliament desired that a complaint must be in writing, nothing would have been easier for Parliament to do than to state so in clear words, and in this case, it would have used the word shall as opposed to may."

b. Whether amending the charges constituted an illegality which flawed the entire process.

62. **Mr. Nyiha** argued that the Board amended the charges without any reference to the ex parte applicant in contravention of section **29 (a) (vi)** of the act, which section was inapplicable. He argued that the applicable section was section **48** of the act.

63. The Respondent's counsel did not specifically address this issue.

64. My understanding of **Mr. Nyiha's** contestation is that the original charge sheet was amended *without reference to the ex parte applicant*. Differently stated, was the Board required to *"notify"* or consult the *ex parte* applicant before amending the charges? **Mr. Nyiha** argues that the amendment violated section **29 (a) (vi)** of the Act. The amended charge sheet included an offence of operating **Interphase** firm without prior Registration by the Board. Section **29 (a) (vi)** of the Act provides for removal of persons from the register on any of the grounds stated in the said section. One of the grounds for removal is stipulated in section **29 (a) (vi)** cited in the charge sheet. It reads. *"… who causes or permits or suffers any sole proprietorship, partnership or body corporate in which he is a sole proprietor, partner, director or shareholder to practice as a firm prior to its registration by the Board or after the Board has suspended or cancelled its registration."*

65. It's true the above section does not create an offence, but provides for removal from the register on any of the grounds stated therein. The section that creates an offence is section **48** cited by **Mr. Nyiha** which reads:-

48. Prohibition on provision of professional engineering services by body of persons

1) A body of persons shall not carry on the business of engineering unless one of its partners or directors, as the case may be, is a professional engineer.

2) Where a partner or director of a body of persons mentioned under subsection (1), dies, that body of persons may, despite the provision of subsection (1), continue to carry on the business of engineering for not more than six months as if the legal representatives were professional engineers and thereafter the body of persons shall cease to carry on the business of engineering unless it can demonstrate, through legally binding documents, that it has taken on board a professional engineer as a partner or director.

3) Any person who contravenes the provisions of this section commits an offence.

66. The second assault on the charge sheet is that it referred to **Interphase Firm** as opposed to **Interphase Consultants Limited.** The contestation here is that the *ex parte* applicant was a Director in **Interphase Consultants Limited,** hence, he is a stranger to **Interphase Firm.** The question that flows from this argument is how could he be convicted of an offence allegedly committed by a firm he was a stranger to and had no connection with.

67. The provisions governing registration are stipulated under Part **111** of the Act. The narrow but dispositive question is whether the *ex parte* applicant was tried and convicted on a defective charge sheet, and, if so, whether that amounts to an *illegality* which is a ground for Judicial Review. The broad question but equally significant and also highly dispositive is the question whether by citing the wrong provision

of the law and the wrong firm, the *ex parte* applicant was prejudiced.

68. Both counsels did not find it fit to address these two significant issues at all. The question before me is whether the said error is fatal or curable, and, whether it led to a miscarriage of justice. True, the law contemplates that there may be occasions when there will be an error, omission or irregularity in a charge. And there will be errors, omissions or irregularities that will defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasioned a failure of justice.

69. Because of the similarity of the issue under consideration in this case and in JR No. **107** of 2018 referred to earlier, I find it appropriate to reproduce what I stated in the said case:-

> *"Even though the ex parte applicant was not facing a criminal trial he was in my view "an accused person facing offences created under the act." Conscious of the fact that a criminal trial is more serious than the charges the ex parte applicant faced, I will seek guidance from the provisions of the Section **382** of the Criminal Procedure Code**[28]** which provides:-*
>
> *"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*
>
> *Discussing the above proviso, **Rudd J**[29]stated:-"as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended to fall within the proper provisions."*

70. It is common ground that the *ex parte* applicant was supplied with the original charge sheet and the amended charge sheet. *First,* he asked in writing for time to respond and he was granted time and he replied as evidence by annextures in the Board's Replying affidavit. *Second,* he attended the Disciplinary proceedings where he faced the same charges. His written and oral responses are reproduced in the minutes. I find that no objection to the charge sheet was raised at all through-out the proceedings or in his written response. It is my conclusion that the charge sheet as drawn contained sufficient particulars as were necessary for giving information as to the nature of the offence charged and that the *ex parte* applicant understood the charge, replied and participated in the proceedings. More important is my conclusion that the alleged defect in the charge sheet occasioned no failure of justice, and, in any event, the alleged defect was curable if it was raised at the proceedings at any stage. Further, the alleged irregularity or error was not of such a nature as to occasion a failure of justice.

