REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 396 OF 2018

IN THE MATTER OF APPLICATION BY UNITED MILLERS LIMITED AGAINST THE KENYA BUREAU OF STANDARDS FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS PURSUANT TO THE PROVISIONS OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 4, 7, 8 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

REPUBLIC…….....….....……..APPLICANT

VERSUS

KENYA BUREAU OF STANDARDS.....1ST RESPONDENT

THE DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS….2ND RESPONDENT

THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY…..3RD RESPONDENT

THE DIRECTOR, PUBLIC HEALTH…….....….…4TH RESPONDENT

THE EXECUTIVE DIRECTOR, ANTI-COUNTERFEIT AUTHORITY…....5TH RESPONDENT

AND

THE DEPARTMENT OF HEALTH SERVICES, NAKURU COUNTY…..INTERESTED PARTY

UNITED MILLERS LIMITED….....*EX PARTE* APPLICANT

JUDGMENT

Introduction.

1. By way of a Chamber Summons dated **8th** October 2018 expressed under the provisions sections **4,7, 8** and **11** of the Fair Administrative Action Act[1](FAA) and Order **53** Rule **3** of the Civil Procedure Rules, 2010, the *ex parte* applicant seeks the following orders:-

i. A declaratory order that the 1st Respondent has infringed its rights under Article 47 of the Constitution and section 4 (1) of the Fair Administrative Action Act.

ii. An order of certiorari quashing the 1st Respondent's decision not to release 29,714 bags (50 Kg each) of sugar to the applicant and for the same to be destroyed in line with the Multi Agency Team release protocol as contained in its letter dated 7th September 2018.

iii. An order of prohibition directed at the 1st to 5th Respondents restraining them from destroying the applicant's 29,714 bags (50

Kg each) of sugar as stated in the 1 Respondent's letter dated 7th September 2018.

iv. Mandamus directing the 1st Respondent to release the applicant's 29,714 bags (50 Kg each) of sugar to the applicant.

v. The costs of and occasioned by the Judicial Review application be provided for.

The grounds relied upon.

2. The application is anchored on the provisions of Article 47 of the Constitution and section 4(1) of the FAA Act,[2] which guarantees every person the right to an administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair. The *ex parte* applicant contends that the first Respondent, a body established under section 3 of the Standards Act[3] has an obligation to carry out its duties in a way that not only upholds the Standards Act[4] and subsidiary legislation thereunder, but also, in a manner consistent with the terms, principles and values of the Constitution and the FAA Act.[5] Further, the *ex parte* applicant states that pursuant to the requirements of the Agriculture and Food Authority, Sugar Directorate, on 11th July 2017, it was granted a licence to import sugar and having been granted an extended pre-shipment approval, it complied with all import procedures and proceeded to import 997.7 Metric Tonnes of brown sugar.

3. The *ex parte* applicant contends that despite having obtained a Certificate of Conformity from South Africa, (a pre-shipment verification body contracted by the 1st Respondent under section 4 of The Verification of Conformity to Kenya Standards of Imports Order, 2005), the first Respondent issued a seizure Notice in respect of the sugar shipment. It also states that the first Respondent wrote to the 2nd, 3rd and 4th Respondents on 7thSeptember 2018, conveying its decision to destroy the seized sugar.

4. The *ex parte* applicant contends that the decision is unreasonable, arbitrary and irrational because the sugar was tested prior to shipment as evidenced by the Certificate of Conformity. It argues that on 24th August 2018, the Interested Party wrote to the 1st to 5th Respondents informing them that the 29,714 bags (50Kg each) of the sugar was analyzed and found to have conformed to the 1st Respondent's KS EAS 749:2010 Standard. Further, the *ex parte* applicant contends that the decision is unreasonable, arbitrary and irrational because the Interested Party confirmed that the sugar conformed to the 1st Respondent's Standards. The *ex parte* applicant contends that the decision infringed its right to a fair administrative action under Article 47 of the Constitution and section 4(1) of the FAA Act.[6]

The First Respondent's Notice of Preliminary Objection

5. On 7th December 2018, the first Respondent's Advocates filed a Notice of Preliminary Objection stating that the applicant's application is incurably defective on grounds that pursuant to sections 11 and 14A (4) of the Standards Act,[7] this court lacks jurisdiction to hear and determine this suit.

The First Respondents Replying Affidavit

6. **Caroline Outa-Ogweno**, the first Respondents Acting Director, Market Surveillance, swore the Replying Affidavit dated 10th December 2018. She averred that by dint of sections 11 and 14A (4) of the Act,[8]this court lacks jurisdiction to hear and determine this case. Additionally, she deposed that Article 46(1) (a) (b) and (c) of the Constitution protects consumer's rights to access goods of reasonable quality, their health, safety and, economic interests, which is the main function delegated to the first Respondent under section 4 of the Standard Act.[9] She averred that every commodity imported, manufactured or processed for consumption in the Kenyan Market has to undergo testing for ascertaining that the goods conform to the set standards.

