Satchu v Capital Markets Authority (Miscellaneous Civil Application 220 of 2019) [2019] KEHC 12135 (KLR) (Judicial Review) (3 December 2019) (Judgment)

Aly Khan Satchu v Capital Markets Authority [2019] eKLR

Neutral citation: [2019] KEHC 12135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS CIVIL APPLICATION 220 OF 2019

JM MATIVO, J

DECEMBER 3, 2019

IN THE MATTER OF: ARTICLES 10, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CAPITAL MARKETS ACT, CHAPTER 485A

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION FOR CERTIORARI AND PROHIBITION

BETWEEN

ALY KHAN SATCHU ..... APPLICANT

AND

CAPITAL MARKETS AUTHORITY ..... RESPONDENT

Breaches of the Capital Markets Act, including insider trading, have various consequences which include administrative action and criminal action.

The High Court dismissed a judicial review application challenging the CMA's administrative sanctions for insider trading. The applicant, a stockbroker and investment advisor, had disclosed price-sensitive information. He argued that insider trading was a criminal offence beyond CMA's jurisdiction and claimed breach of natural justice. The court held that the CMA lawfully exercised its regulatory mandate, including investigation and

sanction, and that the applicant, as an insider, was a regulated person under the Act. It found that he had failed to exhaust the available statutory appeal mechanism before approaching the court.

Reported by Beryl Ikamari

Judicial Review *- availability of judicial review remedies - exhaustion doctrine - where a statutory appeal to the Capital Markets Tribunal was applicable but was not utilized by the applicant before filing a judicial review application - effect of failure to exhaust alternative remedies when instituting judicial review proceedings.*

Statutes *- interpretation of statutes - regulated persons under the Capital Markets Act - definition of an agent and an insider - whether a person with insider information was a regulated person under the Capital Markets Act - Capital Markets Act (Cap 485A), section 2.*

Judicial Review *- grounds for judicial review - natural justice - where the Capital Markets Authority served a multiplicity of roles related to dispute settlement and they included investigatory, prosecutorial and adjudicatory roles - whether under such circumstances there was a breach of the rules of natural justice.*

Judicial Review *- nature and purpose of judicial review - availability of judicial review remedies - merit review as compared to judicial review - whether a judicial review applicant had improperly invited a judicial review court to engage in a merit review.*

Brief facts

The applicant was a registered stock broker and the Chief Executive Officer of an investment advisory firm. While engaged as a stock broking agent, the applicant was accused of insider trading. The Capital Markets Authority (CMA) served him with a notice to show cause (NTSC) wherein it was alleged that he had price sensitive insider information concerning the Kenol Kobil PLC takeover by Rubies Energie SAS and that he disclosed it to various parties including his clients. The NTSC was premised on section 26(8) of the Capital Markets Act and section 4 of the Fair Administrative Action Act. A hearing was conducted under section 26(8) of the Capital Markets Act by a committee of the CMA.

Before the NTSC was issued, investigations were conducted by the CMA. The CMA obtained court orders that allowed it to remove all documents and electronic devises in the custody of the applicant for three days. The applicant had to provide information including passwords that allowed for unhindered access to the seized devices for purposes of obtaining information.

Before the committee of the CMA, the applicant raised a preliminary objection. He said that the hearing conducted under section 26(8) of the Capital Markets Act was illegal as the CMA had no jurisdiction to handle the offence of insider trading which was a statutory crime recognized in section 32 of the Capital Markets Act. He also added that the respondent was an investigator, prosecutor and judge in the matter and it was therefore biased. The applicant also stated that the respondent sought to rely on illegally obtained evidence in the matter. That evidence was obtained from electronic devices that the respondent removed from the applicant's custody pursuant to a court order. An application for a stay and review of that court order was pending. The preliminary objection was dismissed. The respondent found the applicant guilty of insider trading and disqualified him from holding office as a key officer and director of a public listed company in an approved institution of the CMA for three years. The three years were to run from the date of the enforcement notice issued on July 5, 2019.

The applicant challenged respondent’s decision and said that the respondent had acted contrary to statute and in excess of its jurisdiction when it issued the NTSC. He also argued that the manner in which the respondent's committee purported to hear and determine the matter was illegal. Additionally, he challenged the constitutionality of the ultimate decision in light of articles 10, 47 and 50 of the Constitution and stated that insider trading was a criminal offence that could only be tried in a criminal court and prosecuted by the Director of Public Prosecution.

Issues

i. What was the effect of failure to exhaust alternative statutory remedies when seeking judicial review remedies?

ii. Which persons were within the category of regulated persons under the Capital Markets Act?

iii. Whether it was permissible for the Capital Markets Authority to undertake administrative action including imposition of penalties against a person who was accused of insider trading.

iv. When would a judicial review application be said to be an invitation to the court to engage in a merit review?

v. Whether the multiplicity of functions served by the Capital Markets Authority in dispute resolution including investigations and imposition of penalties violated the rules of natural justice.

Held

1. The doctrine of exhaustion of remedies would arise when a litigant sought judicial review of an agency's decision without pursuing available remedies within that agency. The court had to decide whether to review that agency's actions or remit the case back to the agency while permitting judicial review only when all available remedies would fail to produce a satisfactory resolution.
2. Exceptions to the exhaustion doctrine were not clearly delineated and courts had to analyse the facts, regulatory scheme, the interests involved, including the level of public interest involved and the polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applied. In exceptional circumstances the High Court could find that the exhaustion doctrine would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.
3. The impugned decision was a determination by the CMA on a matter relating to the CMA as contemplated under section 35A of the Capital Markets Act. It was therefore appealable to the Capital Markets Tribunal.
4. Section 9(2) of the Fair Administrative Actions Act provided that the High Court or subordinate court could 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 were first exhausted. The use of the word 'shall' meant that the requirement was mandatory. However, exceptional circumstances were an exemption to the exhaustion requirement under section 9(4) of the Fair Administrative Action Act.
5. What constituted exceptional circumstances depended on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy was ineffective or its pursuit was futile, a litigant could be permitted to approach the court directly.
6. It was not shown that the Capital Markets Tribunal as a dispute settlement mechanism would be impractical or that the dispute was purely legal and therefore it had to be determined by a court. It was also not shown that the mechanism was ineffective or that it could not yield an effective remedy.
7. A litigant seeking as exemption from an obligation to exhaust an internal remedy had to first apply to court and demonstrate the existence of exceptional circumstances. That was what section 9(4) of the Fair Administrative Action Act required.
8. A contextual or purposive reading of a statute had to remain faithful to the actual wording of a statute. Therefore, it had to be sufficiently clear and accord to the rule of law.
9. The preamble to the Capital Markets Act stated that it was an Act of Parliament to establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes. A purposive construction of insider trading legislation required courts and regulatory bodies tasked with enforcement of the Capital Markets Act to interpret and apply the Act in a manner that gave effect to its objects as set out in the preamble. Market fairness and equal footing trading, *inter alia*, had to serve

as important guiding principles in the interpretation of insider trading provisions and in determining who the regulated persons under the Act were.

10. An insider under the Capital Markets Act meant any person who was connected with a company, or was deemed to have been connected with a company and who was reasonably expected to have access, by virtue of such connection, to unpublished information which, if made generally available, would be likely to materially affect the price or value of the securities of the company, or who had received or had access to such unpublished information. The test applicable in the circumstances of the case was whether the applicant was an insider and not whether he was an agent.
11. There were two considerations related to the definition of an insider. First, the existence of a relationship that gave access, directly or indirectly, to unpublished information intended to be available only for corporate purposes and not for the personal benefit of anyone. The applicant admitted to the existence of such a relationship. The second consideration was the inherent unfairness involved where a party took advantage of such information while knowing that it was unavailable to those with whom he was dealing.
12. The applicant described himself as an agent of an investment advisory firm. As such he gave advice to clients about investing in securities such as stocks, bonds, mutual funds, or exchange traded funds. His role included learning and making predictions in the market and advising on investing in securities and such a role placed him in a peculiar position of qualifying as an insider. The applicant was at all material times, an insider and agent and therefore he was a regulated person.
13. A reading of the preamble to the Capital Markets Act, the definitions of an insider, inside information, and a regulated person and the clear admission by the applicant that he was an agent of a company, pursuant to an agreement that empowered him to be his client's agent for the sale and purchase of securities and other investments to be transacted through the company, brought him within the ambit of a regulated person as contemplated under the Act. He was therefore subject to regulation by the respondent.
14. Since the applicant was an insider, an agent and a regulated person under the Act, the CMA did not misconceive its authority under the law.
15. Under section 11 of the Capital Markets Act, the CMA had statutory power to regulate, promote and facilitate the development of an orderly and efficient capital market in Kenya. It had powers which included the conduct of investigations and imposition of sanctions for breach of the Capital Markets Act.
16. The Capital Markets Act prohibited insider trading and it empowered the Capital Markets Authority to impose sanctions for breach of the Act and provisions thereunder. It recognized that certain actions could give rise to more than one consequence. The Capital Markets Act recognized both civil and criminal liability and the following factors were relevant to the applicant's circumstances:
    1. the Act distinguished between civil, criminal, administrative or disciplinary proceedings under the Act and prescribed penalties that the CMA could impose for statutory breaches;
    2. sections 13A and 13B gave the CMA powers to search and investigate;
    3. section 22B of the Act granted power to CMA to intervene in the operations of securities and future exchanges where there was an act of Government affecting securities or commodities, where there was a major market disturbance which prevented the market from accurately reflecting the forces of supply and demand for such securities or commodities, where there was a threatened or actual manipulation of the market and where the authority considered it necessary or expedient in the interest of the public or for the protection of the interests of investors;
    4. there was a clear distinction between a penalty imposed by CMA in exercise of its regulatory mandate and criminal proceedings.

17. The impugned decision could give rise to a criminal offence. However, that did not alter the nature of the administrative proceedings before CMA. There was no formal accusation of a breach of the criminal law before the CMA. The proceedings were inquisitorial and were initiated by way of a complaint or Notice to Show Cause (NTSC) not a criminal charge.
18. When CMA undertook administrative and regulatory proceedings and imposed administrative penalties, the decision remained administrative in nature and fell within the four corners of the areas assigned to it by the legislature.
19. Judicial review was about the decision-making process and not the decision itself. The court had a supervisory role in judicial review under which it would supervise the exercise of power by those that held it to ensure that it had been lawfully exercised. Judicial review was the review by the court of a decision, proposed decision or refusal to exercise power to determine whether that decision or action was unauthorized or invalid.
20. Judicial review was more concerned with the manner in which a decision was made than the merits or otherwise of the ultimate decision. As long as the decision-maker followed the proper procedure and the decision was within the confines of the law, the court would not interfere with it.
21. The complaint relating to the decision on the preliminary objection was an invitation to the court to consider a merit finding. Such a merit review was outside the scope of judicial review jurisdiction and did not fall within the expanded scope of judicial review jurisdiction.
22. The question as to whether the CMA had overlapping functions that could allow it to serve investigatory, prosecutorial and decision-making roles in a given dispute had been considered in various cases. However, a case was only an authority for what it decided and not what logically flowed from it. The ratio for a decision had to be understood within the background of its facts.
23. In the case of *Capital Markets Authority v Alnashir Popat & 8 others,* [2019] eKLR the court acknowledged the powers of CMA to determine appeals against its decisions and to conduct investigations into statutory breaches. However, it did not address the question as to whether that was a breach of the rules of natural justice.
24. Section 11A of the Capital Markets Act permitted the CMA to delegate any of its functions to a committee of the board or a recognized self-regulatory organization or an authorized person. That was the section that the court in *Chadwick Okumu v Capital Markets Authority* [2018] eKLR criticized the CMA for not utilizing to avoid a decision that was tainted with procedural impropriety and a violation of the principles of natural justice.
25. It was difficult to prove actual bias but it was enough to prove apparent bias. Apparent bias would be proven if it was shown, that from the viewpoint of a reasonably informed person who had knowledge of the facts, it was reasonable to apprehend the possibility of bias in the circumstances. The test for bias was whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision-maker had not or would not bring an impartial mind to bear on the adjudication of the case meaning a mind open to persuasion by the evidence and submission of counsel.
26. When it issued the NTSC, the CMA served as an investigator and it was for all purposes a prosecutor and its members sat in the ad hoc committee that heard and determined the dispute. That scenario raised a fundamental issue of procedural impropriety and a reasonable apprehension of likelihood of bias.
27. A violation of natural justice, a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involved the direct application of the Constitution. Procedural fairness as contemplated by article 47 of the Constitution and the Fair Administrative Action Act demanded that there should be no violation of natural justice.

28. The ad hoc committee that heard and determined the matter in question was comprised of four members of the respondent. The composition of the ad hoc committee did not pass the constitutional test on fairness and for that reason the resultant decision was tainted with illegality.