71. The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand and to prepare his defence. My reading of the particulars of the charge, the *ex parte* applicant's response, the law and the entire proceedings leave me with no doubt that from the onset, the *ex parte* applicant knew the charges facing him. It is also my finding that the *ex parte* applicant has not demonstrated that he suffered any prejudice as a result of the charge sheet as drawn. He not only understood the charges, but he responded to the charges in writing and addressed all the issues raised and finally he fully participated in the proceedings.

72. Lastly, it was not necessary for the *ex parte* applicant to be notified before the amended charge sheet was drawn. His argument that the charges were amended without reference to him lacks substance in law. What is important is that the amended charge sheet was forwarded to him requiring him to respond, and he asked for time to respond which request was granted and he responded as required and he participated in the proceedings.

73. For avoidance of doubt, the description of the company as *Interphase firm* as opposed to *Interphase Consultants Limited* and quoting the wrong section of the law are not fatal errors. These are curable defects which could have been cured by an amendment if any objection was raised. In any event, having submitted himself to the entire process on the basis of the charge sheet and the documents which clearly describe his company, he is now estopped from raising the objection at this stage. More significant is the fact that there is no allegation before me that the "errors" occasioned injustice or prejudiced him at the trial, nor do I find any. It is my finding that the objection to the charge sheet on the grounds discussed herein above lacks substance in law.

c. Whether the ex parte applicant was accorded a fair trial.

74. The crux of the ex parte applicant's case rests on this ground. **Mr. Nyiha** argued that section **53 (2)** of the act provides for affording the person the opportunity to be heard. The ex parte applicant's case is that the Board threatened to revoke his license, it was hostile to him, it chased his witness, it failed to consider his defense, hence, the process was unfair. To buttress his argument **Mr. Nyiha** cited Republic vs Engineers Board of Kenya ex parte Multiscope Consulting Engineers Ltd [30] and invited the court to fault the Board and annul the decision.

75. **Mr. Nyiha** further cited violation of Articles **47** and **50** of the Constitution. He argued that the ex parte applicant was not provided with the evidence against him in advance, and, that no evidence was adduce against him at the hearing because no witnesses were called. He submitted that the ex parte applicant being an accused person, ought to have been presented with all the evidence against him to enable him to prepare his defense. In particular, he argued that the report marked **NMM1** was adduced at the trial was not supplied to the ex parte applicant. He also argued that the minutes were never forwarded to the ex parte applicant to confirm the contents. He also argued that save for the charge sheet, no complainant or witnesses were called, hence, the Board disregarded the presumption of innocence. To support his case he cited *R vs Subordinate Court of the fist Class, Magistrate at City Hall Nairobi Ex parte Yougindar Pall Sennik & Another*[31] He

reiterated that the Board violated the ex parte applicant's right to be heard.[32]

76. Counsel for the Board argued that due process was followed. He cited 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. He also argued that the decision was arrived at after following due process in conformity with Article **47** of the Constitution and section **4 (4)** of the Fair Administrative Action Act.[34] He argued that the Board invited the ex parte applicant for a Disciplinary meeting via a letter and he attended on **25th** January 2018, and, that, he was given a hearing in which he gave a written and oral defense and thereafter the Board deliberated and made the impugned decision. Further, he submitted that the Board handed over the report marked **NMM1** to the ex parte applicant.

77. A reading of the Special Board Disciplinary Minutes held on **25th** January 2018 shows that the ex parte applicant's written response and his oral arguments are recorded. The same charges the ex parte applicant was notified and called upon to reply are recorded. The Board's deliberations are also recorded. The finding is clearly stated. The fact that the Board did not accept his defense is not a ground for Review but an invitation to this court to delve into the merits of the finding.

78. On the alleged violation of Articles **47** and **50** of the Constitution, guidance can be borrowed from the Court of Appeal decision in J.S.C. vs Mbalu Mutava[35]which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** of the Constitution is a distinct right from the right to a fair hearing under Article **50 (1)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and 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.[36] Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies. Similarly, in Dry Associates Limited vs CMA & Another**[37]** the High Court held that Article **50** applies to a court, impartial tribunal or a body established to resolve a dispute while Article **47** applies to administrative action generally. There lies the distinction.

79. There are numerous decisions by our superior courts holding that the investigating body is the master of its own procedure.[38] In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon a statutory body, which will inhibit its ability to make and implement policy effectively (a principle well recognized in the common law and that of other countries). We cannot deny the importance of the need to ensure the ability of the statutory bodies mandated to perform effectively. A statutory body that is vested by a statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court should be slow to assume a discretion which has by statute been entrusted to a tribunal.

80. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[39]

81. In treating the decisions of statutory agencies with the appropriate respect, a court is recognizing the proper role of the such functionaries within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to statutory bodies. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, and the lawfulness of the process. Such a decision requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

82. It is important to mention that the Board is bound by the principle of legality. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be annulled, it must be demonstrated that the decision is *not* grounded on law or the process was flawed, or no reasonable tribunal properly directing its mind to the material presented before it could arrive at the same conclusion. As such, the Board's 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:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[40]***

83. Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[41] sets out procedures that administrators must follow before they make decisions.

84. Section **7 (2)** of the Fair Administrative Action Act[42]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or

abuse of power. For the Court to Review an administrative decision, an applicant must demonstrate any of the above grounds.

85. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. *First,* the affected person must be given, before the decision is taken, *adequate notice* of the nature and purpose of the proposed administrative action. *"Adequate notice"* means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).To me, the *ex parte* applicant was supplied with details of the charges and was granted time to respond responded. In fact, his response is quite telling. Its detailed and revealed that he was fully aware of the charges against him. No argument was made before me that notice was not given or that the notice given was not sufficient.

86. *Second,* the affected person must be given a reasonable opportunity to make representations. A *reasonable opportunity* to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A *"reasonable opportunity to make representations"* can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them. Again, the *ex parte* applicant after being afforded time to respondent, and he did respond in writing. He was required to attend either in person or through a legal representative. He appeared in person. He made both written and oral presentations. No evidence was tendered before me that this requirement was not adhered to.

87. *Third,* after the decision is taken, the affected person is entitled to a clear statement of the administrative action. Again, the decision was communicated in clear terms to the *ex parte* applicant. No argument was presented before me that the decision was not clear.

88. *Fourth*, the affected person is entitled to adequate notice of any right of review or internal appeal. The *ex parte* applicant moved to court within a record of about **10** days (inclusive the date of the decision). He cannot claim, nor has he claimed, that this right to apply for Review was violated.

89. *Fifth*, adequate notice of the right to request reasons.[43] In my view, the letter communicating the decision gave the basis for the decision. He had the liberty to apply for proceedings as happens in judicial and quasi-judicial bodies.

90. A reading of the ex parte applicant's statutory statement and his written response to the charges leaves me with no iota of doubt that he has meticulously enumerated in detail all the charges against him, he responded to the charges in detail and addressed the issues raised. He is so satisfied with his response to the extent that he complaints that it was not considered. In other words he is of the view that if "it was considered, the outcome would have been different." He appeared before the Disciplinary Committee as the minutes of the deliberations show. He also gave an oral interview at the hearing. He was supplied with the charges, he was given time to respond, and he responded and he attended the hearing. That is the procedure he is faulting now. Additionally there were professional reports which are in agreement on the cause of the collapse of the Bridge, one of which was undertaken by the ex parte applicant. The Board also states that they supplied him with the report they commissioned, though he denies. He also admits that an independent report arrived at the same conclusion. I find no evidence before me to suggest that the procedure adopted was tainted with impropriety.

91.In summary, substantive fairness is not a requirement. The criteria for administrative review are legality, procedural fairness and rationality.[44]In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable.[45] The review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, one of the criteria now laid down in the Fair Administrative Action Act. Reasonableness can, of course, be a relevant factor but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it.[46]

d. Whether the Respondent violated the ex parte applicant's right to legitimate expectation

92. **Mr. Nyiha** submitted that the ex parte applicant's right to legitimate expectation was violated in that he expected the Respondent to perform its duties lawfully, fairly, rationally in conformity with the law. To buttress his argument, he cited Msagha vs Chief Justice & 7 Others.[47]

93. Counsel for the Board argument on this issue was that legitimate expectation does not apply in this case[48] and that the applicant has not demonstrated how he relied on the Respondent's decision to his detriment.[49]

94. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[50]*** at pages 449 to 450, 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)

95. In my view, the *ex parte* applicant has not established the alleged violation to legitimate expectation, and, even if he had, 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. The relevant provisions of the law cited earlier clearly show that the Board's decision is grounded on the relevant statutory provisions. It can safely be said that a Review Court cannot give effect to 'substantive legitimate expectation.'[51]

e. Whether the process and the impugned decision is tainted with bias.

96. It was **Mr. Nyiha's** contention that there was no complainant before the Board, that the Board was the complainant in that it initiated the investigations and the committee undertaking the investigations comprised of its members. Further, he argued that it prosecuted the case, heard it and made the determination. He argued that the Disciplinary Committee was biased.