7. **M/s Outa-Ogweno** also averred that the first Respondents Laboratory is the only one accredited in accordance with the recognized international standard ISO/IEC 17025:2005. She also averred that in the performance of its statutory mandate, the first Respondent develops standards, which provide for common and repeated use of rules, guidelines or characteristics for products and services to make sure that the products and services are fit for their purpose, comparable and compatible. Further, she stated that the first Respondent tests and inspects products at port of entry into Kenya to provide assurance as to quality and prevent harmful products from entering Kenyan market. In addition, she stated that the first Respondent also monitors products at port of entry into Kenya to provide assurance as to quality and prevent harmful products from entering Kenyan Market. Lastly, she averred that the first Respondent takes samples from products in the market and carries out laboratory tests to ascertain if the products conform to the set standards.

8. **M/s Outa-Ogweno** also averred that the first Respondent in accordance with its mandate and, with its counterparts within the East African Community, established standards known as the East African Standard, which all healthy goods and products are required to satisfy. Further, she deposed that the first Respondent developed the East African Standard: Brown Sugar Specifications. In addition, she averred that the inspection to ascertain whether goods conform to set standards is done by its officers whose powers are provided under section 14 of the Standard Act.[10] She also averred that in exercise of its statutory powers, on 26th June 2018, its officers collected samples of Golden Brown Sugar; Brown Sugar and Wet Sugar from the *ex parte* applicant's consignment to establish the quality and safety of the sugar. She stated that the samples were tested against the East African Standard Brown Sugar specifications EAS 749:2010 at the first Respondent's accredited laboratory. She averred the samples failed to comply with the set standards in relation to parameters of yeast and moulds. She annexed a copy of the Laboratory Test Report and stated that the sugar had a yield and mould content of 200 against the legal requirement of 50 and was therefore not in compliance with the standards specification.

9. She further averred that the first Respondent on 7th September 2018 communicated to the relevant authorities and copied to the *ex parte* applicant notifying it of the test results and advised that the sugar be condemned for destruction.

10. **M/s Outa-Oweno** deposed that due regard to the law was observed during the exercise, and stated that the health and wellbeing of the public comes first and should never be sacrificed at the altar of commercial interests. She also deposed that the first Respondent is a

stranger to the tests done by the Interested Party and stated that such tests are done at an accredited Laboratory facility and by the first Respondent which is vested with powers to test commodities against applicable specifications as set down in the law. Additionally, responding to the pre-shipment testing, she stated that the first Respondent tests products within the country to ensure that the standards are met throughout the intended lifespan of the products because shipping, handling and packaging might degrade the fitness of food products.

11. She also stated that the Agriculture and Food Authority's mandate is limited to registration of importers and it does not deal with quality and standards of the proposed imports, which mandate is left to the first Respondent. Further, she deposed that the court is being invited to rely on a report by a third party and disregard the report by the first Respondent despite the fact that its report originates from a duly accredited laboratory, namely, the first Respondents, in the performance of its constitutional and statutory mandate. She urged the court to consider that the decision was arrived at by experts in the relevant filed and is meant to protect the general public from consuming hazardous and substandard products, and, that, the *ex parte* applicant has not stated the legal basis upon which substandard sugar can be released to the public. Lastly, she averred that the first Respondent's duty is to ensure that substandard products are not traded in the market.

***Ex parte* applicant's supplementary Affidavit**

12. **Shilen Gadhia**, the *ex parte* applicant's Financial Manager swore the supplementary Affidavit dated 14th December 2018. He averred that the wet sugar related to a small quantity of 153 bags of sugar imported from Mauritius, which became wet as a result of water seeping into a few of the containers while it was being shipped. He also averred that the said bags were condemned by the Interested Party by its letter of 9th July 2018 and have since been destroyed. He averred that the *ex parte* applicant had not received test results from the first Respondent and was not sure whether the 7th September 2018 decision was pursuant to the testing conducted on the wet sugar.

Litigation history

13. On 17th October 2018, the *ex parte* applicant's counsel and counsel for the third and fifth Respondents, in the absence of counsel for the second Respondent, first and fourth Respondents recorded a consent staying the impugned decision. It was a term of the consent that counsel for the *ex parte* applicant Mr. Amoko would furnish the court with a written irrevocable professional undertaking. The terms of the undertaking were that the consignment, the subject of these proceedings comprising of 29,714 bags of sugar weighing 50 Kgs each would remain intact and would not leave the premises it is stored. It was also a term of the consent that consignment would not be interfered with in any way or tampered with, and that the same shall be available for inspection by the Respondents, or, the parties herein, or this court, as and when demanded, until further or other order of this court.