Application partly allowed.

Orders

i. Order issued that:
   a. *the suit offended the doctrine of exhaustion of remedies.*
   b. *The applicant was a "regulated person" within the definition of the Act and therefore subject to the regulatory mandate of the respondent.*
   c. *The proceedings before the ad hoc committee were not criminal in nature but they were regulatory proceedings within the mandate of the respondent.*
   d. *To the extent that the ad hoc committee comprised of four members of the respondent, then the respondent acted as the investigator, prosecutor, judge and the executioner in total violation of the rules of natural justice, article 47 of the Constitution and section 4 of the Fair Administrative Action Act.*
   e. *The respondent's decision and/or determination namely the enforcement notification dated July 5, 2019 finding the applicant guilty/culpable of insider trading pursuant to section 32(B) (i) (a) and (b) of the Capital Markets Act and all consequential orders flowing therefrom were set aside.*
   f. *The dispute was remitted back to the respondent to be heard and determined by an independent and impartial committee appointed under section 14 of the Act.*
   g. *The dispute shall be heard and determined within six months from the date of the judgment.*
ii. *No orders as to costs.*

Citations

Cases

1. Alnashir Popat,Omurembe Iyadi,Jinit M. Shah,Anwar A. Hajee,Hanif Somji,Vishnu Dhutia,Eric G. Bengi,Christopher Diaz & Mukesh K.M. Patel v Captial Markets Authority (Petition 245 of 2016; [2016] KEHC 8398 (KLR)) — Explained
2. Capital Markets Authority v Alnashir Popat,Omurembe Iyadi,Jinit M. Shah,Anwar A. Hajee,Hanif Somji,Vishnu Dhutia,Eric G. Bengi,Christopher Diaz & Mukesh K. M. Patel (Civil Appeal 35 of 2017; [2019] KECA 592 (KLR)) — Explained
3. Cementia Holding Ag, Didier Tresarrieu v Capital Markets Authority, Registrar of Companies,The Nairobi Securities Exchange Ltd & East African Portland Cement Co Ltd (Petition 110 of 2014; [2014] KEHC 8066 (KLR)) — Mentioned
4. Chadwick Okumu v Capital Markets Authority (Constitutional Petition 510 of 2016; [2018] KEHC 7281 (KLR)) — Explained
5. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR)) — Mentioned
6. Dry Associates Limited v Capital Markets Authority & Director of Public Prosecutions Interested Party Crown Berger (K) Ltd (Petition 328 of 2011; [2014] KEHC 5478 (KLR)) — Mentioned
7. Energy Regulatory Commission v SGS Kenya Limited & 2 others (Civil Appeal 341 of 2017; [2018] KECA 616 (KLR)) — Explained
8. Ernst & Young v Capital Markets Authority & Attorney General (Civil Appeal 92 of 2017; [2019] KECA 81 (KLR)) — Explained
9. Geoffrey Muthinja & Robert Banda Ngombe v Samuel Muguna Henry, John Jembe Mumba, John Maroo, John Columbus Gikunda M'mwanjah, Bernard Njiru Arozon, Samuel Chivatsi Munga, James Marangu M'muketha & 1750 others (Civil Appeal 10 of 2015; [2015] KECA 304 (KLR)) — Explained

10. Gladys Boss Shollei v Judicial Service Commission & another (Petition 39 of 2013; [2014] KEELRC 764 (KLR)) — Mentioned
11. In the Matter of the Mui Coal Basin Local Community (Constitutional Petition No 305 of 2012) — Explained
12. Jeremiah Gitau Kiereini v Capital Markets Authority & another (Petition 371 of 2012; [2013] KEHC 6032 (KLR)) — Explained
13. Natal Joint Municipal Pension Funds v Endumeni Municipality ((920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA)) — Explained
14. OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya, Electricity Generating Company Limited (KENGEN), Rentco East Africa Limited, Lantech Africa Limited & Toshiba Corporation (Consortium) (Civil Appeal 28 of 2016; [2017] KECA 386 (KLR)) — Mentioned
15. Republic v Attorney General, Director of Public Prosecutions, Commissioner of Police, Ethics & Anti-Corruption Commission & Bahadurali Hasham Lalji ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji (Miscellaneous Application 153 of 2012; [2014] KEHC 2238 (KLR)) — Explained
16. Republic v Capital Markets Authority Ex parte: Joyce Ogundo (Miscellaneous Application 606 of 2016; [2018] KEHC 8857 (KLR)) — Explained
17. Republic v Independent Electoral and Boundaries Commission Ex parte National Super Alliance (Miscellaneous Application 238 of 2017; [2017] KEHC 5907 (KLR)) — Mentioned
18. Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC, Attorney General, Jubilee Party, Ekuru Aukot & Third Party Alliance, Samuel Waweru & Stephen Owoko Oganga (Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR)) — Mentioned
19. Republic v Public procurement Administrative review Board & 3 others Ex parte Olive Telecommunications PVT Limited (Judicial Review Application 106 of 2014) — Explained
20. Republic v Speaker of the Senate & Senate Ex parte Afrison Export Import Limited & Huelands Limited (Miscellaneous Civil Application 182 of 2018; [2018] KEHC 9509 (KLR)) — Explained
21. R v Wigglesworth ([1987] 2 SCR 541) — Mentioned
22. Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party) (Judicial Review Miscellaneous Application 251 of 2018; [2019] KEHC 4895 (KLR)) — Explained
23. Stopforth v Minister of Justice and Others, Veenendaal v Minister of Justice and Others ((316/97, 317/97) [1999] ZASCA 72; [1999] 4 All SA 383 (A)) — Explained
24. African Christian Democratic Party v Electoral Commission and Others ({2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC)) — Mentioned
25. Daniels v Campbell NO and Others ([2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC)) — Mentioned
26. Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others ([2000] ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC)) — Mentioned
27. Jaga v Dönges NO and Another; Bhana v Dönges NO and Another (1950 (4) SA 653 (A)) — Mentioned
28. Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae) ((CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC)) — Mentioned
29. Minister of Health & Others v Treatment Action Campaign & Others (No 2) ((CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)) — Explained

30. 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 ((467/2004) [2005] ZASCA 97; 2008 (1) SA 383 (SCA) ; [2006] 1 All SA 589 (C)) — Mentioned
31. Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others ((CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241) — Mentioned
32. Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others ([1999] ZASCA 72; 2000 (1) SA 113 (SCA)) — Mentioned
33. Veenendaal v Minister of Justice and Others ((316/97, 317/97) [1999] ZASCA 72; [1999] 4 All SA 383 (A)) — Explained
34. Committee for Justice and Liberty v National Energy Board ([1978] 1 SCR 369) — Explained
35. Guindon v Canada (2015 SCC 41; [2015] 3 SCR 3) — Explained
36. Proprietary Articles Trade Association v Attorney General for Canada ([1931] AC 310) — Mentioned
37. Mohinder Singh Gill v Chief Election Commissioner (1978 AIR 851, 1978 SCR (3) 272, AIR 1978 SC 851, 1978 (1) SCC 405, 1978 2 SCR 272, 1978 2 SCJ 441) — Explained
38. State of Orissa vs. Sudhansu Sekhar Misra (1968 AIR 647, 1968 SCR (2) 154, AIR 1968 SC 647, 1967 2 SCWR 846, 1968 2 SCR 154, 1968 SCD 1, 1968 2 SCJ 236, 34 CUTLT 105, 1970 (1) LABLJ 662) — Explained
39. Craig v South Australia ([1995] HCA 58; 184 CLR 163; 1995 ALJR 873; 131 ALR 596) — Explained
40. Customs and Excise Comrs v City of London Magistrates' Court ([2000] EWHC J0517-3; [2000] 1 WLR 2002) — Mentioned
41. Hudson v US (522 U.S. 93 (1997)) — Explained
42. In re Birdie v General Accident Fire and Life Assurance Corporation Ltd (1949 Ch D 121 130) — Explained
43. John Donaldson MR in R v Secretary of State for the Home Department, Ex parte Swati ([1986] 1 All ER 717 (CA)) — Mentioned
44. Local Government Board v Arlidge (1914 LawSuit UKHL 42) — Explained
45. Martineau v MNR (2004 SCC 81; [2004] 3 SCR 737) — Explained
46. R v Somerset CC Ex parte Dixon (COD) ([1998] EnvLR 111; [1997] QBD 323) — Explained
47. Snyder v Massachussets (291 U.S. 97 (1934)) — Explained

Statutes

1. Capital Markets Act (CAP. 485A) — section 5, 11(2)(3); 13A(a)(b)(c); 13(2); 14; 25; 26; 32A-32E; 34(6); 35A — Interpreted
2. Capital Markets Markets (Take-overs & Mergers) Regulations, 2002t (cap 485A) — regulation 4(3) — Interpreted
3. Companies Act (cap 486) — In general — Cited
4. Constitution of Kenya — article 10, 23(3); 33; 47; 50; 157 — Interpreted
5. Fair Administrative Action Act (cap 7L) — section 4, 9(2)(3) — Interpreted
6. Constitution of Kenya, 2010
7. Income Tax Act

Texts

1. Auburn J, Moffet J, Sharland A (2013), Judicial Review: Principles and Procedure (Oxford University Press; paragraphs 12.05 to 12.07)
2. Tiwari, SK., (Dr) (Ed) (2015), 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 (Universal Multidisciplinary Research Institute Pvt Ltd ISSN:2348-8212 (Volume 2 Issue 2))

Advocates

None mentioned

JUDGMENT

The Parties

1. The applicant is a male adult of sound mind residing and working for gain as a registered stock trader in Nairobi within the Republic of Kenya. He is the founder and Chief Executive Officer of Rich Management Limited, a limited liability company incorporated in Kenya under the *Companies Act*,[1] an Investment Advisory firm offering advisory, investor relations and digital media services to publicly listed and non-listed blue chip companies.

2. The Respondent, the Capital Markets Authority (herein after referred to as CMA) is a statutory body established pursuant to section 5 of the *Capital Markets Act*[2] (herein after referred to as the Act). Its mandate is to inter alia promote, regulate and facilitate the development of an orderly, fair and efficient Capital Market in Kenya.[3]

The Factual Matrix

3. The applicant states that in 2007 he entered into an agency agreement with Krestel Capital (East Africa) Limited pursuant to which he was engaged as a Stock broking agent, thus empowering him to be the agent for his clients in the sale and purchase of securities and other investments to be transacted through Krestel Capital. He states that on the 30th of October 2018, CMA summoned him for an interview alleging that it was inquiring into allegations of Insider Trading in respect of Kenol Kobil PLC counter during the period prior to the announcement by Rubis Ennergie of their intention to take over Kenol Kobil. He states that on or around November 2018, accompanied by his Advocate, he appeared before the CMA and explained his role and the nature of his advice to his clients regarding the intended take over.

4. In addition, he states that on the 14th January 2019, the lower court[4] issued ex-parte orders authorizing CMA's offices to enter into his premises to seize/ obtain information and remove from his custody all documents and electronic devises including but not limited to mobile phones and laptops and any components thereof and retain the same for a period of 3 days. He maintains that CMA willfully misled and misrepresented to the lower court that section 13A (a) (b) (c) of the Act gives it powers to seek the prayers sought and as a consequence, the court granted ex-parte orders. He adds that the said order required him to provide all keys, identification codes, passwords, passphrases or any such information or knowledge to achieve unhindered access to the seized devices to facilitate the identification, inspection, preservation and reproduction of relevant information found therein.

5. Further, the applicant states that on 18th January 2019, he received a letter from CMA advising him to make arrangements to collect his items and confirming that the initial process of locating, decoding, accessing and decrypting the items was complete. He also states that vide an email dated 21st January 2019, CMA confirmed that his items were ready for collection save the mobile phone and laptop. He states that he instructed his advocates to write to CMA citing the unfair and clandestine manner in which the investigations were being done.

6. The applicant states that his advocates applied in the lower court to review, recall, discharge, vary and set aside the said ex parte orders citing non-disclosure of the material facts and blatant breach of the law and upon hearing, the lower court reserved its Ruling for Friday, 19th July 2019.The applicant states

that despite the pendency of the said ruling, on 11th March 2019, CMA served him with a Notice to Show Cause (NTSC) alleging Insider Trading in the takeover of Kenol Kobil PLC and accusing him of committing the criminal offence contrary to Section 32(B)(i)(a) and (b) of the Act and requiring him to appear before the CMA Committee (herein after referred to as the Committee) on 26th March 2019.