97. The Board's counsel relied on Judicial Service Commission vs Mbalu Mutava & Another[52] and argued that the investigations were conducted by an independent committee of inquiry, which comprised of members from outside the Board who provided expertise. Further, he argued that the ex parte applicant was given reasonable opportunity to put forward his arguments,[53]and that decision making bodies whose procedures are governed by statute are masters of their own procedures provided they achieve the degree of fairness appropriate to their task, it is for them to decide how they will proceed.[54]

98. Counsel for the Board argued that it adhered to the principles of natural justice, that its actions were grounded on the law, and, that the ex parte applicant was informed the charges against him and was accorded an opportunity to be heard and to respond, hence he failed to prove violation of natural justice.[55] He further argued that malice requires a high degree of proof. He cited Republic vs Inspector General (State Corporation) Ex parte Isaiah Kiplangat[56] where it was held that an applicant has to demonstrate an evil wind driving the allegations.

99. **Eng. Musuni** in his affidavit states that the Board acted pursuant to its mandate under section **7 (1)** of the Act, and that it co-opted persons from outside the Board by virtue of their knowledge and expertise as provided under section **8 (3)** of the Act. Thus, the inquiry was conducted by committee constituted for that purpose.

100. The Supreme Court in *Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Anther*[57] citing Professor Groves M. in *"The Rule Against Bias*"[58] stated:-

> *"… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."*

101. As the bias rule has expanded to include a great range of decision-makers it has also become more flexible. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[59] There are many similar judicial pronouncements which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias -- that of the fair minded and informed observer.[60] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

102. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[61] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[62] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public.

103. The High Court of Australia explained that *"Bias, whether actual or apparent, connotes the absence of impartiality."* Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[63] A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent", "imputed", "suspected" or "presumptive" bias. [64]

104. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.[65] Each form of bias also requires differing standards of evidence.[66] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy.[67] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.[68]

105. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[69]The Lords also made it clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion". In a subsequent decision, the House of Lords also affirmed that the fair minded observer would take account of the circumstances of the case at hand.[70]

106. South African Constitution has provisions equivalent to Article 47 of our constitution. Similarly, their legislation giving effect to the said provision is equivalent to our Fair Administrative Action Act.[71] An examination of their judicial pronouncements in comparable cases on test for bias may be useful. In *BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union**[72]*** Hoexter JA stated it as follows:-

> "*I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias. In my opinion the statement in the Full Court judgment (at 879A-B) that '… provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker…' fairly reflects the recent trend in South African judicial thought, and I approve of it*."

107. In *President of the RSA v South African Rugby Football Union**[73]*** the Constitutional Court preferred the term "*apprehension of bias*" rather that the term "*suspicion of bias*". The Court, at paragraph **37** also referred, with approval to the following passage in *BTR Industries SA (Pty) Ltd v Metal & Allied Workers Union**[74]*** at 649I-550:-

> "*The law does not seek … to measure the amount of his [the judicial officer's] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is apprehended, then that is an end of the matter*."

108. The test was further clarified in *S v Roberts**[75]*** where Howie JA stated it as follows:-

> "*Thus far, the requirements of the test thus finalised are as follows as applied to judicial proceedings:*
>
> *(1) There must be a suspicion that the judicial officer might, not would, be biased;*
>
> *(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.*
>
> *(3) The suspicion must be based on reasonable grounds."*

109. In *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others**[76]*** the court explained the difference between holding certain tentative views about a matter and prejudging the matter which constitutes bias as follows:-

> "*It is our view that it is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it. Thus pre-judgment of the issues to be decided (which is in a sense prejudice) constitutes bias. The entire proceedings become tainted with bias*."

110. I find that the *ex parte* applicant has not established reasonable apprehension of bias which is a violation of Section **7 (2)** of the Fair Administrative Action Act[77] which provides for grounds of review which include *bias*, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. I am not persuaded that the applicant has established that the Board was biased. The Board was directed by the Ministry to investigate. It could also *suo motto* investigate. The Committee that undertook the inquiry was set up for that purpose. It co-opted professionals as the law permits. Its finding were not different from the *ex parte* applicant's inquiry. The minutes reveal that the proceedings were not undertaken in the traditional adversarial set up like court proceedings. It was a more relaxed set up. The law permits it to adopt its own rules of procedure. The allegations of bias in the circumstances of this case are unmerited. Differently stated, there is no evidence that a reasonable tribunal properly directing its mind to the law, and applying the same facts of this case would have arrived at a different conclusion.

f. Whether the ex parte applicant has established any grounds for the court to grant the Judicial Review Orders sought.

111. First **Mr. Nyiha** argued that the Board acted in bad faith in that it deliberately failed to consider the Respondent's Response and letter dated **6th** February 2018 explaining the scope of the contract[78] written by COVEC, and that it denied receiving the letter, yet the letter had its stamp showing it was received. He also argued that the Board demonstrated malice by suspending the ex parte applicant yet he was never involved in the project.