14. In compliance with the above consent, Mr. Amoko filed a letter of undertaking dated 24th October 2018.

15. The second and fifth Respondents and the interested parties did not file any pleadings at all. Counsel for the third Respondent attended the hearing but did not file any pleadings. He relied on the pleadings filed by the first Respondent. Similarly, counsel for the fifth Respondent adopted the position taken by the first Respondent.

16. On 18th December 2018, the court directed that the first Respondent's Notice pf Preliminary Objection be treated as part of the Respondent's grounds of objection to the substantive application. Counsel for the *ex parte* applicant's and the first Respondent highlighted their written submissions and the court scheduled the case for delivery of judgment on 18th March 2019. However, on 15th February, 2019, the *ex parte* applicant's counsel filed an application seeking to introduce and address the court on a High Court decision rendered in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others.*[11] I allowed the request and directed the parties to address the court on the said decision.

17. The first Respondent's position was that the argument cited in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others.* [12] is *orbiter* and not binding[13] to this court and that the said case is distinguishable from this case.

18. While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity, which is the respect one court holds for the decisions of another. As a concept, it is closely related to *stare decisis*. In the case of *R.* v. *Nor. Elec. Co.*,[14] McRuer C.J.H.C. stated:-

> *"....The doctrne of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…" (Emphasis added).*

19. I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was *given without consideration of a statute or some authority that ought to have been followed*, or where the facts of the case can be distinguished. After all cases are context sensitive. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[15]

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

20. The ratio of any decision must be understood in the background of the facts of the particular case.[16] A case is only an authority for

what it actually decides, and not what logically follows from it.[17]A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[18]

21. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[19]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[20] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[21] My plea is to keep the path of justice clear of obstructions which could impede it.

22. Some fundamental distinctions I have noted is that unlike in the instance case, in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others,*[22] no objection was raised in the said case on the question on exhaustion of statutory provided dispute resolution mechanism. Further, in the said case, the learned judge observed that verification standards at the port of import does not stop further verification when the goods arrive in Kenya, but observed that the verification cannot be done capriciously "with noted intention to find fault and what appears to be malice and bad faith."

23. I will address the question of capriciousness and arbitrariness later. I have not seen allegations of malice and bad faith in the pleadings before me. Whereas in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others,*[23] it was argued that a Pre-Verification Certificate of Conformity had been issued by KEBS, in the instant case the *ex parte* applicant placed reliance on a testing allegedly done by the Department of Health Services, Nakuru. It is noteworthy that uncontested evidence shows that such testing can only be done in accredited laboratories. No material was presented before the court to demonstrate that the said facility was an accredited laboratory as required.

24. Counsel for the *ex parte* applicant argued that the circumstances in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others*[24] are strikingly similar to the instant case. He submitted in the said case, no explanation was given on the need to do further testing after the goods entered, since the goods had been verified for conformity from the port of origin. I have already pointed out that verification is a legal requirement. Secondly, the learned judge was clear that verification not be done capriciously. I will address the question of arbitrariness and capriciousness later in this judgment.

Issues for determination

1. Upon considering the diametrically opposed arguments presented by the Parties, I find that the following issues distil themselves for determination:-

> *a. Whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.*
>
> *b. Whether the ex parte applicant has demonstrated any grounds to warrant this court to grant the Judicial Review Orders sought.*

a. Whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

2. The *ex parte* applicant's counsel argued that the Preliminary objection on jurisdiction is mistaken on three fronts. *First*, the existence of an alternative remedy is not jurisdictional but a matter of discretion. *Second*, that there is no alternative remedy as the Standards Tribunal does not have the jurisdiction to entertain the complaints raised in this case. *Third*, that the matters raised herein are legal and ideally suited for determination by this honorable court, which can provide the most efficacious remedies.

3. He contended that the principle laid down in section 9 (2) of the FAA Act[25] has no application in this case. He argued that section 11 and 14 A of the Standards Act[26] is not relevant to this case since its relevance can only be viewed in relation to section 10 of the Standards Act.

4. Counsel also argued that the impugned decision was issued under the aegis of a multi-Agency team and that it was not a fourteen days' notice addressed to the applicant as envisaged under section 14(3) of the act. He contended that the Standards Tribunal has no jurisdiction over the rest of the Respondents. He cited *Fleur Investments Limited v Commissioner of Domestic Taxes & Another*[27] for the proposition that it was proper for a relief to be granted on the basis of *Wednesbury* unreasonableness and unlawfulness notwithstanding the unexploited statutory appeals process.

