



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 510 OF 2016

In the matter of a constitutional Petition brought

pursuant to Article 22, 23, 165 (3) (b) & 258 of the

Constitution of the Republic of Kenya

and

In the matter of the enforcement of the Supremacy of the

Constitution as per Article 2 (1) & (4) of the Constitution

and

In the matter of breach of the National Values and Principles of

Governance in regards to Article 10 of the Constitution

and

In the matter of enforcement of The Fundamental Right and Freedom

of the Right to a Fair Trial Under Article 50 (1) of the Constitution

and

In the matter of the enforcement of the Fundamental Right and

Freedom of the Right to Fair Administrative Action under

Article 47 (1) of the Constitution

and

In the matter of The Capital Markets Act (Cap 485A) of the Laws of Kenya

and

In the matter of Principle of Legitimate Expectation

BETWEEN

Chadwick Okumu.....Petitioner

Versus

Capital Markets Authority.....Respondent

JUDGMENT

The Parties

1. The Petitioner brings this Petition against the Capital Markets Authority (CMA), a statutory body^[1] whose mandate is to promote, regulate and facilitate the development of an orderly, fair and efficient Capital Market in Kenya citing violation of his constitutional Rights to a fair administrative action and right to a fair process.

The uncontested facts

2. The uncontested facts of this case are that the Petitioner was employed by Uchumi Supermarkets Ltd. (USL) as the Company's Chief Finance Officer from 17th January 2007 to 15th June 2015.

3. CMA served him with a notice to show cause dated 31st August 2016 pursuant to its statutory mandate seeking from him detailed submissions relating to various issues relating to the operations of USL during his tenure of office. The issues cited in the notice are the Rights issue, Financial Statements, USL Branch network expansion program, Asset Sale and Lease Back. The notice read in part "the authority having undertaken a review of various allegations made against you with respect to the operations of USL, has inquired into your compliance with the Capital Markets regulatory framework obligations attaching to your position as Chief Financial Officer at USL for the period up to 15th June 2015."

The contested facts

4. The contested facts are that the Petitioner's averments that the notice did not identify to him the makers and or origin of the "various allegations." He nevertheless avers that he presented to CMA a detailed written submission dated 13th September 2016. Further, he avers, vide a letter dated 4th October 2016, CMA invited him personally make oral submissions and to provide any additional information regarding the said allegations. He avers that in response to the summons, on 5th October 2016 and on 11th October 2016, in conformity with the provisions of Section 4 (3) (g) of the Fair Administrative Action Act,^[2] he requested CMA prior to the hearing date set for 25th October 2016, that he be provided with the names and positions of the persons who made the various allegations against him, copies of the written allegations, against him and copies of the documents incriminating him. He avers that the Responses availed did not address his rights.

5. He also avers that he appeared before CMA's Board of Directors (the Board) and CMA's External Legal Counsel on 25th October 2016 accompanied by his advocate. He avers that he responded to all the questions put to him by CMA's Chief Executive. Further, he avers that he asked to be provided with typed proceedings to enable him to prepare his final submissions and on 1st November 2016 he was supplied with incomplete proceedings pending correction of errors, and which was not adequate for purposes of preparing his final submissions.

6. The Petitioner also avers that notwithstanding the Boards' failure to supply him with the proceedings, on 18th November 2016, he received a letter from CMA informing him of certain breaches of the Capital Markets Act^[3] and Regulations that he was alleged to have committed as a consequence of which CMA imposed administrative sanctions against him, namely:- (a) Disqualify him from holding office as a Chief Finance Officer, Director and/or key officer of a public listed company and or issuer, licensee or any approved institution of the CMA for a period of two (2) years from the date of the notification, (b) Lodge a request for the commencement of disciplinary proceedings by Institute of Certified Public Accountants of Kenya in respect of his professional conduct as a Certified Public Accountant of Kenya-CPAK.

7. The Petitioner states that aggrieved by the said decision, he wrote a letter of objection through his advocates on 19th November 2016. Further, he avers, that on 21st November 2016, his advocate was supplied with an audio recording of the proceedings of 25th October 2016. The Petitioner also avers that CMA informed him that the onus of ensuring the validity of the proceedings' rested upon him and that he was supplied with final typed proceedings on 25th November 2016.