112. Second**, Mr. Nyiha** also argued that the Board failed to consider that section **48** of the act allowed the applicant to practice under Interphase Consultants being a director of the company who was licensed as a professional engineer, hence, it was impossible for the applicant to commit an offence under section **29 (a) (vi)** of the Act.

113. Third, **Mr. Nyiha** argued that the decision is irrational in that it does not give reasons how it was arrived at, hence it is unreasonable. To support his argument, counsel cited Republic vs Attorney General[79] in which it was held that even where the law does not expressly

enjoin the concerned authority to give reasons for the exercise of discretion, it ought to give reasons so as to satisfy the requirement that it is acting bona fide and not abusing its statutory power or discretion conferred upon it.

114. Fourth, he argued that the word "capable" is not and cannot be a finding of guilt to warrant such severe punishment of suspension for **2** years and that the decision is not rationally connected to the available information,[80] and that it beats logic since after finding him 'capable" it meted a stiff penalty.

115. The Board's counsel's response was that the ex parte applicant operated **Interphase** without having it registered by the Board in contravention to section **29 (a) (vi)** of the act. He also argued that he vacated the site before completion of the project, thus, the work was done without his input and formal communication to **KeRRA,** which acts were laid before the applicant.

116. He cited Republic vs The Voice Chancellor Jomo Kenyatta[81] whereby the court stated the grounds for Judicial Review as abuse of discretion, exercising discretion for an improper purpose, breach of duty to act fairly, failing to exercise discretion unreasonably, acting in a manner that frustrates the purpose of the act, failure to exercise discretion or fettering the discretion given, and where a decision is irrational and unreasonable.

117. First, I will address the submission that the Board acted in bad faith in that it deliberately failed to consider the ex parte applicant's Response and letter dated **6th** February 2018 explaining the scope of the contract. To resolve this issue, this court will be required to venture in contested issues of facts and evidence, analyze the agreements and in the process fault or uphold the decision. It will also be required to determine who is telling the truth on whether or not the letter from **COVEC** dated **6th** February 2018 was received by the Board. This will require taking evidence from the person who wrote the letter and the one of delivered and also hear the Board's witness. In my view, this is clearly a merit review, outside the function of this court. In fact section **54** of the Act provides for "appeals" to the High Court, not Judicial Review. The section provides that "A person aggrieved by a decision of the Board under this Act may, within thirty days from the date of the Board's decision, **appeal** to the High Court and in any appeal the High Court may annul or vary the decision as it may consider necessary."

118. Parliament was very clear in the choice of the word "appeal" as opposed to "Review". These two words are different in law. In its wisdom, Parliament prescribed the available avenue for a person aggrieved by a decision of the Board.

119. Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the scope of the contract would require direct evidence to be adduced and tested through cross-examination of witnesses before the court can conclude the real intention of the parties as expressed in the contract. *Judicial review is not the most efficacious remedy where the evidence is disputed. In such a situation, a civil suit or in this case an appeal which examines the merits is the most appropriate remedy."* In judicial Review proceedings, the court can only determine the process not the merits of the decision.

120. Guidance can be obtained from Republic vs District Land Registrar, Mombasa & 5 Others ex parte Nova Properties Limited[82] where the court citing authorities held "that judicial Review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

121. It is common ground that the *ex parte* applicant seeks Judicial Review remedies, hence, the rules governing grant of Judicial Review orders do apply. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the Rule of Law.

122. Judicial Review Remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The 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. Judicial Review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and it is therefore an important component of good public administration.[83]

123. A court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to Judicial Review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.

124. Second is the argument that the Respondent failed to consider that section **48** of the act allowed the applicant to practice under **Interphase** being a director of the company who was licensed as a professional engineer, hence, it was impossible for the applicant to commit an offence under section **29 (a) (vi)** of the Act.

125. Unfortunately this argument fails on two elementary grounds. First the applicable section is section **20** and not section **48** as **Mr. Nyiha** suggests. Section **20** provides for "Registration of an engineering consulting firm." It reads:-

> *1) Subject to the provisions of this Act, a person may register an engineering consulting firm if—*
>
> *a. the firm has a certificate of registration of a business name or a certificate of incorporation;*
>
> *b. it has at least one partner or principal shareholder who is registered as consulting engineer and who has a valid licence in a specified discipline;*

c. at least fifty one percent of the shares in the firm are held by Kenyan citizens; and

d. he fulfils any other condition as may be stipulated by the Board.