5. The first Respondent's counsel cited *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[28] in support of the proposition that a court has no power where it has no jurisdiction, and, that, a court downs its tools the moment it holds that it is without jurisdiction. Additionally, he cited *Consolidated Bank of Kenya Limited v Arch Kamau Njendu t/a Gitutho Associates,*[29] which held that a court with jurisdiction builds a solid foundation because jurisdiction is the bedrock on which proceedings are based. Counsel also argued that jurisdiction must be exercised in accordance with the enabling statute.[30] He contended that sections 11 & 11A of the Standards Act[31] divests this court of the jurisdiction to hear this case. He cited *Kenya National Chamber of Commerce and Industry & 2 Others v Kenya Bureau of Standards & Another,*[32] in support of the proposition that the import of the above provisions is that the jurisdiction of the High Court under the Standards Act[33] is that of an appellate court. Consequently, he argued that in that regard, parties are not expected to approach the High Court directly in the first instance where a dispute arises under the act.

6. Counsel also relied on *Republic v Kenya Revenue Authority ex parte Interactive Gaming & Lotteries Limited.*[34] Here, the court acknowledged the existence of a chain of High Court and Court of Appeal decisions to the effect that where a statute has provided a remedy, the court must exercise restraint, and, first give an opportunity to the relevant bodies to deal with the dispute as provided in the statute. To

fortify his argument, he relied on *Republic v Principal Magistrate Lamu Magistrates Court & Another**[35]** ex parte Kenya Forest Service*, [36] *Republic v The Commissioner of Lands, ex parte Lake Flowers Limited*,[37] *Republic v Architectural Association of Kenya & 3 Others ex parte Paragon Ltd**[38]*** among other decisions in support of the same proposition.

7. The first Respondent's counsel argued that the *ex parte* applicant has not demonstrated exceptional circumstances to warrant an exemption from the statutory requirement,[39] nor has he pleaded the existence of virgin constitutional questions to warrant bypassing the said mechanism.

8. The preamble to the Standards Act[40] reads as follows:- "Act of Parliament to promote the standardisation of the specification of commodities, and to provide for the standardisation of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing."

9. Section 16(1) of Act[41] establishes the Standards Tribunal. The short title to section 14A of the Act provides as follows:-

> *(1) An inspector may order the destruction of goods detained under section 14(1) if the following conditions are satisfied—*
>
> *a. testing indicates that the goods do not meet the relevant Kenya Standard; and*
>
> *b. it is reasonably necessary to destroy the goods because the goods are in a dangerous state or injurious to the health of human beings, animals or plants.*
>
> *(2) In an order under subsection (1) the inspector may require the owner of the goods to pay the costs of the destruction of the goods including the costs of transporting and storing the goods before destruction.*
>
> *(3) At least fourteen days' notice shall be given of an order under subsection (1) either by giving the owner of the goods a written notice or by publishing a written notice in the Gazette.*
>
> *(4) Any person who is aggrieved by an order under subsection (1) may, within fourteen days of the notice of the order under subsection (3), appeal in writing to the Tribunal.*
>
> *(5) An order under subsection (1) shall not be carried out until the time for appealing to the Tribunal has expired and, if the order is appealed, the order shall not be carried out until the Tribunal has dealt with the appeal.*

10. Section 11 of the act provides:- "Any person who is aggrieved by a decision of the Bureau or the Council may within fourteen days of the notification of the act complained of being received by him, appeal in writing to the Tribunal."

11. The Preliminary Objection is anchored on the above provisions. The question that falls for determination is whether this court has the jurisdiction to entertain this dispute in view of the above provisions. Of particular relevance is section 16(4) which provides that "*Any person who is aggrieved by an order under subsection (1) may, within fourteen days of the notice of the order under subsection (3), appeal in writing to the Tribunal."*

12. It is convenient to start by stating that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this court holding that this doctrine is now of esteemed juridical lineage in Kenya.[42] The doctrine was felicitously stated by the Court of Appeal[43] in *Speaker of National Assembly vs Karume**[44]*** in the following words:-

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*."

13. The above case was decided before the promulgation of Constitution of Kenya. However, many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution.[45] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*. [46] It stated that:-

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

14. Additionally, the High Court in the *Matter of the Mui Coal Basin Local Community*,**[47]** stated the rationale thus:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss*

to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

15. From the above jurisprudence, at least two principles are clear. *First,* while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[48]

16. The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

17. To justify the reason why the *ex parte* applicant bypassed the dispute resolution mechanism provided under the act, counsel cited two reasons. The first is that the impugned decision was made by a one **Caroline Outa-Ogweno** in her capacity as the AG- Director of Market Surveillance as a Director of the first Respondent and not as an inspector as contemplated under section 14A of the Act. In his view, there is no order made by an inspector capable of being appealed against under section 14A(4) of the act. The second is that the impugned decision was issued under an amorphous collection of state agencies operating as "Multi-Agency Team Release Protocol. He contended that the Tribunal has no jurisdiction over the rest of the Respondents. On these grounds, counsel argued that this is a proper case for the court to intervene and exercise judicial review jurisdiction.