8. He also avers that failure to supply him with all the details and information and or evidence that would be used against him violated his Right to Fair Administrative Action under Section 4 (3) (g) of the Fair Administrative Action Act^[4] and Article 47 (3) of the Constitution. He further avers that CMA's Chief Executive Officer acted in a prosecutorial capacity and thereafter participating in the decision making process to impose sanctions against him, which violated his Rights under Article 50 (1), of the Constitution hence the proceedings were not before an independent tribunal. He also averred that, imposing a sanction against him before the proceedings were concluded violated Articles 47 & 50 (1) of the Constitution. As a consequence, the Petitioner prays for:-

- a) Conservatory Orders staying the enforcement by the Respondent of the Respondent's letter dated 18th November 2016;
- b) A Declaration that by its acts or omissions the Petitioner's rights as enshrined in the Constitution for a Fair Hearing have been breached and continue to be breached by the Respondent;
- c) A Declaration that by its acts or omissions the Petitioner's rights as enshrined in the Constitution that the Respondent would take an Administrative Action against the Petitioner in a procedurally fair manner have been breached and continue to be breached by the

Respondent;

- d) A Declaration that the Hearing conducted before the Respondent on the 25th October 2016 was not a fair hearing and thus should be declared ultra vires;
- e) A Declaration that the Respondent's letter dated 18th November 2016 is ultra vires and should be struck out;
- f) A Declaration that the Petitioner is deserving of damages to be assessed by this Honorable Court;
- g) Costs and Interests.

Respondent's Response to the Petition

9. The Petition is opposed. CMA filed the Replying affidavit sworn by its Manager, Investigation and Enforcement **Mr. Abubakkar Hassan Abubakkar** dated 21st February 2017. He avers inter alia that:-

- a) **That** CMA is a statutory body established under section 5 (1) of the Capital Markets Act., and its principal objectives under Section 11 (1) of the act include the development in 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; 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 practical extent; The protection of investor interests; the operation of compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations;
- b) **That** for the purposes of carrying out the above objectives, Section 11(3) of the act confers the Respondent with a wide range of powers, duties and functions which include to frame rules and guidelines on all matters within the jurisdiction of the Authority under the Act as such rules and guidelines may prescribe- (a) the financial penalties or sanctions for breach of the Authority's rules or non-compliance with the Authority's requirements; (b) the disclosure requirements and other terms and conditions on which securities may be listed or delisted from a securities exchange or offered for sale to the public or a section thereof;
- c) to grant a license to any person to operate as a stockbroker, dealer or, investment adviser, fund manager, investment bank or authorized securities dealer, and ensure the proper conduct of that business;
- d) to grant approval to any person to operate as a securities exchange, central depository, credit rating agency, registered venture capital fund or to operate in any other capacity which directly contributes to the attainment of the objectives of this act and to ensure the proper conduct of that business;
- e) 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 it has granted a licence and any public company the securities of which are traded on an approved securities exchange;
- f) give directions to any person which the authority has approved or to which it has granted a license and any public company the securities of which are traded on an approved securities exchange;
- g) conduct inspection of the activities, books and records of any persons approved or licenced by the authority;
- h) suspend or cancel the listing of any securities or the trading of any securities for the protection of investors;
- i) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;
- j) have recourse against any person whose act or omission has resulted in a payment from the Compensation Fund;
- k) regulate and oversee the issue and subsequent trading, both in primary and secondary markets, of capital market instruments;
- l) prescribe rules or guidelines on corporate governance of a company whose securities have been issued to the public or a section of the public; and
- m) 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.

10. **Mr. Abubakkar** further averred that:- On 15th June 2015 some changes in the top management at USL were reported to CMA, which changes he said took place against a backdrop of media reports on allegations of financial mismanagement and impropriety at USL. He averred that the changes included the immediate termination of employment contract of the Petitioner herein as Finance Manager of USL and the Chief Executive of USL, a limited company which falls under the oversight of the CMA under the Act. **Mr. Abibakkar** averred that the said changes coupled with the media reports as aforesaid had the effect of negatively affecting the performance of the USL shares at the

Securities exchange, hence, it was imperative for CMA to conduct an inquiry in conformity with its statutory mandate.