7. Further, he states that the Committee purported to formulate its Terms of Reference (TOR) to be followed in conducting the proceedings, and, that, Clause 8(2) thereof provided that the proceedings of the Ad hoc Committee shall be in private and inquisitorial in nature. The applicant contends that the manner in which the hearing proceeded before the Committee was contrary to Article 50(1) of *the Constitution* which guarantees the right to have any dispute decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

8. He states that it was alleged that he was in possession of price sensitive insider information concerning the takeover of Kenol Kobil PLC by Rubies Energie SAS and that he had allegedly disclosed the information to various parties including his clients. He states that the only allegations made against him were words or phrases he used in communicating with his clients such as "I have actionable intelligence" and "I know Feildmarsham."

9. Further, he states that NTSC was allegedly premised on Section 26(8) of the Act and section 4 of the *Fair Administrative Action Act*[5] (herein after referred to as the FAA Act). He stated that, section 25 of the CMA Act was repealed by Act No. 48 of 2013, while section 26 of the Act relates to the suspension or revocation of a license.

10. The applicant states that Insider Trading is not one of the instances the Respondent could serve a NTSC and that the hearing was carried under section 26 of the Act which applies to two circumstances prescribed by therein, which are inapplicable to this case. He also avers that section 26(8) of the act requires CMA to grant an affected person with an opportunity to be heard where adverse action is contemplated under section 25 and 26 of the Act.

11. The applicant states that he appeared before the Committee on 26th March 2019, and, his Advocate raised a preliminary objection on numerous points of law as follows:-

    a. The hearing conducted by the Committee pursuant to section 26(8) of the Act was un-procedural and illegal.

    b. That since he was accused of committing the criminal offence of insider trading pursuant to 32(B)(i)(a) and (b) of the Act, the Authority had no jurisdiction and/or capacity to conduct an administrative hearing of what is obviously a statutory crime.

    c. The hearing was conducted before a committee of the Board of the Authority, yet the same board conducted the investigation that led to the notice to show cause. In the premise the Respondent was the investigator, the prosecutor and the judge. It was not only biased but was incapable of properly adjudication of a matter it was so intrinsically connected to;

    d. The alleged evidence that the Respondent relied on was obtained through an ex-parte order obtained in the lower court.[6] The Respondent obtained the order that allowed it access to his telephones and laptops contrary to article 33 of the *Constitution*. Since an Application to stay and review the initial order was still pending before the court, the applicant informed the committee that it was prudent to await the court's determination. Further, he informed them that the evidence relied on by the Respondent was obtained illegally and unlawfully.

    e. The composition of the ad hoc committee was against the principles of natural justice, the provisions of the FAA Act and the provisions of *the Constitution*.

12. The applicant states that the Respondent summarily dismissed the objections on 2nd July 2019, though no reply or objection had been raised; and, that, the Committee's Ruling was drafted/prepared by a team of lawyers headed by the Respondent's Chief Executive Officer, Mr. Paul Muthaura and his assistants.

13. The applicant states that vide an Enforcement Notification issued on Friday, 5th July 2019, Committee notified him of its decision finding him culpable/guilty of Insider Trading contrary to Section 32(b) (i) (a) and (b) of the Act and disqualified him from holding office as a key officer and director of a public listed company in an approved institution of the CMA for a period of three years from the date of the enforcement notification.

14. He states that CMA acted without jurisdiction, that it acted contra-statute and ultra-vires its powers, and it committed a grave jurisdictional error by issuing the NTSC. Further, the applicant states that the impugned decision was flawed and illegal ab initio in that the manner in which the Committee purported to hear and determine the matter was illegal, and that, the Authority was unreasonable, biased and exceeded its statutory powers.

15. The applicant also states that the Authority's decision was in flagrant breach of articles 10, 47 and 50 of *the Constitution*, and, that, that Insider Trading under section 32(B) (i) (a) and (b) of the Act is a criminal offence that can only be tried in a criminal court and only the Director of Public Prosecution pursuant to article 157 of *the Constitution* can undertake the prosecution of such an offence, if any.

16. The applicant states that the punishment imposed is not only illegal and unlawful but it is also grave, outlandish and untenable, draconian and far reaching in that it is contra statute and has the effect of rendering him jobless. He added that the entire proceeding right from the inception to the conclusion was grounded on flagrant and willful breach of *the Constitution* and the provisions of the Act and other statutes that render each and every step taken illegal, null and void. Further, he stated that the evidence relied on by CMA was tainted with illegality and was not admissible, and, that, the procedure adopted had no basis in law and the applicant was denied the right to confront the allegations leveled against him.

17. In addition, the applicant states that CMA breached its obligations and duties, specifically breached the duty to act fairly; the duty to be free from prejudice and the duty to put in place a fair decision making process. Lastly, the applicant states that manner in which the proceedings were carried out breached the applicant's legitimate expectation.

The reliefs sought

18. The applicant prays for the following reliefs:-

    a. An Order of Certiorari to bring to this Honourable Court the Respondent's decision and/or determination namely the Enforcement Notification dated 5th July 2019 finding the Ex-parte Applicant guilty/culpable of insider trading pursuant to section 32(B) (i) (a) and (b) of the Capital Market's Act and taking any steps in furtherance of the said determination and any step that informs the same as it relates to the alleged Kenol Kobil PLC insider trading for purposes of quashing the same.

    b. An order of prohibition prohibiting and or restraining the Respondent and their agents, servants and employees from acting upon, enforcing and/or implementing the determination namely the Enforcement Notification it made on 5th July 2019.

    c. Costs of the Application.

Respondent's Replying Affidavit

19. Mr. Abubakar Hassan Abubakar, the CMA's Head of Investigations and Enforcement swore the Replying affidavit dated 29th August 2019. He averred that on or about 24th October 2018, CMA received a Notice of Intention by Rubis Énergie to make a cash offer to acquire 100% of the ordinary share capital of KenolKobil Plc not already legally or beneficially owned by Rubis Énergie pursuant to regulation 4(3) of the *Capital Markets (Take-overs & Mergers) Regulations, 2002*.

20. He further averred that through its market surveillance, CMA as the market regulator identified potentially irregular trading of the KenolKobil counter in the run up to the issue of the Notice of Intention by Rubis Énergie. He also deposed that following reasonable suspicion of Insider Trading, CMA launched an inquiry process in relation to the KenolKobil PLC take over transaction and identified Fourteen (14) accounts that had purchased a total of 62,699,700 Kenol Kobil shares worth Kshs. 938,382,800.00 with potential illegal gains amounting to Kshs.503, 710, 300.00 based on the offer price.

21. Mr. Abubakar deposed that as a result of the foregoing, CMA placed caveats on all Kenol Kobil Plc shares purchased through the 14 accounts identified to have engaged in suspicious trading, the week before the intended take over announcement. Further, he averred that the majority of the accounts frozen (by placement of caveats) due to irregular trading were those traded by the applicant through Kestrel Capital (East Africa) Ltd, where Mr. Andre DeSimon was at all material times an Executive Director.

22. He deposed that at all material times, the Applicant was a duly appointed agent of a licensed stock broker known as Kestrel Capital (East Africa) Ltd, and, that, he had an agency agreement committing himself to comply with the Laws of Kenya, rules and regulations of the Nairobi Securities Exchange as well as the CMA. In addition, he deposed that most of the accounts frozen fell under the applicant's agency, and, that, the applicant (being a stock broking agent of Kestrel Capital) was therefore considered a person of interest.

23. Mr. Abubakar deposed that CMA conducted the investigations pursuant to the provisions of section 11(3) of the Act which provides that as the statutory regulator, it may: - (h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which CMA has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market.

24. He averred that as at January 2019, CMA's Preliminary investigations established that the former Managing director of Kestrel Company Limited, Mr. Andre DeSimone and Mr. David Ohana (former Managing director of Kenol Kobil Plc) were insiders and in possession of material non-public information of the proposed acquisition of Kenol Kobil Plc at a premium take over price of Kshs. 23 and that they knew the date of the takeover offer. He deposed that that the investigation by CMA among others, sought to establish if the traders including the Applicant traded based on the material information not available to the public.

25. He also deposed that section 32A-32E of the Act, to establish the offence of Insider Trading, and, that, preliminary investigations established that there was communication between some insiders and some traders especially the applicant during the material time before the insider information was made public, and, that, CMA reasonably believed that the persons of interest in the investigations including the applicant were in possession or in control of documents and electronic devices which likely contained information relevant to the investigations.

26. Mr. Abubakar averred that to enable CMA to conduct investigations, it applied for warrants in the lower court[7] under section 13A (2) &13A (3) (a) (b) & (c) of the Act to facilitate the seizure of germane electronic gadgets and devices in order to establish the persons of interest in the investigation who had shared the material non-public price sensitive information or used the information to trade in Kenol Kobil Plc Shares. He averred that the court considered the application and issued the warrants permitting CMA to seize germane electronic gadgets and devices from Andre De Simone, Aly Khan Satchu & David Ohana to assist in further investigations.

27. He averred that on 15th January 2019, armed with the court warrants, CMA's agents seized the applicant's gadgets (and the other two named persons), which provided evidence that indeed there was disclosure of information to traders and its investigations established prima facie that the applicant was among the persons who had had potentially engaged in Insider Trading.

28. He deposed that the applicant had filed an application dated 1st February, 2019 seeking to set aside, vary or discharge the Warrants on the grounds that CMA had misled the court in misinterpreting the provisions of section 13A (2) &13A (3)(a)(b)&(c)of the Act. He averred that CMA opposed the application and on 19th July, 2019 the court upon considering the arguments by the parties, dismissed it on the basis that the court had properly and lawfully issued the Warrants.

29. Mr. Abubakar averred that the hearings of applicant's NTSC was not sub-judice because:-

    a) The enforcement proceedings where the Applicant was appearing in the hearing are not a concurrent suit in a court of competent jurisdiction like CMCC Misc. 13 of 2019. The enforcement proceedings were administrative actions by the Authority which are within its mandate under the Act ; and

    b) The enforcement proceedings were not dealing with the same subject matter as in CMCC Misc. 13 of 2019. The enforcement concerned allegations of Insider Trading (in Kenol Kobil Plc Shares) against the Applicant and the hearing was also meant to assist the ad hoc Committee establish if the applicant had contravened the legal framework by engaging in insider trading, and, if and where such contravention would be established, to determine culpability and appropriate enforcement actions. On the other hand, CMCC Misc. 13 of 2019 concerned the validity of warrants that CMA had obtained in order to conduct investigations into the allegations. The issue of the validity of the warrants was not an issue pending for determination before the ad hoc Committee and the Respondent's culpability or otherwise on allegations of insider trading was not pending before the court. The enforcement hearings were different from the court proceedings in CMCC Misc. 13 of 2019. Consequently, where the subject matter or issue between the parties was not pending before the court for determination, the rule on sub judice is inapplicable.

    c) There was no court Order barring the enforcement proceedings.

30. He averred that CMA issued the Applicant (together with other persons found culpable) with a NTSC requiring him to show cause why CMA as the statutory regulator should not take enforcement action against him for engaging in Insider Trading. He also averred that in response to the NTSC, the applicant wrote to CMA on 25th March 2019 and besides the written response, CMA invited applicant to a hearing of the NTSC vide a letter dated 27th May, 2019 before be conducted by the Ad hoc Committee constituted by CMA for that purpose.

31. He deposed that the ad hoc Committee was properly constituted pursuant to section 14 of the Act for purposes of hearing the said allegations and that it comprised of:-

(a) The Chairman of CMA's Board of Directors.

(b) 3 members of CMA's Board of Directors; and

(c) 4 external members comprising of a retired chief justice, two renowned Accountants and renowned capital markets practitioner.

32. Mr. Abubakar further averred that CMA's ad hoc Committee was a master of its own procedure and that the procedure adopted should not be faulted so long as it conforms with the Constitutional and Statutory standards for guaranteeing Fair Administrative Actions. He also averred that the oral hearing of the NTSC took place on 10th June, 2019 and the applicant appeared in person accompanied by his legal counsel and he was afforded an opportunity to make oral representations and confront the allegations in the NTSC. He averred that upon considering both the applicant's written and oral representations, the Committee rendered its decision through the Notification of Enforcement Action dated 5th July, 2019 which is the subject of the current judicial review proceedings.

33. Mr. Abubakar averred that the NTSC was not issued solely under Section 26(8) of the Act, but also under Section 4 of the FAA Act which creates an obligation to provide an opportunity to be heard to any person who is the subject of administrative proceedings in line with Article 47 of *the Constitution*. Further, he averred the hearing of the NTSC conducted on 10th June, 2019 demonstrated that CMA played an active role in assisting the applicant to realize his right to fair administrative action as encapsulated and anticipated by the FAA Act and Article 47 of *the Constitution*.

34. He also deposed that the grounds challenging the applicability of Section 26(8) of the act fail to take into account the provisions of Section 25A of the Act which replaced Section 25 upon its repeal and section 11(3) (cc) of the act which vests in the Authority the power to conduct administrative proceedings in respect of any breach of the Act, Regulations, Rules or Guidelines. He further deposed that the provisions of Section 25A of the act make no distinction between breaches that may be subjected to administrative proceedings or otherwise and that no limitations on the mandate of CMA exists in practice or under the Act.