126. Also, the *ex parte* applicant stated that he had taken out licenses for his company. This was contested by the Board. Being a contested issue, it would require evidence for the court to determine. That is outside the scope of Judicial Review. Without venturing into merits, I note that the licenses exhibited by the *ex parte* applicant are *Trade Licenses and not licenses issued by the Board.* To me this is a confirmation that the company had not been registered as required. One wonders what how the Board could possibly have committed an illegality by convicting the *ex parte* applicant for this offence. This disposes this issue.

127. Second, section **48** reads that "A body of persons shall not carry on the business of engineering unless one of its partners or directors, as the case may be, is a professional engineer." This provision does not exempt the ex parte applicant from the provisions of section **20** cited above as far as the registration requirements are concerned, hence, the ex parte applicant's above stated argument cannot stand.

128. The third argument advanced by **Mr. Nyiha** is that the decision is irrational in that it does not give reasons how it was arrived at, and that, it is unreasonable. In the letter dated **27th** February 2018 in which the decision was communicated, the Board referred to the Disciplinary meeting held on **25th** January 2018, it stated the offence which the ex parte applicant was charged with, it notified him the decision and the effective date of the decision.

129. This case was filed on **8** February 2018, barely **10** days after the decision was communicated. Its correct that Section **4 (2)** of the Fair Administrative Action Act[84] provides that "Every person has the right to be given written reasons for any administrative action that is taken against him." Section **6** of the Act[85] bearing the short title "Request for reasons for administrative action" provides that "Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5."

130. Sub-section **2** of Section **6** of the Act[86] provides that the information referred to in subsection **(1),** may include- the reasons for which the action was taken, and any relevant documents relating to the matter. Though the short title to Section **6** is entitled *"Request for reasons for administrative action"*, the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.[87] The information, which must be supplied in writing within *three months*, may include reasons for the administrative action and any relevant documents relating to the matter.[88] Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.[89]

131. However, the Act provides that an administrator may be permitted to depart from the requirement to furnish adequate reasons if such departure is reasonable and justifiable in the circumstances.[90]The administrator must inform the person of such departure.[91] The implication of this provision is that the section allows a limitation of the right to information under Article **35** and the right to fair administrative action under Article **47**.

132. The *ex parte* applicant was given the letter dated **27th** January 2018 the contents of which I discussed above. The letter explains charges, the proceedings and the decision. It is common ground that the *ex parte* applicant moved to court within a period of **10** days. The act is explicit that an affected person is entitled to be provided with reasons to file an appeal or a review. The *ex parte* applicant moved to court within a record period of **10** days and mounted a spirited case. He has not cited inability to present his case or how the failure affected him. Guidance can be obtained from the approach taken to Judicial Review by Australian Courts which reflects an awareness of the boundaries of Judicial Review.[92] In *Minister for Immigration and Ethnic Affairs vs Wu Shan Liang*[93] Brennan CJ, Toohey, McHugh and Gummow JJ said:-

> *"... the reasons of an administrative decision maker are meant to inform and not be scrutinized upon by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."*

133. Various cases provide some guidance as to the content of reasons.[94]It may not be an error for the decision-maker to fail to discuss why contrary evidence was not accepted or to fail to discuss every conflict in the evidence in its reasons.[95]

134. The content of the letter is clear in that it communicates the decision, the charges and the process. This being a quasi-judicial body, the *ex parte* applicant had the option of asking for the proceedings. There is nothing to show that he requested for copies of the proceedings and the request was declined. I find that no contravention of the right to be supplied with reasons in the circumstances of this case.

135. The *ex parte* applicant's counsel also cited the ground of rationality and invited the court to find that the decision is not rational. Perhaps I should say something about the test for rationality. True, Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[96] which provides that:-

> *" A court or tribunal under subsection (1) may review an administrative action or decision, if-*
>
> *i. the administrative action or decision is not rationally connected to-*
>
> *a) the purpose for which it was taken;*
>
> *b) the purpose of the empowering provision;*

c) the information before the administrator; or

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

136. The test for rationality was stated as follows by Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others:-**[97]***

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

137. In *Trinity Broadcasting (Ciskei) v ICA of*,[98] Howie P stated the rationality test as follows:-

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

138. **Mr. Nyiha** also argued that the decision is unreasonable. It is necessary to consider the test of reasonableness. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[99] 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.

139. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Other**s**[100]* O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.**[101]***

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

140. In *Carephone (Pty) Ltd v Marcus NO**[102]*** per Froneman JA, stated the test as follows:-

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

141. I have consciously applied the above tests to the facts and circumstances of this case. There is no allegation before me that the Board acted *ultra vires* its statutory powers neither do I find grounds for so finding. There is no argument before me that it abuse its discretion in adopting the procure it adopted neither do I find any. Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad; particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.[103]

142. It is my finding that no cogent material has been placed before me to establish any of the grounds for Review stipulated in the Fair Administrative Action Act.[104] There is no evidence before me to show that the impugned decision cannot pass the rationality or reasonableness tests discussed above. Differently stated, it has not been shown that the Board's decision is so unreasonable that no sensible person or body could arrive at the same decision confronted with the same facts and the law. Additionally, it has not been demonstrated that the decision cannot pass the constitutional muster.