18. In my view, the above arguments presented by counsel for *ex parte* applicant present perfect reasons for a litigant to apply for exemption from exhausting the remedy. This is because as explained below, for a litigant to bypass the dispute resolution mechanism provided under a statute, he must apply exemption from the court. The applicant ought to have moved the court under section 9(4) of the FAA Act and demonstrate exceptional circumstances as explained below in this judgment.

19. In addition, the said reasons fail for the following reasons. *First,* a look at the *ex parte* applicant's application shows that the key prayers sought in the application are directed against the first Respondent. In addition, all the complaints in the application are all directed against the first Respondent. This tells with sufficiency detail the substance of the *ex parte* applicant's case, which discloses a dispute under the Standard's Act.[49] Joinder of the other parties has not changed the character of the pith and substance of the case.

20. *Second,* there is no argument before me that an adequate and effective remedy cannot be obtained from the Tribunal.

21. *Third,* on the argument that the impugned decision was taken by an Ag Director of the first Respondent as opposed to an inspector contemplated under section 14A of the act, it is my view that there is no dispute that the decision was undertaken under the Standards Act. [50] Section 11 of the Act refers "to any person aggrieved by a decision of the Bureau." *Fourth,* this being a decision under the act, any aggrieved person is obliged to exhaust the mechanism provided under the act or apply for an excvemption. *Sixth* and more fundamental is the fact that the only way out to by-pass this mechanism is to cite exceptional circumstances and move the court under section 9(4) of the FAA Act[51] discussed below.

22. Section **9(2)** of the FAA Act[52] provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that *"*the High Court or a subordinate Court *shall,* if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

23. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[53]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[54] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

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

25. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[55] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[56] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

26. A proper construction of section **9(2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section 9**(4),** which provides that: - "Notwithstanding subsection **(3),** the High Court or a subordinate Court *may, in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First,* the applicant must demonstrate exceptional circumstances.

27. In my view, what constitutes exceptional circumstances depends on the facts of each case[57] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act[58] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance.

28. Flowing from my above conclusion, I find that the following points from a leading South African decision relevant:-[59]"

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

29. Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[60] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act,[61] but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[62]

30. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. There was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for this court to permit the applicant to approach the court directly. There was no argument that the appellate tribunal has developed a rigid policy, which renders the requirement for exhaustion futile.

31. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. It has not been shown that the mechanism is not effective nor has it been demonstrated that the *ex parte* applicant cannot obtain an effective remedy from the Tribunal.

32. The second requirement is that on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act.[63] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. [64] Section **9(4)** of the FAA Act[65] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

33. As stated above, the law is that Section **9(4)** of the FAA Act[66] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. No competent application was presented before this court to determination the question whether or not the *ex parte* applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

34. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act.[67] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[68] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[69] An internal remedy is adequate if it is capable of redressing the complaint.[70]

35. As stated earlier, no argument was advanced before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

36. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

37. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I find any.

38. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.

39. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the ex *parte* applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section **9 (2)** of the FAA Act.[71] The *ex parte* applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act.[72] In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail.

b. Whether the ex parte applicant has demonstrated any grounds to warrant this court to grant the Judicial Review Orders sought.

40. The *ex parte* applicant's counsel assaulted the impugned decision on several grounds among them, arbitrariness, unreasonableness, irrationality, proportionality and an error of law. He also argued that Public policy cannot override express provisions of the law. I will address each of these grounds sequentially.

41. The first ground is arbitrariness. The *ex parte* applicant's counsel submitted that the impugned decision was arbitrary. He argued that the condemned sugar conforms to the Kenya Standards as per certificates of conformity issued by the Bureau's Pre-shipment Verification Agency, and, that, the agency appointed by the first Respondent inspected the consignment at the port of origin and certified that the sugar conformed to the Kenyan Standards. In addition, he argued that the Interested Party had inspected and condemned part of the consignment, and, that the rest of the consignment was cleared fit for human consumption. He referred to a letter dated 24th August 2018 from the Interested Party confirming that the sugar conforms to the standards.

42. Further, he challenged the impugned decision on grounds of unreasonableness and irrationality. In support of this contention, he cited *ABN Amro Bank NV v Kenya Revenue Authority*[73] where the Court of Appeal cited *Associated Provincial Picture House Ltd v Wednesbury Corporation*[74] that defined the test of unreasonableness. He argued that the existence of uncontested evidence of compliance with the first Respondent's own standards and from the Interested Party manifests the unreasonableness. To fortify this submission, he cited *Republic v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda Sc t/a Prof. Tom Ojienda & Associates.* ***[75]*** He contended that the impugned decision does not give regard to significant factors before it, namely, the pre-shipment certificates of conformity. In his view, the decision does not demonstrate that the sugar does not meet the Bureau's testing standards or that it is reasonably necessary to destroy the sugar.