35. Mr. Abubakar also deposed that the applicant misunderstood the nature of the administrative proceedings as well as the nature of the committee, and, that, the allegation that CMA contravened the provisions of Article 50(1) of *the Constitution* fails because CMA is neither a court of law nor an independent tribunal nor was the applicant not on trial.

36. He averred that the administrative action and/or enforcement proceedings by CMA as against the applicant were neither judicial nor quasi-judicial in nature, but, they were totally and purely administrative in nature, hence, the legality of the current proceedings and threshold of legality thereof are spelt out in Article 47. He also deposed that the applicant has conflated the rights under Article 47 and 50 of *the Constitution* and wrongly assumed that the rights under Article 50 are applicable to administrative proceedings.

37. Mr. Abubakar averred that CMA's ad Hoc Committee heard the applicant's preliminary objection and made a well-reasoned decision. He also averred that the ad hoc Committee was neither a court of law/tribunal nor a quasi-judicial Tribunal or body. He added that CMA rendered an oral reply to the objections raised by the applicant on 10thJune 2019, and, the ruling was delivered by the same day and the proceedings resumed.

38. Mr. Abubakar also averred that section 25A of the act vests in CMA the power to conduct administrative proceedings in respect of ANY breach of the Act, Regulations, Rules or Guidelines-including regulatory infractions that constitute Insider Trading. He also stated that the provisions

of section 25A of the Act make no distinction between breaches that may be subjected to criminal v administrative proceedings and no limitations on the mandate of CMA exists in practice or in the provisions of the Act. He averred that CMA was within its regulatory powers and/or mandate to conduct administrative proceedings in respect of allegations of Insider Trading. Further, he averred that CMA was conducting a lawful administrative action because Section 34(6) of the Act vests it with jurisdiction to impose administrative sanction.

39. Mr. Abubakar averred that the act lays out a clear appellate framework which entitles the applicant to challenge the decision of CMA before the Capital Markets Tribunal and clearly the proceedings before this Honourable Court is nothing but a clever attempt to circumvent the same so as to defeat and hamstring a statutory regulator from exercising its mandate. Further, he averred that the Act deliberately vests the CMA with the dual power and responsibility to investigate and take enforcement action against any breaches of the statutory provisions and regulations, and, that, in the circumstances of this case, CMA exercised that mandate fairly.

40. He also averred that CMA gave sufficient notice of the allegations against the applicant through the NTSC and all the key and relevant facts and/or assertions and all the evidence relied upon. Lastly, he averred that the applicant's application to set aside the warrants was dismissed on merits, and, that, CMA lawfully exercised its jurisdiction and adhered to Statutory and Constitutional Provisions governing fair administrative action.

Issues for determination

41. Upon carefully analyzing the fiercely diametrically opposed positions presented by the parties, I find that the following issues distil themselves for determination:-

    a. Whether this suit offends the doctrine of exhaustion of remedies.

    b. Whether the applicant is a "regulated person" under the Act.

    c. Whether the Respondent tried the applicant for a criminal offence.

    d. Whether the applicant is inviting the court to engage in merit review.

    e. Whether the Respondent violated the applicant's right to Natural Justice.

a) Whether this suit offends the doctrine of exhaustion of remedies.

42. The question of the applicant's failure to exhaust the remedies prescribed by the act was first raised by CMA in its Replying sworn by Mr. Abubakar. He averred that the act lays out a clear appellate framework which entitles the applicant to challenge the impugned decision before the Capital Markets Tribunal.

43. Despite the above averment, the Respondent's counsel did not address it either in his written and oral submissions.

44. Mr. Waweru Gatonye, counsel for the Respondent submitted that section 35A of the Act provides a clear appellate framework. He argued that the applicant ought to have challenged the decision at the Capital Markets Tribunal from which an appeal lies in the High Court. He observed that in the impugned decision, the applicant was informed about the alternative remedy, but, despite being so informed, the applicant institute these proceedings in the High Court.

45. Section 35A of the Act establishes the Capital Markets Tribunal. Subsection (4) provides that the Tribunal shall, upon an appeal made to it in writing by an aggrieved party following a determination

by the Authority on any matter relating to the Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned and the Authority as the case may be.

46. Under subsection (5) thereof, the Tribunal has all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. In addition subsection (17) provides that upon any appeal to the Tribunal under section 34A, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

47. Also significant is subsection (22) which provide that any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court. It is important to note that Parliament in its wisdom restricted the right to appeal to the High Court to points of law and stipulated a time frame within which the appeal ca be filed.

48. Subsection (23) confers an automatic stay expressed as follows: - "No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced until the appeal has been determined. At subsection (24), Parliament listed the remedies available from the High Court upon hearing an appeal under the Act-

    (24) Upon the hearing of an appeal under this section, the High Court may—

        (a) confirm, set aside or vary the decision or order in question;

        (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

        (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

        (d) make such other order as it may deem just, including an order as to costs of the appeal of earlier proceedings in the matter before the Tribunal.

49. I have in numerous determinations of this court stated 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.[8] 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. This doctrine has been consistently appreciated by our superior courts. It is correct to opine that it is now of esteemed juridical lineage in Kenya.[9] The doctrine was felicitously stated by the Court of Appeal in Speaker of National Assembly vs Karume,[10] a pre-2010 decision 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."

50. Many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. For example, 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*[11] as follows:-

> " 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."

51. The High Court added its voice *in the Matter of the Mui Coal Basin Local Community*[12] 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..."

At least two principles emerge from the above jurisprudence. 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.[13] 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.[14]

52. I have already reproduced the relevant provisions of section 35A of the act. The impugned decision is a determination by the Authority on a matter relating to the Act, as contemplated by section 35A of the Act. Therefore, it is a appealable decision to the Tribunal established under the said section.

53. The starting point is section 9(2) of the FAA Act which provides that the High Court or a subordinate court under sub-section (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).

54. Parliament in its wisdom used 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.[15] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[16] 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.

55. The duty of the 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.

56. 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.[17] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[18] Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory.

57. Thus, a proper construction of section 9(2) & (3) of the FAA Act leads me to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by subsection (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.

58. I have on numerous past decisions opined that what constitutes exceptional circumstances depends on the facts of each case[19] 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[is] heavily borrowed from the South African equivalent legislation, that is, the Promotion of Administrative Justice Act,[20] hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from the foregoing conclusion, I find that the following points from a leading South African decision on the subject relevant:-[21]

    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.

59. 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.[22]

60. It is accepted that there is no definition of 'exceptional circumstances' in the FAA Act. However, I interpret 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.[23]

61. 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. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case.

62. There was no argument before me that 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 as opposed to the Tribunal. 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. There is nothing to show that the mechanism is not effective nor has it been demonstrated that the applicant cannot obtain an effective remedy from the Tribunal.

63. 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. 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.[24] Section 9(4) of the FAA Act 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.

64. The law is that Section 9(4) of the FAA Act 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 to his case and leave it to the court to determine. No application was presented before this court to determine the existence of exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

65. Perhaps, I should boldly add that it is uncontested that the impugned decision constitutes an administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the applicant can show exceptional circumstances to exempt him from this requirement.[25] 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.[26] An internal remedy is adequate if it is capable of redressing the complaint.[27]

66. 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.

67. 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.

68. 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.

69. Perhaps I should emphasize that 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. A reading of the Act, and in particular section 35A reproduced earlier shows that the Tribunal is clothed with jurisdiction to determine the dispute. The section is admirably crafted in a manner that is so balanced that it offers protection to a party aggrieved by the decision of the Respondent. As soon as he approaches the Tribunal, there is an automatic stay. A similar stay is available once an appeal is filed in the High Court. During the period provided for appealing in the two instances, the impugned decision remains frozen. Section 35A is perhaps among the few friendly provisions ever to exist in a statute.

70. In view of my analysis and the determination of the issue under consideration, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. This case offends section 9 (2) of the FAA Act.[28] The applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the FAA Act.[29] In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies.

71. I am alive to the fact that similar cases under the Act have been entertained and determined by the High Court. However, I note that in literally all of them including the ones cited before me, the doctrine

of exhaustion of remedies was never raised despite the clear provisions of section 35A of the Act. Notwithstanding my findings herein above, I proceed to examine the merits of the case.

b. Whether the applicant is a "regulated person" under the Act

72. The applicant's counsel cited the definition of an agent at section 2 of the act and argued that the Respondent did not identify any provision of the law authorizing it to exercise jurisdictional authority over the applicant. Counsel argued that the Respondent has no statutory powers over the Applicant. He argued that the Respondent based its powers on clause 3.1 of the agency agreement between the applicant and Kestrel Capital Limited but never cited any statutory authority.

73. It was his submission that there is not a single provision of the law empowering the Respondent to deal, discipline, sanction, and license and/or regulate the conduct of an agent. He maintained that the law does not empower or authorize the Respondent to exercise any powers against an agent. To him, it is only Kestrel Capital Limited, the applicant's principal that has a legal relationship with the applicant. He maintained that the applicant has no relationship with the Respondent, and he is not one of the bodies enumerated in the empowering statutes as subject of the Respondent's reach and regulatory powers. Simply put, counsel argued that the relationship between the applicant and the Respondent is that of total strangers. He placed reliance on the definition of an agent at section 2 of the act which is:-

> " agent means any person appointed in writing by a licensed person, except in a derivatives market, to perform any of the functions ordinarily performed by the licensed person on behalf of that licensed person."

74. It was counsel's submission that because the Respondent has no statutory powers to deal with the applicant under any law, the process and the decisions it took against him are null and void ab initio. He submitted that in the absence of statutory jurisdiction, the Respondent acted ultra vires, hence, the Respondent is guilty of "Jurisdictional error." To buttress his argument, counsel placed reliance on a passage from De Smith's Judicial Review,[30] thus:-

> " in essence the doctrine of ultra vires permits the courts to strike down decisions made by bodies exercising public functions which they have no power to make. Acting ultra vires and acting without jurisdiction have essentially the same meaning, although in general term "vires" has been employed when considering administrative decisions and subordinate legislative orders, and "jurisdiction" which considering judicial decisions, or those having a judicial flavor."

75. He continued to quote from the same author as follows:-

> " An administrative decision is flawed if it is illegal. A decision is illegal if it: (a) contravenes or exceeds the terms of the powers which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty."[31]

76. To further buttress his argument, counsel cited page 29 of the same work in which the authors explained the task of the court as follows:-

> " 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 statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other "common law"

power. 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."

77. To further fortify his argument, counsel cited Judicial Review: Principle and Procedure[32] where the author observes thus:-

> "A public body will act unlawfully if it acts outside the scope of its powers and duties. In order to identify the scope of a particular statutory power or duty, it is necessary to conduct an exercise of statutory interpretation. In this respect, the particular context in which the function is to be performed may impact upon the question whether the public body is under a duty to act, whether it has a power to act, or whether it can act in a particular way at all, as the courts apply a number of rebuttable presumptions as to the meaning of legislations."

78. Counsel urged the court to reach at what he described as the inescapable conclusion that the Respondent has no jurisdictional authority to undertake the process it needlessly took applicant through. Referring to the courts power to quash decisions of an inferior tribunals when they act without jurisdiction, he cited Judicial Review: Principle and Procedure[33] thus:-

> "In his classic enumeration of the three main grounds of judicial review, Lord Diplock described "illegality" as a failure by a public body to understand correctly the law that regulates its decision-making power or a failure to give effect to the law. A public body must therefore act within the scope of its powers and duties and may not purport to exercise a power that it does not possess. It has jurisdiction in the narrow sense (ie legal authority to act), to deal with the matter in question. If it does not, it will be acting ultra vires in the literal meaning of that expression."

79. The Respondent's counsel argued that a review of the documents in court confirms that at all material times, the applicant was duly appointed stock broking agent of Kestrel Capital (East Africa) Ltd, and, that, Kestrel is a stock broker licensed by the Authority. He argued that the applicant had an agency agreement wherein he committed to comply with the Laws of Kenya, rules and regulations of the Nairobi Securities Exchange as well as the CMA. In support of this argument, he relied annexure AHA-6 (at page 66 of the Replying Affidavit). He pointed out that the applicant in response to the NTSC stated as follows:-

> I confirm to have maintained an Agency Agreement with Kestrel Capital (East Africa) Limited (kestrel) with effect from 2007 as a stockbroking agent thereby empowering me to be the agent for my clients in the sale and purchase of securities and other investments to be transacted through Kestrel.
>
> According to the terms of the Agency Agreement, specifically Clause 3.1, in my capacity as an Agent I have committed "To comply with the laws of Kenya, rules and regulations of Nairobi Stock Exchange and the Capital Markets Authority" throughout the term of my agency;"[underlining added].