11. He also averred that in conformity with its mandate under Section 11 of the Act, by its letter dated June 16th 2015, CMA commenced its own independent inquiry into the affairs of USL by summoning the Board of USL to attend a meeting on 25th June 2015. Also, he averred that the Board submitted a written explanation for the change in management and attendant issues through its letter dated June 22nd, 2015. Further, he averred that on December 18th 2015, CMA received a draft of the forensic investigation report procured by the Board of USL and conducted by KPMG together with a request for the CMA to take action on the former management at USL for gross misconduct. He stated CMA considered the said information as a complaint, hence, it formed the basis of the investigation pursuant to Section 11 (3) (h) and 13 (B) of the Act.

12. **Mr. Abubakkar** further averred that upon initial review of the complaint, CMA formed the view that it required further clarifications from USL. Consequently, he avers that, on January 26th 2016, CMA requested USL to provide additional information to facilitate further analysis of the complaint. He deposed that the inquiry into the affairs of USL was narrowed down to the following specific areas, namely:- (i) whether the Rights issue proceeds were actually received and used for the intended purposes as disclosed in the approved information memorandum which was published and disseminated to the investing public when USL floated the rights issue in November 2014; (ii) whether the asset sale and lease back agreements entered by USL with a company called Rent Co were sanctioned by the USL's Board, and whether the resultant funds were received by USL and how the proceeds were used; (iii) whether the transactions were in the best interest of USL and whether the relevant required disclosures were made and approvals obtained; (iv) whether the financial statements filed with CMA and shared with the public and potential investors for the period between the year 2010 to the period ended June 30th 2014 (which were relied upon by USL to raise the funds through the rights issue and subsequent financial statements for the period ended December 2014) were free from misstatements and (v) whether there were breaches of fiduciary duties and conflicts of interest by USL Board and Management in their conduct of the affairs of USL.

13. **Mr. Abubakkar** also averred that during the inquiry, CMA engaged the Petitioner on several occasions through interviews and request for information, and upon conclusion, CMA sent a notice to show cause letter addressed to the Petitioner dated 31st August 2016 requiring him to respond to allegations in respect of specific breaches of the Act.

14. He also averred that in response to the Notice to Show Cause, the Petitioner sent his written reply to CMA dated 13th September 2016. He also stated that CMA wrote a further letter to the Petitioner dated 14th September 2016 attaching a catalogue of evidence to the allegations set out in the notice to show cause letter, and that the Petitioner was informed that the evidence referred to in the catalogue of evidence was within his possession but the CMA was willing to provide the same if so requested. Further, he averred that in a letter dated 26th September 2016, USL was directed to provide the Petitioner with the KMPG report notwithstanding the fact that the Petitioner did not request for provision of the evidence and that CMA shared with the Petitioner the evidence used to support the findings.

15. **Mr. Abubakkar** also averred that upon reviewing the written submissions provided by the Petitioner, CMA board wrote to the Petitioner on 4th October 2016 inviting him to appear before the Board on 25th October 2016 for the purposes of making his oral submissions, highlighting written submissions and providing additional information for their consideration in making a just decision. He deposed that the Petitioner acknowledged receipt of the summons vide a letter dated 5th October 2016 from his advocates in which the Advocates accused CMA of bias and in reply to the same CMA notified the advocate that it had furnished the required information to the Petitioner through its letters dated 22nd September 2016 and 30th September 2016 respectively. He also averred that both the Petitioner and his advocate attended the hearing and responded to questions. He averred that the process was inquisitorial as opposed to prosecutorial. He averred that upon being asked whether he had comments at the end of the process, the Petitioner's counsel asked for the transcripts before commencing and the Chair of the Board clearly informed the Petitioner and his advocate any further comments should be in writing and no hearing date was given and if any clarification was required, the Petitioner would be informed.