43. Also, the *ex parte* applicant's counsel argued that the decision does not pass muster under the proportionality test prescribed in section 7(2)(i) and (j) of the FAA Act[76] and Article 47 of the Constitution which guarantees that every person has the right to administrative decision which is expeditious, efficient, lawful, reasonable and procedurally fair. He cited *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others*[77] for the proposition that the changes made in Judicial Review by the FAA Act[78] include merits review.

44. Counsel also argued that the decision is tainted by an error of law, in that, the consignment had been tested and a certificate of conformity issued. In response to first Respondent's argument that the Constitution guarantees every person goods of reasonable quality, he argued that the *ex parte* applicant's rights under Article 47 are equally important as the consumer rights under Article 46 and argued that public policy cannot override the express provisions of the law.[79]

45. The first Respondent's counsel submitted that for the *ex parte* applicant to be granted the orders sought, it must establish that the first Respondent acted beyond its statutory duty, and, that, the process was marred with illegalities, irrationality, unfairness and unreasonableness. Counsel cited the Respondents statutory and constitutional duty and contended that the first Respondent acted within its mandate. He submitted that judicial review is concerned with the decision making process[80] and stated that the first Respondent exercised its powers lawfully. He urged the court to consider public interest, and, the fact that every commodity imported to, or manufactured, or processed for consumption in the Kenyan Market has to undergo testing to ascertain that it conforms to the set standards.

46. I now address the question of the alleged arbitrariness. The contestation here is that the decision is arbitrary because the testing was done at the port of entry and by the Interested Party who confirmed that the goods satisfied the standards. This argument fails on three grounds. *First*, Regulation 3 of the *The Verification of Conformity to Kenya Standards of Imports Order, 2005*,[81] places an obligation to a person

who imports goods to ensure that the goods meet Kenyan Standards or approved specifications. The word *"must"* is used in this provision.

47. *Second,* it is a legal requirement that all goods entering into the country must be tested. Regulation 5 provides in peremptory terms that:- "All goods which are specified by the Kenya Bureau of Standards in accordance with paragraph 2 shall be subjected to verification of conformity to Kenya Standards, or approved specifications in the country of origin by an inspection body authorized by the Bureau, and may be re-inspected at the port of entry by the Bureau if it is deemed necessary." The verification applies irrespective of whether the goods have been tested at the port of origin or not. The verification is a legal imperative; hence, the decision to verify cannot be arbitrary or irrational

48. *Third,* it was argued that existence of a Certificate from the Interested Party is evidence of arbitrariness and irrationality and that the decision cannot pass proportionality test. Counsel contended that the decision constitutes "an error of law." I will discuss these three grounds in detail later.

49. *Fourth*, it is common ground that the law permits the first Respondent to inspect any goods entering into the country to confirm conformity with the set standards. Section 14A(1) of the act provides that an inspector may order the destruction of goods detained under section 14(1), if the following conditions are satisfied:-

> *(a) testing indicates that the goods do not meet the relevant Kenya Standard; and*
>
> *(b) it is reasonably necessary to destroy the goods because the goods are in a dangerous state or injurious to the health of human beings, animals, or plants.*

50. Also relevant are Regulations 3 and 5 of the The Verification of Conformity to Kenya Standards of Imports Order, 2005[82] discussed above. The foregoing being the legal framework governing the impugned decision, the question that calls for an answer in whether the decision can pass the test of arbitrariness, unreasonableness, proportionality and or amount to an error of the law.

51. I will first consider the elements of an arbitrary action. Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the "arbitrary and capricious" standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors is arbitrary, capricious, an abuse of discretion. So is an action not in accordance with law or if undertaken without observance of procedure required by law.[83]

52. I have diligently examined the circumstances of this case. I have placed the material before me side by side with the law. I am unable to locate any element of arbitrariness or capriciousness. Differently stated, the *ex parte* applicant has failed to demonstrate that the impugned decision was executed arbitrarily.

53. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest or arbitrariness. None of these has was established in this case. A power is exercised fraudulently if intended for an improper purpose. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. These elements were not proved to support the alleged arbitrariness.

54. I now address the question of unreasonableness and rationality. It is true unreasonableness and irrationality are grounds for Judicial Review. Reasonableness, within the context administrative law cannot be imbued with a single meaning.[84] Pillay states that the first element of a reasonable administrative action is rationality, and the second is proportionality. Rationality means that evidence and information must support a decision an administrator takes.[85] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.[86]

55. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of FAA Act.[87] The section 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*." The test for rationality was stated as follows:-***[88]***

> **"***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."*

56. 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 materials made available and the conclusion arrived at.[89] Contextualizing the impugned decision with the circumstances and the law under which it was made leaves the court with the irresistible conclusion that the decision was not influenced by other considerations, nor was it was made in utter abuse of power and discretion. There is nothing to show that the decision was not connected or related to the purpose of the statute. There is nothing to show that it was influenced by extraneous circumstances. It has not been demonstrated that the decision was not rationally connected to the purpose of the statute or the discretion given under the act.

57. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the FAA Act.[90] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one,

which a reasonable authority could reach. The converse was described by Lord Diplock[91] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

58. The law permits the first Respondent's agents to test the goods to ensure conformity with standards. Testing is a legal requirement, it is not a choice.

59. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it* ***[92]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[93]This stringent test has been applied in Australia,[94] where the court held that in order for invalidity to be determined, the decision must be one, which no reasonable person could have reached, and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." I am not persuaded that a different body properly addressing itself to the same facts and circumstances and the law could have arrived at a different conclusion. In fact, the *ex parte* applicant never advanced this argument despite citing unreasonableness.

60. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, no argument was advanced before me that the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law. The following propositions can offer guidance on what constitutes unreasonableness.

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

62. If a statute, which confers a decision-making power, is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. I find no convincing argument in this case to suggest that the statutory power was abused by the first Respondent's agents.

63. The tests for legal unreasonableness comprises of any or all of the following:-

a. specific errors of relevancy or purpose,

b. reasoning illogically or irrationally,

c. reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified;

d. giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others. ***[95]***

The *ex parte* applicant has not demonstrated any of the above tests.

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

65. Judicial intervention in Judicial Review matters is limited to the following cases:-

a. Where the decision was arrived at arbitrarily, capriciously or mala fides, or,

b. As a result of unwarranted adherence to a fixed principle, or,

c. In order to further an ulterior or improper purpose, or

d. Where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or,

e. Where the decision of the functionary was so grossly unreasonable as to warrant the inference, or,

f. Where the decision maker failed to apply his mind to the matter.

Having analyzed the material before me, I find that none of the above grounds has been established in this case.

66. On the allegation that the decision is tainted by an error of law, I start by pointing out one distinction, which has long bedevilled administrative law, that is, the distinction between an error of law and an error of fact.[96] This distinction is not one without theoretical significance. Thus, by way of example, prerogative relief by way of *certiorari* or *prohibition* will only be granted where the error, which appears on the face of the record of an administrative decision, is an error of law and not an error of fact.

67. When a court is asked to invalidate a decision on grounds of error of law, its task is simply to satisfy itself whether the decision was arrived at based upon relevant evidence, and, whether, the decision maker acted in an arbitrary manner and reached a finding of fact not supported by any evidence. It also entails examining whether the decision maker misdirected himself and directed its attention to the wrong issue by misconstruing a statute. Additionally, it involves examining whether the decision maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.

68. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by Tribunals or public bodies can be judicially challenged on grounds that the administrative decision does not comply with these basic requirements of legality. Thus, the ex parte applicant had a duty to demonstrate these basic requirements.

69. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

70. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it. No argument was presented in this case to suggest that the first Respondent's agents exceeded their powers.

71. The concept 'error of law' is mainly concerned with the erroneous applications of the law. I have carefully searched the law and the manner in which the decision was undertaken. I find no traces of an erroneous application of the law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

72. Two critical issues flow from the foregoing. *First*, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the first Respondent. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[97]

73. Even as we address the challenge that the decision suffers from an error of law, we must bear in mind the fact that the provisions conferring mandate upon the first Respondent must be read in the context of not one but three different imperatives. The *first* is to enable the first Respondent to effectively carry out its specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for the first Respondent to perform its functions through the application of the law and ensure that consumer rights are protected. This constitutional imperative renders the *ex parte* applicant's argument that public policy cannot override the *ex parte* applicant's rights impotent. The reverse is correct, that is, the first Respondent has a constitutional duty to protect and uphold consumer rights by ensuring conformity with the standards. Private commercial interests cannot override this constitutional imperative. The reverse is correct. Private rights must give way to the public good.

74. *Second*, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the first Respondents decisions affects the *ex parte* applicant, the first Respondent is obliged **not** to act unfairly. The impugned decision must be construed to promote respect for the Bill of Rights.

75. 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.[98]Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the first Respondent would act in such a manner as to violate, trump, or trivialize citizens' constitutional rights. However, the alleged violation of Article 47 rights has not been established. It is not enough to allege violation of constitutional rights. The alleged rights must be pleaded with specificity and the alleged violation proved.

76. Lastly, the *ex parte* applicant's counsel argued that the operation complained of was undertaken by an amorphous Mutli-agency team and questioned its legal capacity. Interestingly, a similar issue was raised in *Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 Others*[99] cited by the applicant's counsel and the court was clear that the various ministries whose functions overlap can constitute a team to

coordinate their function especially in urgent critical situations where the life of a nation is concerned. I find nothing useful to add.