80. The Respondent's counsel also argued that the applicant also confirmed during the preliminary investigations that he receives ½ of the brokerage commission charged by Kestrel- that is a 50/50 split. He submitted that in the wording of section 2 of the Act, the applicant was indeed a stockbroking agent-a person who carries on the business of buying or selling of securities as an agent for investors in

return for a commission. He further argued that the Respondent is a statutory body established under Section 5(1) of the Act, and whose principal objectives under Section 11(1) of the Act, include:-

(a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in productive enterprises;

(b) the creation, maintenance and regulation, of a market in which securities can be issued and traded in an orderly, fair, and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;

(c) the protection of investor interests;

(d) the operation of a compensation fund to protect investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations.

81. He submitted that the Authority under section 11(3) of the Act has been granted a wide range of powers, duties and functions which it may exercise, including inter alia the following:-

(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include-

(i) Levying financial penalties, proportional to the gravity or severity of the breach, as may be prescribed;

(ii) Ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach;

(iii) Publishing findings of malfeasance by any person;

(iv) Suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange –traded derivative contracts, for the protection of investors.

(h) Inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which he has granted licence and any public company the securities of which are publicly offered and traded on an approved securities exchange or an over the counter market

(w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act."

82. Counsel emphasized that the applicant admitted that he was an agent, and, that, section 25A(5) of the Act states as follows:-

(5) For purposes of this Act, an act, omission or failure of an agent, employee or any other person acting on behalf of a licenced person shall be considered to be the act ,omission or failure of the licenced person as well as of the agent, employee or any other person acting as such.

83. It was his submission that the above provisions demonstrate the powers of the Authority to intervene in appropriate circumstances and take action against errant players (and their agents) in the capital market so as to protect the investing public. He submitted that the applicant as person who was dealing with listed securities having been accused of breaching section 32B of the Act (Insider Trading) was amenable to the jurisdiction of the Authority. To fortify his submissions, he relied on *Cementia*

Holding Ag. & Another v Capital Markets Authority & 3 Others[34] where the High Court held that section 11 of the Act was very elaborate, and, that, the Legislature did not exhaustively stipulate each and every thing that the Authority was empowered to do in discharge of its mandate and that is why section 11(3) (w) stated that the Authority could do such acts as could be incidental or conducive to the attainment of the objectives of the Authority in exercise of its powers under the Act.

84. The Respondent's counsel argued that the interpretation the Applicant was inviting the court to adopt would expose investors in the capital market to errant and rogue players. He relied on *Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party)*,[35] in which the High Court underscored the need for courts to give true intentions of the legislature in interpreting statutes as follows:-

> " 45. Therefore, in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. Hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act. The legal meaning of an enactment is also in this respect not determined in the abstract, but in relation to the relevant facts of a case before it."

85. Lastly, counsel argued that the High Court in the Solomon Muyek Alubala case (supra) was categorical that to hold otherwise would be to aid the mischief that Parliament intended to remedy by enacting the CMA Act, and perpetuate the same mischief. He also relied *Republic v Capital Markets Authority Ex Parte Joyce Ogundo*[36] for a similar holding and submitted that a plain reading of section 32B of the Act leaves no doubt that Insider Trading in the capital markets is proscribed Act and the wording is broad enough to cover principals and their agents.

86. Our Constitution requires a purposive approach to statutory interpretation.[37]The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[38] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> " Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[39]

87. The Supreme Court of Appeal of South Africa in *Natal Joint Municipal Pension Funds v Endumeni Municipality*[40] acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that "in resolving a problem, where the language of a statute leads to ambiguity the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation."[41]

88. In the United Kingdom, the Chancery Division of the High Court, per Lord Greene MR in *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd*,[42] stated the following on the contextual approach to statutory construction:-

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

89. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[43] In *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others*[44] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

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

90. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the enabling Act, which reads "An Act of Parliament to establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes."

91. A purposive construction of Insider Trading legislation requires courts and regulatory bodies tasked with enforcement of the Act to interpret and apply the Act in a manner that gives effect to its objects as set out in the preamble. The provisions of the Act proscribing market abuse entrenched in the preamble must be given effect to when interpreting the statute. These policy reasons discernible from the preamble include the realization of fair, efficient and transparent financial markets and the promotion of investor confidence.

92. Therefore, market fairness and equal footing trading, amongst others, must serve as important guiding principles in the interpretation of the insider trading provisions and in determining who regulated persons under the Act are. Furthermore, the constitutional demands of statutory interpretation must be adhered to in interpreting the provisions of the Act. *The Constitution* imposes a mandatory requirement for every of legislation to be interpreted in a manner that promotes the spirit and purpose of the Bill of Rights.[45] *The Constitution* also requires courts to follow an interpretation that is consistent with international law which is now part of our law. It is on the basis of the above exposition that this court follows the purposeful interpretation of statutes and the constitutional demands to statutory interpretation, to offer an analysis of the issue under consideration, namely, whether the applicant is a regulated person under the Act.

93. The gravamen of the applicant's submission is that there is no single provision in the Act conferring CMA with mandate to regulate an agent. To buttress his argument he referred to the definition of an agent under the Act.

94. Consistent with the cannon of statutory construction that requires a holist reading of a statute in order to get its full meaning, purpose and effect without excessive peering the language of the statute, I find it useful to refer to the definition of an insider under the Act which is:-

> "insider" means any person who is or was connected with a company, or is deemed to have been connected with a company and who is reasonably expected to have access, by virtue of such connection, to unpublished information which, if made generally available, would be likely to materially affect the price or value of the securities of the company, or who has received or has had access to such unpublished information"

95. A reading of the above definition leaves me with no doubt that the test in the circumstance of this case is not whether the applicant was an agent but whether he was an insider. The emphasis under this definition is whether a person was connected with a company or whether he was reasonably expected to have access, by virtue of such connection, to unpublished information, which would be likely to materially affect the price or value of the securities of the company or who has received or has had access to such unpublished information. The question whether a person was an agent is in my view irrelevant to the said test.

96. It is common ground that the applicant in his own pleadings states that in 2007 he entered into an agency agreement with Krestel Capital (East Africa) Limited pursuant to which he was engaged as a Stock broking agent, thus empowering him to be the agent for his clients in the sale and purchase of securities and other investments to be transacted through Krestel Capital. The scope of his work in this admission is clear. In his own words he had been empowered to sale and purchase securities and other investments to be transacted through the said company.

97. Two consideration flow from the above definition of an insider. First, the existence of a relationship giving access, directly or indirectly, to unpublished information intended to be available only for a corporate purpose and not for the personal benefit of anyone. To me the applicant has not denied the existence of this relationship. In fact, by his own admission in his pleadings, he admits the existence of such a relationship. Second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. Thus, task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs and thereby suffer correlative duties in trading in its securities. Simply put, such intimacy demands restraint lest the uninformed be exploited.

98. In 2006 Jooste, considering the definitions of the terms 'insider' and 'inside information' in South African law,[46] wrote as follows:

> "Liability can be incurred only by an 'insider' who acts with knowledge of 'inside information'. The definitions of 'inside information' and 'insider' are accordingly of vital importance. The definitions, which are interconnected, are, however, as in the Insider Trading Act, 'cumbersome and counter-intuitive'. They are in fact circular — to know whether information is 'inside information' one has to know who an 'insider' is; and to know who an insider is, one has to know what 'inside information' is. 'Inside information' is information 'which is obtained or learned as an insider'; and an 'insider' is a person who has 'inside information.' Since the provisions of the Act that impose criminal and civil liability turn on the meaning of 'inside information', the Act is 'fundamentally incoherent."[47]

99. Inside information grants the insider in possession of such information an advantage in relation to all the other actors on the market who are unaware of it. It enables that insider, when he acts in

accordance with that information in entering into a transaction on the market, to expect to derive an economic advantage from it without exposing himself to the same risks as the other investors on the market. The essential characteristic of insider dealing thus consists in an unfair advantage being obtained from information to the detriment of third parties who are unaware of it and, consequently, the undermining of the integrity of financial markets and investor confidence.[48]

100. Usually, inside information is defined as information that is non-public and material. The information is confidential until it is made public. The term insider is generally used to describe people who by virtue of their relationship with the company have privileged access to information about the company and its affairs that are not generally known to the public or securities market.[49] This information may be used by a person either to buy securities at their current price before the information becomes public and causes prices to rise, or to sell securities at their current price before the price falls when that information becomes public.

101. Insider trading refers to buying, selling and dealing in shares and securities of a listed company by insiders such as directors, officers of management team, employees of the company or any other connected persons such as auditors, consultants, lawyers, analysts who possess material inside information which is not available to the investing public.[50]

102. The act defines a "regulated person" to mean an operator of an approved person, a licensed person, a listed company or a person approved to offer securities to the public; "Representative" means a representative of any person licensed by the authority who is in the employment of the licensed person and plays a critical role in that company, and includes a trader, director, general manager, analyst, or any other person employed by the licensee who plays a critical role.

103. The applicant described himself as an Investment Advisory firm offering advisory, investor relations and digital media services to publicly listed and non-listed blue chip companies. He also described himself as an agent of the company mentioned earlier. It is common ground that an investment adviser gives advice to clients about investing in securities such as stocks, bonds, mutual funds, or exchange traded funds. Simply put, as an investment adviser, the applicant is a stock analyst, a person typically employed by a large bank, investment firm or analysis company, who devotes his/her life to learning and making predictions in the market, and advises on investing in securities etc. Such a role places him in a peculiar position of qualifying to an insider. I have already reproduced definition of an agent, an insider and a regulated person. Put differently, the applicant was at all material times an insider, an agent and therefore a regulated person.

104. The Act establishes the CMA as the statutory regulator, with the objective of promoting, regulating and facilitating the development of an orderly, fair and efficient market in Kenya.[51]Another objective of the CMA is the protection of investor interests, for instance through the prohibition and criminalization of insider trading.[52]

105. The Act is the law governing insider trading in Kenya. The Act prohibits insider trading, and sets out the sanctions for insider trading. It makes the Authority responsible for the licensing, regulation and supervision of all capital markets participants. The Act also disseminates rules and regulations. CMA is empowered to carry out enforcement and sanctions. In the enforcement of existing laws, the courts in Kenya have recognized that the rationale behind the prohibition of insider trading is the promotion of market integrity by enhancing an orderly and fair operation of the market.[53] From the definition of an insider reproduced above, it is observable that the concept of information is central to the prohibition of insider trading. An offence will only be committed when a person has inside information which is used to deal in securities.

106. In addition, it is useful to recall the act defines a "regulated person" to mean an operator of an approved person, a licensed person, a listed company or a person approved to offer securities to the public. This definition becomes relevant as we recall the applicants own admission that the agency agreement between himself and Krestel Capital (East Africa) Limited pursuant to which he was engaged as a Stock broking agent, empowered him to be the agent for his clients in the sale and purchase of securities and other investments to be transacted through Krestel Capital.

107. My reading of the preamble to the act, the definitions of an insider, inside information, and a regulated person and the clear admission by the applicant that he was an agent of a company pursuant to an agreement that empowered him to be his clients agent for the sale and purchase of securities and other investments to be transacted through the company brings him within the ambit of a regulated person as contemplated under the act ns therefore subject to regulation by the Respondent.

108. Having established that the applicant fell within the ambit of an insider, an agent and a regulated person under the act, the argument that CMA fell in to jurisdictional error collapses. I find nothing to show that CMA misconceived its authority under the law. To fortify my finding, I refer to *Craig v South Australia* (1995) HCA 58 which held that:-

> " A jurisdictional error occurs when the extent of that authority is misconceived. Decisions affected by jurisdictional error can be quashed by judicial review. Examples of jurisdictional errors include asking the wrong question, ignoring relevant material, relying on irrelevant material, and breaching natural justice.
>
> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers."

109. The facts and circumstances discussed above do not fall within the above description.

c. Whether the Respondent tried the applicant for a criminal offence

110. The applicant's counsel argued that the applicant was accused of the criminal offence of insider trading contrary to Section 32 B of the Act. He submitted that this shows total absence of jurisdictional authority on the part of CMA to undertake administrative action against the applicant. He submitted that prosecution of criminal offences is a function of the Director of Public Prosecutions.

111. The applicant's counsel further submitted that under section 26(8), CMA can only summon a person for an administrative hearing. It was his submission that a person can only be asked to show cause if he is subject to an administrative action under Section 25 and 26 of the Act. He maintained that section 26 of the Act deals only with license and circumstances under which CMA can revoke licenses. He argued that what the applicant was called upon to explain was not an issue relating to license or the revocation of a license. It was his submission that the applicant was called to explain his innocence or culpability regarding insider trading. He submitted that CMA had not licensed the applicant, hence, the issue of revoking his license does not arise at all.