143. Lastly, it was argued that the letter communicating the decision uses the word *"capable"* which the *ex parte* applicant construed literally to mean that the *ex parte* applicant could not be guilty. Fortunately the decision is contained in the Special Board Disciplinary Meeting under **SUB-MIN. SB 2/2/2018/5** dated **26th** February 2018. The finding is very clear. The use of the word *"capable"* in the letter communicating the decision does not change the finding. Whether the author of the letter meant *"culpable"* as opposed to *"capable"* is in my view not significant because the word *"capable"* does not appear in the decision. The final decision as contained in the minutes is clear and warrants no explanation. In any event, notwithstanding the use of the word *"capable"*, the communication is clear. The letter cannot be read in isolation. It can only be construed from the lens of the proceedings and the determination. The letter cannot communicate what was not decided. The primary document is the decision.

144. The letter dated **27th** February 2018 merely communicated the decision. It was imprudent for the *ex parte* applicant to seek to quash the letter communicating the decision and leave the decision intact. Differently stated, no order has been sought in these proceedings to quash the proceedings and the decision dated **26th** February 2018 and all the consequential orders or decisions flowing there from.

Disposition.

145. In view of my analysis and determination of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant has not demonstrated any grounds for this court to grant the Judicial Review orders sought. Accordingly, the *ex parte* applicant's Notice of Motion dated **21st** March 2018 is hereby dismissed with costs to the Respondent.

Right of appeal.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 29th day of October 2018.

John M. Mativo

Judge.

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[1] Act No. 43 of 2011.

[2] {2014} eKLR.

[3] {1969} 1 All ER 20.

[4] {2018} eKLR.

[5] *2000 (2) SA 674 (CC) at 33.*

[6] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[7] See Hoexter 2000 SALJ 501.

[8] Hoexter Administrative Law 138.

[9]See Wallis JA dealt with the matter as follows in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

[10]This rule is restated by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC

[11] {1987} 1 SCC 424

[12]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf

[13] Christopher G. Wren and Jill Robinson Wren, The Legal Research Manual: A game Plan for Legal Research and Analysis(2d. ed. 1986)

[14] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning.

[15]In *Official Liquidator vs. Dharti Dhan (P) Ltd* {1977} 2 SCC 166

[16]This is the principle can be deduced in the following case by the Supreme Court of India:- *Bhaiya Punjalal Bhagwandin vs. Dave Bhagwatprasad Prabhuprasad* (AIR 1963 SC 120), *State of Uttar Pradesh vs. Jogendra Singh* (AIR 1963 SC 1618), *Sardar Govindrao vs. State of M.P.*(AIR 1965 SC 1222), Shri A.C. Aggarwal, Sub-Divisional Magistrate, *Delhi vs. Smt Ram Kali*, Bashira vs. State of U.P.(AIR 1968 SC 1) and *Prakash Chand Agarwal vs. Hindustan Steel Ltd*.((1970) 2 SCC 806).

[17] South African Police Service v Public Servants Association (CCT68/05) [2006] ZACC 18; 2007 (3) SA 521 (CC) ; [2007] 5 BLLR 383 (CC) (13 October 2006).

[18] Ibid

[19] In Jaga v Dönges, N.O. and Another, 1950 (4) SA 653 (A).

[20]*Jaga v Dönges , N.O. and Another; Bhana v Dönges, N.O. and Another* **1950 (4) SA 653** (A) at 662G-H.

[21] Ibid.

[22] See Article 259 of the Constitution.

[23] Article 50 (1).

[24] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[25] Ibid.

[26] Wallis JA had this to say in *Commissioner For The South African Revenue Service v Bosch and Another* **2015 (2) SA 174** (SCA) at para 9:

[27] Ibid.

[28] Ibid.

[29] In the case of *Mwasya vs Republic* {1969} EA 280.

[30] {2014} eKLR.

[31] {2006} eKLR.

[32] Citing *Msagha vs Chief Justice and 7 Others* NBI HCMCA No. 1062 of 2004 {2006}2KLR 553.

[33] {2015} eKLR.

[34] Act No. 4 of 2015.

[35] {2015}eKLR.

[36] Ibid.

[37]{2012}eKLR .