77. It was argued that the first Respondent's acting Director signed the Seizure Notification yet she was not an officer appointed under the act. *First*, exhibit 22 relied upon by the *ex parte* applicant is illegible and it is not clear who signed it nor can the court guess. *Secondly*, the deponent to the first Respondent's Affidavit is clear that the inspection to ascertain whether goods conform to set standards is done by its officers whose powers are provided under section 14 of the Standard Act.[100] She averred that in exercise of its statutory powers, on 26th June 2018, the first Respondent's officers collected samples of Golden Brown Sugar; Brown Sugar and Wet Sugar from the *ex parte* applicant's consignment to establish the quality and safety of the sugar. She did not state that she did it herself nor has these averments been rebutted. Differently stated, there is no material before the court or cogent argument to impugn the impugn the competence of the Seizure Notification.

78. In view of my analysis of the facts and the law herein above, and my findings on the issues discussed herein, the conclusion becomes irresistible that the *ex parte* applicant has not demonstrated that the impugned decision is tainted with illegality or any judicial review grounds to warrant an order of judicial review from this court. Accordingly, the *ex parte* applicant's application dated 8th October 2018 be and is hereby dismissed with no orders as to costs.

Orders accordingly.

Signed, dated and delivered at Nairobi this 13th day of May 2019

John M. Mativo

Judge

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[1] Act No. 4 of 2015.

[2] Ibid.

[3] Cap 496, Laws of Kenya.

[5] Act No. 4 of 2015.

[6] Ibid.

[7] Cap 496, Laws of Kenya.

[8] Cap 496, Laws of Kenya.

[9] Ibid.

[10] Cap 496, Laws of Kenya.

[11] Constitutional Petition No. 205 of 2018- Mombasa

[12] Ibid.

[13] *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 Others* {2017} e KLR and *Mwai Kibaki v Daniel Toroitich Arap Moi* {1999} e KLR

[14] {1955} O.R. 431.

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

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

[17] Ibid

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

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

[20] Ibid.

[21] Ibid.

[22] Constitutional Petition No. 205 of 2018- Mombasa

[23] Ibid.

[24] Ibid.

[25] Act No. 4 of 2015.

[26]Cap 496, Laws of Kenya.

[27] {2018} e KLR.

[28] {1989} KLR.

[29] {2015} e KLR.

[30] Counsel also cited *Kenya Revenue Authority & 2 Others v Darasa Investments Limited* {2018} e KLR.

[31] Cap 496, Laws of Kenya.

[32] {2017} e KLR.

[33] Cap 496, Laws of Kenya.

[34] {2016} e KLR.

[35] Citing *David Kimani Karogo v Thika Land Disputes Tribunal & 2 Others* {2017} e KLR.

[36] {2016} e KLR.

[37] HC Misc App No 1235 of 1998.

[38] {2017} e KLR.

[39] Citing *Republic v Director of Immigration Services & 2 Others ex parte Olamilekan Gbenga Fasuyi & 2 Others* {2018} e KLR , *Resolution Insurance Ltd v HIV & AIDS Tribunal & 3 Others* {2018} e KLR and *Leonard Otieno v Airtel Kenya Limited* {2018} e KLR.

[40] Cap 496, Laws of Kenya.

[41] Ibid.

[42] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[43] Ibid.

[44] {1992} KLR 21.

[45] Ibid.

[46] {2015} eKLR.

[47] {2015} eKLR.

[48] Ibid.

[49] Cap 496, Laws of Kenya.

[50] Ibid.

[51] Act No. 4 of 2015.

[52] Act no. 4 of 2015.

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

[54] Ibid.

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

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

[57] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[58] Act No. 4 of 2015.

[59] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[60] See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J

[61] Act No. 4 of 2015.

[62] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[63] Act No. 4 of 2015.

[64] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[65] Act No. 4 of 2015.

[66] Act No. 4 of 2015.

[67]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[68] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[69] Ibid para 44.

[70] Ibid paras 42, 43 and 45.

[71] Act No. 4 of 2015.

[72] Ibid.

[73] {2017} e KLR.

[74] {1947} 2ALL ER 680.

[75] {2018} eKLR.

[76] Act No. 4 of 2015.

[77] {2016} KLR

[78] Act No. 4 of 2015.

[79] Citing *Republic v Kenya Revenue Authority ex parte Coper K-Brands Limited* {2016} eKLR.

[80] Citing *David Kimani Karogo v Thika Land Disputes Tribunal & 2 Others* {2017} eKLR.

[81]Legal Notice No. 78 15th July, 2005.

[82] Legal Notice No. 78 15th July, 2005.

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

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

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

[86] Supra Note 62.

[87] Act No. 4 of 2015.

[88] By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[89] In *Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P.

[90] Act No. 4 of 2015.

[91] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

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

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

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

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

[96] See H Whitmore, *Principles of Australian Administrative Law* 5th ed. (1980) at 157-60.

[97] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11.

[98] Article 50 (1).

[99] Constitutional Petition No. 205 of 2018- Mombasa.

[100] Cap 496, Laws of Kenya.