112. The applicant's counsel also submitted that the NTSC was a clear instance where the Respondent acted in flagrant contravention of the law and/or without any statutory jurisdiction or power. To him, section 26(8) limits CMA to two instances under Section 25 and 26 of the Act both of which were totally irrelevant to the circumstances of the case before it. He submitted that CMA has no powers to transmute the criminal offence of an insider trading under section 33 of the Act and convert it to be

a matter it can lawfully deal with under Section 25A of the act. He referred to heading on section 25 which reads "imposition of additional sanctions and penalties" and submitted that the section talks of additional penalties in addition to primary penalties that had already been imposed. He argued that the said provision has nothing to do with primary sanctions.

113. Lastly, the applicant's counsel argued that section 25A of the Act identifies the persons CMA can exercise jurisdiction or powers. He argued that such persons include licensed or approved persons, listed companies, employees or a director of a licensed or approved person or director of a listed company as provided for in section 11(3)(cc). He also argued that section 25A (1) (a), 25A (1) (b) and 25A (1) (c) of the Act lists the three categories of persons it has jurisdiction over and gives specific punishments it can impose. It was his submission that a clear reading of section 25A shows that it refers to specific persons who have a legal relationship with CMA and empowers it to undertake a specific process and punishment.

114. The Respondent's counsel referred to section 32L of the Act which provides that a person who contravenes the provisions of this Part VI of the Act on Insider Trading and other market abuses commits an offence and is liable for conviction in the case of an individual, to a fine not exceeding five million shillings or to imprisonment for a term of two years and payment of twice the amount the gain made or loss avoided. To fortify his argument, he relied on *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [54] for the proposition that the availability of an option for offences to be prosecuted through the criminal justice system is not a bar to administrative proceedings on the same. He also relied on the Court of Appeal case of *Capital Markets Authority v Alnashir Popat & 8 others*[55] which held that the Authority has power and responsibility to investigate any breaches and enforce all the statutory provisions and regulations.

115. The Respondent's counsel also argued that the applicant's challenge on the applicability of section 26(8) of the Act fails to appreciate that the provisions of section 25A which replaced Section 25 of the Act and that section 11(3) (cc) of the Act vests CMA with power to conduct administrative proceedings in respect of any breach (including insider trading) of the *Capital Markets Act*, Regulations, Rules or guidelines. He added that section 25A of the Act makes no distinction between breaches that may be subjected to administrative proceedings or otherwise. He added that there are no limitations on the mandate of CMA under the act. In addition, he submitted that the NTSC to show communicated sufficient information to enable the applicant show cause.

116. The applicant's counsel also submitted that CMA can in law undertake administrative proceedings and impose sanctions against a person guilty of Insider Trading contrary to the applicant's position that it is a criminal offence. He submitted that section 25A of the Act vests in the Authority the power to conduct administrative proceedings in respect of any breach of the Act, Regulations, Rules or Guidelines-including regulatory infractions that constitute Insider Trading.

117. He argued that section 25A makes no distinction between breaches that may be subjected to criminal v administrative proceedings and no limitations on the mandate of the Authority exists in practice or in the provisions of the Act. He argued that CMA was within its regulatory powers and/or mandate to conduct administrative proceedings in respect of allegations of Insider Trading.

118. Counsel submitted that CMA was also conducting lawful administrative action because Section 34A (6) of the Act further vests in the CMA separate and cumulative jurisdiction to impose administrative sanction and the imposition of such penalties or sanctions do not prejudice the right to any other legal proceedings that may be vested in CMA. Further, counsel submitted that the statutory mandate of CMA is deliberately designed to empower it to investigate and take enforcement action against errant players in the Capital Markets, and, that, the authority has a dual mandate. He argued that CMA as the

regulator of the capital markets in Kenya conducted investigations and established a prima facie case that the applicant was among the persons who had had engaged in Insider Trading in the Kenol Kobil takeover contrary to the provisions of section 32B (1) (a) and (b) of the Act. He argued that CMA has powers to take enforcement action in case of statutory breach.

119. CMA is a statutory body created under Section 5 of the Act to regulate the Capital Markets in Kenya. Its objectives are set out in section 11(1) of the Act as follows:-

a. the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises;

b. to facilitate the existence of a nationwide system of securities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives market;

c. the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;

d. the protection of investor interests;

e. the facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and

f. the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

120. Section 11 (3) of the Act provides that for the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—

a. advise the Minister on all aspects of the development and operation of capital markets;

b. implement policies and programmes of the Government with respect to the capital markets;

c. employ such officers and servants as may be necessary for the proper discharge of the functions of the Authority;

d. (cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include— (i) levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed; (ii) ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; (iii) publishing findings of malfeasance by any person; (iv) suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors;

121. A clear and faithful reading of the provisions of section 11 of the Act leaves no doubt that CMA has the statutory power to regulate, promote and facilitate the development of an orderly and efficient Capital Market in Kenya. There is no doubt that Section 11(3) of the Act confers it with wide powers which include carrying out investigations and imposing sanctions for breach of the provisions of the Act.

122. In general, Insider Trading is the trading of a corporation's stock or bonds by individuals with potential access to non-public information about the company. However, the term Insider Trading is used to refer to a practice in which an insider or a related party trades based on material non-public information

obtained during the performance of the insider's duties at the company, or otherwise in breach of a fiduciary or other relationship of trust and confidence, or where the non-public information was misappropriated from the company.

123. Two contentions were advanced on behalf of the applicant, namely; first, CMA acted without jurisdiction by punishing the applicant for a purely criminal offence; second, CMA erred by assuming jurisdiction it did not have.

124. There is no contest before me that the law prohibits Insider Trading. The mischief the Act seems principally concerned with is protecting the public and promoting confidence in the market. This finds expression in the preamble, the interpretations at section 2 of the Act and section 11 of the Act referred to earlier. The Act empowers CMA to impose sanctions for breach of the provisions of the Act or the regulations made thereunder, or for non-compliance with CMA's requirements or directions. It provides in clear terms that the such sanctions may include— (i) levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed; (ii) ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; (iii) publishing findings of malfeasance by any person; (iv) suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors.

125. The Act recognizes that a single Act may give rise to more than one consequence. Ordinarily, the purpose of an administrative penalty is to ensure compliance with the legislation and to give the regulatory authority an effective means of enforcing it. In this regard, CMA is the regulatory authority. Contraventions have to be discouraged and offences punished for the system to be viable.

126. In addition to the fact that the Act recognizes both civil and criminal liability, the following are important pointers against the applicant. First, the Act explicitly distinguishes between civil, criminal, administrative or disciplinary proceedings under the Act. It prescribes penalties CMA may impose for breaches of the Act. Second, sections 13A and 13B confer CMA with powers to search and investigate. Third, section 22B of the Act grants power to CMA to intervene in the operations of securities and futures exchanges where— (a) there is in place, an act of Government affecting securities or commodities; (b) there is a major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such securities or commodities; (c) there is a threatened or actual manipulation of the market; (d) the Authority considers it necessary or expedient in the interest of the public or for the protection of the interests of the investors.

127. Fourth, there is a clear distinction between a penalty imposed by CMA in exercise of its Regulatory mandate and criminal proceedings. These regulatory provisions are collateral to the other provisions of the Act and whilst some have a punitive aspect they are not criminal or quasi criminal in nature.

128. Whilst the meaning of the Act must ordinarily be found within its four corners, the applicant's counsel seek an interpretation of the statute that avoids the civil sanctions imposed by CMA by suggesting that the Act only creates criminal sanctions for Insider Trading. To me, such a construction flies on the face of the purposes of the statute and the immense powers the Act confers upon CMA to protect, promote and protect the market and impose sanctions for infractions under the act. Whether a particular punishment is criminal or civil is a matter of statutory construction. A court must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.

129. In *Hudson v U.S* [56] it was observed that:- (a) that the double jeopardy clause does not prohibit the imposition of all additional sanctions that could in common parlance be described as punishment; (b) all civil penalties have some deterrent effect; (c) the due process and equal protection clauses

already protect individuals from sanctions which are down-right irrational; (d) that the authority to impose administrative penalties is conferred upon administrative agencies, is prima facie evidence that Congress intended to provide for a civil sanction; (e) quintessential criminal punishments may be imposed only 'by a judicial trial'; (f)...; and (g) 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

130. In Canada, the jurisprudence on the distinction between criminal and administrative proceedings was articulated in *R v Wigglesworth*[57] and *Martineau v MNR*.[58] In the latter case, a customs officer had demanded, by way of a written notice served pursuant to the Customs Act, that the appellant pay $315 458, being the deemed value of the goods he allegedly attempted to export by making false statements. This set in motion a process referred to as 'ascertained forfeiture.' The Canadian Supreme Court had to consider whether the appellant may, in the course of an action under the Customs Act, avail himself of the right against self-incrimination guaranteed by s 11(c) of the Canadian Charter of Rights and Freedoms.[59] In dismissing the appeal the court pointed out that a distinction must be drawn between penal proceedings on the one hand and administrative proceedings on the other.

131. More recently, *Guindon v Canada*[60] affirmed the tests developed in the earlier cases. The appellant, Ms Guindon, was assessed penalties totaling $546 747 under s 163.2(4) of the *Income Tax Act* RSC 1985 arising from certain false statements made by her. She asserted that the penalty imposed under the section was criminal and that she was therefore a person 'charged with an offence' who is entitled to the procedural safeguards enshrined in s 11 of the Charter. In dismissing her appeal, the court held that the proceedings were of an administrative nature and that Ms Guindon therefore was not a person 'charged with an offence' and accordingly the protections under s 11 of the Charter did not apply. In arriving at that conclusion the court explained that an individual is entitled to the procedural protections of s 11 of the Charter where the proceeding is, by its very nature, criminal, or where a 'true penal consequence' flows from the sanction. The court expatiated: (a) A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity.[61] (b) A 'true penal consequence' is 'imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity'.[62] (c) The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act, but the nature of the proceedings themselves.'[63]

132. In the words of Lord Steyn 'the aim of criminal law is not punishment for its own sake but to allow everyone to go about their daily lives without fear of harm to person or property'. 'Criminal law', observed Lord Atkin, 'connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?'[64] And, criminal proceedings, according to Lord Bingham of Cornhill CJ, 'involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant.'[65]

133. That the facts underpinning the complaint can as well give rise to a criminal offence. However, this does not alter the nature of the administrative proceedings before CMA which is primarily concerned with the exercise of a disciplinary power in respect of a limited group under the Act so as to exercise its regulatory mandate. There is no formal accusation of a breach of the criminal law before the CMA. The

proceedings are largely inquisitorial and are initiated by way of a complaint or NTSC, not a criminal charge. In *Martineau v MNR*[66]the court observed:-

> This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of civil action.' Those considerations find equal application here"

134. The above considerations find equal application in this case. Accordingly, for all of the reasons given I take the view that proceedings before CMA do not lie within the criminal sphere and cannot be classified as being criminal in nature. Accordingly, when CMA undertakes administrative and regulatory proceedings and imposes administrative penalties, the decision remains administrative in nature and falls within the four corners of the areas assigned to it by the legislature. It follows that the argument that CMA has no regulatory mandate over the applicant in allegations relating to Insider Trading just because they disclose a criminal offence fails.

d. Whether the applicant is inviting the court to engage in merit review.

135. The applicant's counsel invited the court to find that the Committee's ruling dismissing the Preliminary Objection was a total fraud and in breach of article 10 of *the constitution*. He urged the court to make a finding on the importance of public bodies to abide by the express and mandatory provisions of *the Constitution*. To buttress his argument, he cited *Republic v Public procurement Administrative review Board & 3 others Ex parte Olive Telecommunications PVT Limited*,[67] a decision which emphasized the need for courts to appreciate the expansive purview of article 47 of *the Constitution* and see that the grounds of judicial review upon which an applicant could challenge administrative actions have indeed gone through a seismic shift from the hitherto reliance on common law grounds and statutes to a more solid and firmer ground of *the constitution*. Counsel argued that whereas the statutory and common law grounds are still valid, article 47 Constitution gives juridical review a constitutional foundation and validation. He added that Article 10 is an important basis to see whether a public officer or body has acted within the law.

136. Counsel faulted the Ruling dismissing the applicant's Preliminary Objection citing what he described as "false and deliberate distortion of the law by the Committee in its ruling," namely, "the false assertion that Section 25A replaced the repealed section 25, that section 11(3)(cc) gives the authority unlimited powers to punish any breach of the statute, and, that, the Respondent based its powers to conduct the administrative actions on Section 25A which "makes no distinction between breaches that may be subjected to criminal v administrative proceedings, and that Insider Trading can be the subject of administrative proceedings.