[38] Counsel cited *Judicial Service Commission vs Galdys Boss shollei & Another* {2014} eKLR citing *Selvarajan vs Race Re Board* {1976}ALL ER 12 at 19.

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

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

[41] Act No.4 of 2015

[42] Act No. 4 of 2015

[43] Section 6 of the Act.

[44] See *Del Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) paras 84-90.

[45] Ibid.

[46] See *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* {2003} 4 All SA 589 (SCA).

[47] {2002}2 KLR.

[48] Citing *Justice Kalpana H. Rawal vs Judicial Service Commission & 3 Others* {2016}eKLR.

[49] Citing *Keroche Industries Ltd vs Kenya Revenue Authority & 5 Others* {2007}eKLR.

[50] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[51] *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 27.

[52] {2015} eKLR.

[53] Citing *Republic vs National Transport & Safety Authority & 2 Others ex parte Rengcom Communications Ltd* {2017} eKLR.

[54] Citing *Kenya Revenue Authority vs Menginya Salim Murgani* Civil Appeal No. 108 of 2009.

[55] Citing Patrick Kariungi vs Commissioner of Police & Another {2014} eKLR & Republic vs Kenya School of Law & 2 Others ex parte Juliet Wanjiru Njoroge & 5 Others {2014} eKLR

[56] {2012} eKLR.

[57]Supreme Court No. 11 of 2016

[58] {2009} U Monash LRS 10

[59] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[60]Minister for Immigration and Multicultural Affairs Ex p Jia (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); Bell v CETA (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[61] R v Sussex Justices Ex p McCarthy [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": Shrager v Basil Dighton Ltd [1924] 1 KB 274 at 284.

[62] *See*, eg, *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL*); Forge v Australian Securities Commission [2006] HCA 44*; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also *Belilos v Switzerland* [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

[63] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[64] *Anderton v Auckland City Council [1978] 1 NZLR 657* at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[65] Groves, M. "The Rule Against Bias" [2009] UMonashLRS 10

[66] Ibid

[67] *See*, eg, *Sun v Minister for Immigration and Ethnic Affairs* [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was "likely to be very difficult".

[68] This expression of the bias test was suggested by the English Court of Appeal in Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in Porter v Magill [2001] UKHL 67; [2002] 2 AC 357. The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337 at 345.

[69] [1993] UKHL 1; [1993] AC 646 at 670.

[70] *Porter v Magil* [2001] UKHL 67; [2002] 2 AC 357.

[71] Act No. 4 of 2015.

[72] *{1992} ZASCA 85; 1992 (3) SA 673 (SCA)* at 693 I-694B

[73] *{1999} ZACC 9; 1999 (4) SA 147 CC* at paragraph 39.

[74] *{1992} ZASCA 85; 1992 (3) SA 673 (A).*

[75] *1999 (4) SA 915 (SCA)* at 924, paragraph [32].

[76] *2000 (4) SA 621 (C)* at para 67.

[77] Act No. 4 of 2015.

[78] Citing *Republic vs Ministry of Planning & Another ex pate Prof. Mwangi* HC Misc App No. 1769 of 2003.

[79] {2014}eKLR.

[80] Citing *Associated Provincial Picture Houses Limited vs Wednesbury Corp*.

[81] (2008} eKLR

[82] {2016} eKLR.

[83] Andrew Le Sueur and Maurice Sunkin, *Public Law* 1 (ed) (1997) Longman, London, page 466.

[84] Act No 4 of 2015.

[85] Ibid.

[86] Ibid.

[87] Section 6(1).

[88] Section 6(2).

[89] Section 6(4).

[90] Section 6(4).

[91] Ibid.

[92] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 per Mason J

[93] (1996) 185 CLR 186 at 272

[94]*Military Rehabilitation and Compensation Commission v SRGGG* (2005) 215 ALR 459. *Comcare vs Forbutt* [2000] FCA 837 These decisions have since been cited with approval in the Full Federal Court decision of *McGuire v Military Rehabilitation and Compensation Commission* [2005] FCAFC 52 at [33].

[95] 215 ALR 459 at 480 [96]. See also *Commonwealth v Angela* (1992) 34 FCR 313.

[96] Act No. 4 of 2015.

[97] *2000 (4) SA 674 (CC)* at page 708; paragraph 86.

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

[99] Act No. 4 of 2015.

[100] *{2004} ZACC 15; 2004 (4) SA 490 CC* at 512, para 44.

[101] {1995} 1 All ER 129 (HL) at 157:

[102] *1999 (3) SA 304 (LAC)* at 316, para 36.

[103] *Dawood v Minister of Home Affairs {2000} ZACC 8; 2000 (3) SA 936 (CC)* at 966, para 47.

[104] Act No. 4 of 2015.