137. In addition, the applicant's counsel relied on *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance of Kenya & 6 others*[68] for the holding that judicial review has now a firm constitutional foundation. Further, counsel relied on the Supreme Court decision in *Communication Commission of Kenya v Royal Media Services & 5 others*[69]which held inter alia that *the Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of the common law.

138. The applicant's counsel further submitted that article 47 is not the only provision that gives judicial review a constitutional foundation, but any other relevant constitutional provisions such as article

10 are applicable as well, and, that, decisions made by public bodies must satisfy the constitutional yardstick of article 10 of *the Constitution*.[70] He relied on in the Matter of Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others,[71] in which the court stated:-

> " For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are nether inspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it would never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable."

139. The Respondent's counsel's reaction to the above argument was that the objection was raised before the ad hoc committee, it was considered and dismissed for lack of merit.

140. The argument by the applicant's counsel highlighting the changing character of judicial review jurisdiction is legally correct, appealing and highly attractive. The discourse has been live in many jurisdictions. For example, 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*[72] 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.

141. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

142. As I stated in *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another*[73] 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.[74] In the said decision, I stated that 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*.

143. 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*.[75]

144. However, cases are context sensitive, and the decisions cited by the applicants counsel just like the above decisions I have referred to deal with the expanding scope of judicial review jurisdiction such as the traditional private/public law dichotomy and the need for courts to recognize judicial review as a tool to enforce constitutional rights. The narrow question before me is whether this court can engage in a merit review. The applicant as I understand him is faulting the Committees decision dismissing his Preliminary Objection. To me this is an invitation to this court to engage in a merit review, it has nothing to do with the expanded scope of judicial review discussed above.

145. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. 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.

146. 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*[76] :-

> "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....."

147. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

148. Useful guidance can be obtained from the Court of Appeal decision in *OJSC Power Machines Limited, Transcentrury Limited & Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board & 2 Others*[77] cited in *Energy Regulatory Commission v S G S Kenya Limited & 2 others*[78] where it was stated that:-

> " Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body

concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

149. My reading of the above Court of Appeal decisions and the jurisprudence generated by courts over the years leads me to the conclusion that the ruling under attack is a merit finding by the Committee and the invitation to this court to disturb it is essentially a request to this court to engage in merit review which is outside the scope of judicial review jurisdiction and cannot fall within the expanded scope of judicial review jurisdiction.

e. Whether the Respondent violated the applicant's right to Natural Justice

150. The applicant's counsel submitted that the Respondent acted as the investigator, the judge, the jury and the executioner. He cited the following cases in which the court has rebuked the Respondent for similar conduct, namely; *Al-Nashir Popat & 8 Others vs Capital Markets Authority,* [79]Ernst & Young LLP Vs Capital Markets Authority & another, [80]Chadwick Okumu vs Capital Markets Authority, [81]Jeremiah Gitau Kiereini vs Capital Markets Authority & another,[82] Republic vs Capital Markets Authority & another Ex Parte Jonathan Irungu Ciano[83] and Munir Sheikh Ahmed vs Capital Markets Authority.[84]

151. The Respondent's counsel submitted that the NTSC was not issued solely under Section 26(8) of the Act, but also under section 4 of the FAA Act which creates an obligation to provide an opportunity to be heard to any person who is to be the subject of administrative proceedings in line with article 47 of *the Constitution*. He argued that as the hearing of the NTSC shows, the respondent played an active role in assisting the applicant to realize his right to fair administrative action as encapsulated and anticipated by the FAA Act and article 47 of *the Constitution*.

152. Reacting to the allegations that the ruling referred to earlier was authored by the CEO and the Lawyers working for CMA, counsel pointed out that a copy of the ruling annexed by the applicant clearly shows that the determination was done by the committee and that it is signed by Mr James Ndegwa-Chairman of the ad hoc Committee.

153. Counsel further argued that the mandate of the ad hoc Committee was clearly stated as per the TOR which were clear that the CMA's was to provide secretariat services and transcription services were to be outsourced. In the circumstances, he submitted that there was absolutely nothing wrong in the CMA's management participating in the preparation of the ruling. He placed reliance on the Court of Appeal decision in Kenya Revenue Authority v Menginya Salim Murgani[85] where it was held that decision making bodies other than courts whose procedures are laid down by statute are masters of their own procedures, provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.

154. He submitted that the ad hoc Committee was appointed pursuant to section 14(1) of the Act. He also argued that the applicant was served with the NTSC and the TOR before the hearing, hence, the argument that the ruling is a fraud and breach of Article 10 of *the Constitution* is baseless. Counsel appreciated the requirements of natural justice that no man shall be a judge in his own case as articulated by the applicant, but submitted that statutory authorization of overlapping functions has been upheld to be an exception to this rule. To fortify his argument, he relied on the Court of Appeal decision in *Capital Markets Authority v Alnashir Popat & 8 others*[86] which upheld the dual mandate of the Authority in the following words:-

> 50. Under section 11(3) of the Act, CMA is also granted wide powers that enable it to instill discipline upon any errant players, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the Act. The Authority may, among other things, suspend or cancel the listing of any securities; inquire, either on its own motion or at the request of any person, into the affairs of any person which it has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange; conduct inspection of the activities, books and records of any persons approved or licenced by the Authority.
>
> 51. CMA is also empowered to act as an appellate body in respect of appeals against any self-regulatory organization, securities or exchange-traded derivatives contracts exchange, and do all such other acts as may be incidental or conclusive to the attainment of its objectives under the Act.
>
> 52. Section 11A(1) states as follows:.....
>
> 53. It is therefore clear that CMA has power and responsibility to investigate any breaches and enforce all the statutory provisions and regulations. [Underlining added]

155. In addition, the Respondent's counsel placed reliance on the High Court decisions in *Judicial Service Commission –vs- Gladys Boss Shollei & Another*[87] and *Ernst & Young LLP v Capital Markets Authority & another*,[88] (the latter delivered by this court). Counsel argued that it has now been upheld that the Act deliberately authorizes overlapping functions. He submitted that the allegations of bias cannot stand.

156. I have carefully read the decisions cited by counsel for both parties on the issue under consideration. I will briefly highlight some of them. I must admit the decisions are well reasoned, attractive and appealing. However, cases are context sensitive. A case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[89]

> "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. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,[90]that "Now before discussing the case of Allen vs. Flood[91] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that 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. The other is that a case is only an authority for what it actually decides...." (Emphasis added)

157. The ratio of any decision must be understood in the background of the facts of the particular case. [92] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[93] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[94]

158. 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.[95] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [96] 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.[97]

159. In *Ernst & Young LLP Vs Capital Markets Authority & another*,[98] the applicant rushed to court immediately he was served with the NTSC by CMA citing alleged bias. His argument was that CMA was to act as the investigator, the prosecutor, the jury and the executor. In short, the case stood on mere apprehension of bias as opposed to real bias. After subjecting the facts to the tests of apprehension of bias, the court found that the applicant had rushed to court too early because section 11 of the Act permits CMA to delegate its functions and at this early stage, there was nothing to show that CMA was intending to perform the three or four roles causing the apprehension. The court was of the view that after the investigations, CMA had a legal option of delegating the process to an independent body or person and there was nothing to rule that possibility out.

160. The reverse happened in *Chadwick Okumu vs Capital Markets Authority*.[99] CMA investigated the case. It did the preliminary questing and asked the applicant to supply further clarifications. CMA heard the case, made the decision and sought to enforce it. At this point the applicant came to court challenging the decision for breach of the rules of natural justice arguing that CMA acted as the investigator, the prosecutor, the judge and the executioner. The court quashed the decision citing breach of the rules of natural justice.

161. My reading of *Capital Markets Authority v Alnashir Popat & 8 others*[100] cited by the Respondent's counsel is that the decision acknowledged the Respondent's powers under section 11(3) of the act, including the powers to determine appeals against its decisions and the power and responsibility[101] to investigate breaches under the act. To my mind, the said case did not directly address the question whether it is a breach of natural justice where CMA investigates, prosecutes, tries and enforces the punishment which was the contest in Chadwick Okumu vs Capital Markets Authority.[102]

162. Parliament in its wisdom inserted section 11A of the act which permits CMA to delegate any of its functions under the Act to— (a) a committee of the Board; (b) a recognized self-regulatory organization; or (c) an authorized person. This is the section the court in Chadwick Okumu vs Capital Markets Authority[103]faulted the Respondent for not utilizing it to avoid its decision being tainted with procedural impropriety and a violation of the principles of natural justice. To me the law is clear. The problem has been lack of compliance.

163. Perhaps, learning from the *Chadwick Okumu vs Capital Markets Authority*,[104] CMA in the instant case was more cautious. It constituted an ad hoc Committee under section 14 of the Act for purposes of hearing the allegations against the applicant comprising of:-

a. The Chairman of the Board of Directors of the Respondent.

b. 3 members of the Respondent's Board of Directors; and

c. 4 external members comprising of a retired chief justice, two renowned Accountants and renowned capital markets practitioner.

164. It is the inclusion of the Chairman of CMA's Board of Directors and three Board Members that is generating the applicant's discomfort. He attacks the composition of the ad hoc Committee citing impartiality, hence a breach of natural justice, a formidable ground that can invalidate a decision. It is this exercise of CMA's statutory powers that is under assault.

165. The Court of Appeal appreciated the vast powers conferred to the CMA by the Act in *Capital Markets Authority v Jeremiah Gitau Kiereini & another* [105] as follows:-

> " Under Section 11(3) of the Act, no less than 29 wide 'powers, duties and functions' of the Authority (also referred to as "the Board") established under Section 5 of the Act are listed. Section 11(3) (w) makes such powers unlimited as the Board may "do all other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act." Very wide powers indeed and therefore the reason for caution in the manner of exercising them to avoid abuse. There may be some truth in the adage that 'power corrupts and absolute power corrupts absolutely'.
>
> The Act in Section 11A further gives the Board the discretion to delegate its functions to, inter alia, a "Committee of the Board." Such delegation may be revoked at any time and the delegation does not prevent the Board from performing the delegated function. In other words, the Board and its own committee may carry out the same function simultaneously. There is further general discretion under Section 14(1) of the Act to appoint "Committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority and may delegate to any such committee such of its powers as the Authority may deem appropriate." Sub-section (2) however, makes it mandatory for the Authority to establish: (a) committee to hear and determine complaints of shareholders of any public company listed on an authorized securities exchange, relating to the professional conduct or activities of such securities exchange or such public company, or any other person under the jurisdiction of the Authority and recommend actins to be taken, in accordance with rules established by the authority for that purpose; and (b) a committee to make recommendations with respect to assessing and awarding compensation in respect of any application made in accordance with rules established by the Authority for that purpose.(emphasis added). It is evident from the diverse provisions in those sections of the Act that the Board must make a choice of the form and nature of delegation of its powers and functions. The trial court found and held that CMA was within its powers to appoint the ad hoc committee under Sections 11A and 14 of the Act. With respect, that is not entirely correct. It is only so in so far as the general power exists. The Board must go further and specify which provision of the Act is invoked. (Underlining supplied).

166. It is notable that the Court of Appeal in the above decision was emphatic that that the Board must make a choice of the form and nature of delegation of its powers and functions. This is because fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as bias, fraud, dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to

the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

167. 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."[106]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.[107] 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.

168. 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."[108] 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 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.[109] 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 public.

169. The High Court of Australia explained, "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.[110] 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. [111]

170. The Supreme Court of Kenya in Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Anther[112] citing Professor Groves M. in "The Rule Against Bias"[113] stated that-"... 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."

171. 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."[114]The Lords also made 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.[115]

172. Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-

situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[116]

173. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[117] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[118]

174. The current double reasonableness test, which commenced its journey in the Supreme Court of Canada[119] and then travelled through the High Court of Australia,[120] is so called because it translates into a two-stage requirement of reasonableness. It is a refinement of sorts of the formulation by the late Professor De Smith in his rationalisation of the real likelihood test as "based on the reasonable apprehensions of a reasonable man."[121] There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, someone who need not have interest in the outcome of the matter other than the general interest shared by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.

175. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[122] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.

176. I now apply the tests to the facts of this case. The Respondent constituted an ad hoc committee under section 14 of the Act. The Committee comprised of four members of the CMA among them its Chairperson. CMA is on record stating that acting on reasonable suspicion that the applicant was involved in Insider Trading it commenced investigations. It is common ground that CMA issued the NTSC. For all purposes, CMA was the investigator, the prosecutor, the jury and the executioner. It is a correct statement of the law to state that a tribunal is only competent to adjudicate on a matter only if:-

a. it is properly constituted as regards number and qualification of the members of the Bench and no member is disqualified for one reason or the other;

b. the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

c. the case came before the court initiated by due process of law and upon fulfilment of any conditions precedent to the exercise of jurisdiction.

177. I have serious doubts on paragraphs (a) above. A serious challenge on the impartiality of the four CMA members could have easily lead to their disqualification. This is because a reasonable observer in the circumstances of this case would be persuaded that the said Members could not be perceived to have approached the dispute with an open mind. Similarly, paragraph (c) above raises serious doubts as to whether the dispute was initiated after observing due process of law and upon fulfilment conditions precedent to the exercise of jurisdiction. I say so because CMA was the investigator, it issued the NTSC,

it was for all purposes the prosecutor and finally, its members sat in the ad hoc Committee that heard and determined the dispute. This scenario raises a fundamental issue of procedural impropriety and a reasonable apprehension of likelihood of bias.

178. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[123]The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or nemo judex in causa sua – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or audi alteram partem – "hear the other side").[124] The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. The ever present duty of a decision maker to act fairly is seriously compromised where the decision maker is seen to be guilty of the three categories of bias, namely, actual bias, imputed bias and apparent bias.

179. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[125] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the decision maker.

180. The issue that inevitably follows is whether or not the manner in which the Committee was constituted breached the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

181. In *Local Government Board v. Arlidge*,[126] Viscount Haldane observed, "...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." In *Snyder v. Massachussets*,[127] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a "principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

182. In India the principle is prevalent from the ancient times.[128] In this context, para 43 of the judgment of the Supreme Court[129] may be usefully quoted:-

> "Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and

not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system." (Emphasis added)

183. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. It does not depend on how wide the powers under the statute are. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his Judicial Review of Administrative Action,[130] observed, "Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice." Wade in Administrative Law[131] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

184. As Sir William Wade in his Administrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."[132]

185. *The constitution* recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. section 4 of the FAA Act re-echoes Article 47 of *the Constitution* and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. As Sedley J put it: -[133] "Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."

186. Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead *the Constitution* itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a violation of natural justice, a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of *the Constitution*.[134] Procedural fairness contemplated by article 47 and the FAA Act demands that there should be no violation of natural justice. Composition of the ad hoc cannot pass this constitutional test, and, on this ground, the resultant decision was tainted with illegality.

Disposition

187. In view of my analysis and determination of the issues discussed herein above, the conclusion becomes irresistible that this suit offends the doctrine of exhaustion of remedies. It is also my finding that the applicant is a Regulated person within the meaning of the act. In addition, it is my finding that the applicant was not charged and tried for the "criminal offence" of Insider Trading. On the contrary the Respondent was exercising its regulatory mandate under the Act. It is also my finding that the assault on the ruling dismissing the applicant's Preliminary Objection is an invitation to this court to delve into merits of the ruling which is outside the province of judicial review jurisdiction. Lastly, it is uncontested that the Respondent acted as the investigator, the prosecutor, the judge and the executioner by allowing four of its members to sit in the ad hoc Committee. The effect is that the

resultant decision was arrived at in a manner that violated the principles of natural justice. Differently put, the said scenario cannot pass the constitutional lens of the fair administrative action contemplated in article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*.[135]

188. In any event procedural impropriety and bias discussed above are some of the grounds for judicial review listed in section 7 of the *Fair Administrative Action Act*.[136] The provisions of the law that confer wide powers to the Respondent must pass constitutional muster. It was argued that world over Capital Markets Regulators enjoy wide powers because of their unique role. That argument sounds attractive, but it ignores that section 7 of the Sixth Schedule to *the Constitution* provides that all laws in existence as at 27th August 2010 shall be read with such adaptations, alterations and modifications so as to conform to *the Constitution*. No matter how beautiful the provisions of the Act are, they must pass constitutional validity test. The yardstick remains Article 47 and sections 4 and 7 of the *Fair Administrative Action Act*.[137]

189. Even long before the promulgation of our progressive, transformative and liberal Constitution in 2010, the common law position as discussed earlier was that even where the statute does not provide for natural justice, it must be implied. In any event as pointed out in Chadwick Okumu vs Capital Markets Authority, [138] Parliament in its wisdom included provisions enabling the Respondent to delegate some functions. It is hard to conceive why the Respondent cannot investigate and prosecute the offence before an impartial Committee appointed under the Act. By purporting to appoint a Committee that included its own members to hear and determine the dispute, the Respondent set itself up for a collision course with the constitutional tests discussed above and in the event of such a collision, *the Constitution* prevails as I hereby hold.

190. Having concluded as I have herein above, the next question would be what would be the appropriate reliefs in the circumstances of this case. I have taken into account the nature of the dispute disclosed in this case and delicately fashioned the reliefs granted below to appropriately respond and remedy the specific circumstances of this case. Indeed, this court is empowered by article 23(3) of the *Constitution* to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one.

191. Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others v Treatment Action Campaign & Others*[139]thus:-

> "...appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

192. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this judicial review application. Arising from the findings herein above enumerated, constitutional and statutory interpretations and various pronouncements of law, I have arrived at the following orders:-

a. That this suit offends the doctrine of exhaustion of remedies.

b. That the applicant is a "Regulated person" within the definition of the act and therefore subject to the regulatory mandate of the Respondent.

c. That the proceedings before the ad hoc Committee were not criminal in nature but they were Regulatory proceedings within the mandate of the Respondent.

d. That to the extent that the ad hoc Committee comprised of four Members of the Respondent, then the Respondent acted as the investigator, prosecutor, judge and the executioner in total violation of the rules of Natural justice, Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*.

e. That Respondent's decision and/or determination namely the Enforcement Notification dated 5th July 2019 finding the Applicant guilty/culpable of insider trading pursuant to section 32(B) (i) (a) and (b) of the *Capital Market's Act* and all consequential orders flowing therefrom are hereby set aside.

f. That this dispute is hereby remitted back to the Respondent to be heard and determined by an independent and impartial Committee appointed under section 14 of the Act.

g. That the dispute shall be heard and determined within six months from the date of this judgment.

h. No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2019

JOHN M. MATIVO

JUDGE

[1] Cap 486, Laws of Kenya. NOTE: This act was repealed by the Companies Act, Act No. 17, of 2015.

[2] Cap 485A, Laws of Kenya

[3] See objectives in section 11 of the Capital Markets Act.

[4] In *Miscellaneous Civil Application No. 13 of 2019, Capita; Markets Authority v Andre De Simone and others.*

[5] Act No. 4 of 2015.

[6] In Chief Magistrate Court Misc Application No. 13 of 2019.

[7] In CMCC Misc 13 of 2019, *Capital Markets Authority Vs Andre De Simone, Aly Khan Satchu & David Ohana.*

[8] See for example JR 363 of 2018 and JR 102 of 2018.

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

[10] {1992} KLR 21.

[11] {2015} eKLR.

[12] {2015} eKLR.

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

[14] Ibid.

[15]*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).

[16] Ibid.

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

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

[19] 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).

[20]Act 3 of 2000.

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

[22] 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

[23] 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.

[24] 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]

[25] *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).

[26] Ibid para 44.

[27] Ibid paras 42, 43 and 45.

[28] Act No. 4 of 2015.

[29] Ibid.

[30] 6th Edition, London Sweet & Maxwell 2007, "Concept of Jurisdiction and Lawful Administration," Chapter 4 , pp 177.

[31] Ibid p 20.

[32] Jonathan Auburn, Jonathan Moffet, Andrew Sharland (eds), *Judicial Review, Principle and Procedure,* (OuP), "Identifying Powers and Duties and Ascertaining Their Scope." Chapter 11 pp 277.

[33] Ibid.

[34]{2014} e KLR.

[35] {2019} e KLR

[36] {2018} eKLR.

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

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

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

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

[40] 2012 4 SA 593 (SCA).

[41] Ibid, at (610B–C).

[42]1949 Ch D 121 130.

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

[44] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[45] See *Batho Star Fishing* 527H–528C; *Pather v Financial Service Board* [2014] 3 All SA 208 (GP) para 66; and *Juleiga Daniels v Robin Grieve Campbell* 2004 5 SA 331 CC paras 43–44).

[46] This Act was repealed. The South African insider trading provisions, including the definitions of 'inside information' and 'insider', are now to be found in the Financial Markets Act3 (the Financial Markets Act or Act).

[47] R Jooste "A critique of the insider trading provisions of the 2004 Securities Services Act" (2006) 123 *S African LJ* 437 438.

[48] See European Court of Justice in the vIn *Spector Photo Group NV. Chris Van Raemdonk v Commissie Voor Het Bank-Fanancie- En Assurantiewezen (CBFA)*, [2009] EUECJ C – 45/08 (23 December 2009) par. 50–52.

[49] N. Walter, 'Prioritizing Enforcement in Insider Trading', (2012) (30) 2 Yale Law and Policy Review, 521-530, 522. < SSRN: http://ssrn.com/abstract=2140867> Accessed on 29thNovember 2019.

[50] V. Sharma, 'Prohibition on Insider Trading: A Toothless Law?'(Law School Research Paper No. 996, University of London-Centre for Commercial Law Studies 2009) 5. < SSRN: http//ssrn.com/abstract=1400824> Accessed 29th November 2019.

[51] Refer to the preamble to the act.

[52] See section 11(d).

[53] See *Republic v Bernard Mwangi Kibaru*, Nairobi CMCC 1337 of 2008, 8.

[54] {2012} e KLR.

[55]{2019} e KLR

[56] *Hudson v United States* 522 US 93 (1997).

[57] *R v Wigglesworth* {1987} 2 SCR 541.

[58] *Martineau v MNR* {2004} 3 SCR 737.

[59] Section 11(c) provides that a 'person charged with an offence' cannot be compelled to be a witness 'in proceedings against that person in respect of the offence'.

[60] *Guindon v Canada* 2015 SCC 41.

[61] Ibid para 25.

[62] 4 Ibid para 46.

[63] Ibid.

[64] Proprietary Articles Trade Association v Attorney General for Canada [1931] AC 310, 324.

[65] Customs and Excise Comrs v City of London Magistrates' Court [2000] 1 WLR 202, 2025.

[66] *Martineau v MNR* {2004} 3 SCR 737.

[67] {2014} e KLR

[68] {2014} e KLR.

[69] Petition NO 14 of 2014 at paragraph 355.

[70] Citing i*n the matter Royal Media,* ibid.

[71] {2017} e KLR.

[72] *2000 (2) SA 674 (CC) at 33.*

[73] {2018} e KLR.

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

[75] *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another* (Supra).

[76] {2014} eKLR.

[77]{2017} e KLR.

[78]{2018} e KLR.

[79] {2016} eKLR

[80] {2017} e KLR.

[81] {2018} eKLR.

[82] {2013} e KLR

[83] {2018} e KLR.

[84]Judicial Review Application Number 269 of 2018.

[85] Civil Appeal No. 108 of 2009.

[86] {2019} e KLR

[87] {2014} eKLR

[88] {2017} eKLR.

[89] MANU/SC/0047/1967

[90] {1901} AC 495

[91] {1898} AC 1

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

[93] Ibid

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

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

[96] Ibid

[97] Ibid

[98] {2017} e KLR.

[99] {2018} eKLR.

[100] {2019} e KLR

[101] {2014} e KLR

[102] {2018} eKLR.

[103] {2018} eKLR.

[104] {2018} eKLR.

[105] {2014} e KLR

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

[107]*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").

[108] *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.

[109] *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".

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

[111] *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).

[112]Supreme Court No. 11 of 2016.

[113] {2009} U Monash LRS 10.

[114] [1993] UKHL 1; [1993] AC 646 at 670.

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

[116] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[117] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[118] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[119] In Committee for Justice and Liberty v National Energy Board 1978 68 DLR (3d) 716 735 de Granpré J laid down what has become the trademark of public adjudication in modern Canada when he stated that: "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... That test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

[120] In *Livesey v NSW Bar Association* 1983 151 CLR 288 293-294, the previous "high probability" test was supplanted by the reasonable apprehension test.

[121] De Smith Judicial Review 230

[122] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

[123] Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: *Oxford University Press*, pp. 342–360 at 331, *ISBN 978-0-19-921776-2*.

[124] Supra, Note 20, at p 342.

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

[126] {1915} AC 120 (138) HL

[127] {1934} 291 US 97(105)

[128] We find it Invoked in Kautllya's Arthashastra.

[129] In the case of *Mohinder Singh Gill v. Chief Election Commissioner*,AIR 1978 SC 851

[130] (1980), at page 161.

[131] (1977) at page 395.

[132] 6th Ed at pages 570.

[133]in *R vs Somerset CC Ex parte Dixon(COD)*{1997} Q.B.D. 323.

[134] In the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.*

[135] Act No. 4 of 2015.

[136] Ibid.

[137] Ibid.

[138] {2018} eKLR.

[139] {2002} 5 LRC 216 at p. 249.