16. Further, **Mr. Abubakkar** averred that though the Petitioner was supplied with draft proceedings via e-mail, he made no comments on any corrections. Further, he averred that subsequently the Petitioner's counsel was supplied with the final transcripts, but 2 weeks after the advocate was supplied with the proceedings, he made no comments, hence, the board made a determination on the material before it and served the Petitioner with a notification of enforcement action letter dated 18th November 2016 which stated the determination and the sanctions issued against the Petitioner and his right of appeal. He further avers that the Petitioner's advocate objected to the notification on grounds that they had not been served with the final transcripts of the proceedings to enable them make their final submissions.

17. He averred that the Petitioner was afforded ample time to make his submissions, and on 21st November 2016, the Petitioner was served with an audio recording of the proceedings. He also averred that CMA after reviewing the audio recording corrected typing mistakes in the proceedings and supplied the Petitioner with a copy purely for record purposes, but not meant to reopen the case. He denied the alleged breach of right to legitimate expectation and insisted that the proceedings were undertaken in conformity with the law. He denied the allegations of breach of natural justice or fair administrative action and reiterated that the Petitioner was notified of the allegations against him, he was provided with all the evidence which CMA relied on, and that he was afforded time to prepare for his defense and opportunity to present written submissions, and the opportunity to appear in person together with his advocate. He denied that CMA acted as the accuser, prosecutor, jury and executer, and insisted that the Board exercised its jurisdiction under Section 25A of the Act.^[5]

Issues for determination

18. Upon analyzing the opposing facts presented by the parties, I find that one broad issue falls for determination, namely:- Whether the impugned decision was tainted with bias; and/or violated Article 47 of the Constitution and the Fair Administration Act.

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19. **Dr. Khaminwa** took issue with the fact that the Chief Officer of CMA participated in the investigations, the proceedings and the final

determination. This, according to **Dr. Khaminwa** is unacceptable since he was the investigator, the prosecutor and the jury. He submitted that the respondent should not be allowed to control the investigative process and prosecute the same and render a judgment. He submitted that the proceedings contravened the Petitioners rights. He also submitted that the use of the word "may" in Section **13 B** of the Act appears to grant CMA discretionary power with regards to appointing an independent person to conduct investigations and that since the respondent initiated the investigations on its own motion, it ought to have enlisted the services of an independent body to investigate, arguing that in some instances, the word may means must.[\[6\]](#)

20. **Dr. Khaminwa** cited *Ernst & Young LLP vs Capital Markets Authority & Another*[\[7\]](#) in which this court held that "...Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias has been sufficiently demonstrated." He urged the court to consider that the action against the Petitioner was instigated by the Respondent and re-consider its decision in the above cited case.

21. He further submitted that Article **47 (1)** of the Constitution grants the Petitioner five separate rights distinct from each other and that the definition in Section **2** of the Fair Administrative Action Act[\[8\]](#) is not exhaustive. He argued that Article **47** is intended to subject administrative processes to constitutional discipline. Also, he argued that the relief for administrative grievances is no longer left to the realm of common law or judicial review[\[9\]](#) under the Law Reform Act. He argued that the standards in the constitution include the provisions of Articles **232** and **10** of the Constitution and that the spirit of Section **4** of the Fair Administrative Action Act[\[10\]](#) can be seen in the said provisions.

22. The Respondent's Counsel submitted that the investigating body is the master of its own procedure.[\[11\]](#) He cited *Judicial Service Commission vs Mbalu Mutava & Another*[\[12\]](#) where the Court of Appeal drew a distinction between a fair hearing under Article **50 (1)** of the Constitution and a fair administrative action under Article **47** of the Constitution, a position that was up reiterated by the High Court in *Dry Associates Ltd vs Capital Markets Authority & Another*.[\[13\]](#)

23. He also submitted that no evidence of bias was tendered and that the law empowers the chief executive officer to act in both capacities at the inquiry and at the hearing.[\[14\]](#) He relied *Ernst & Young LLP vs Capital Markets Authority & Another*[\[15\]](#) (Matiwo J.) where this court declined to uphold a plea of bias. (The said decision and its relevancy (if any) in this case will be discussed later in this judgment). He also relied on *Federal Trade Commission vs Cement Institute*.[\[16\]](#)

24. He also submitted that a reading of Section **11A** of the Act shows that it does not prescribe a mandatory obligation on the Petitioner to appoint an independent investigator. He cited the Supreme Court decision in *Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Another*[\[17\]](#) citing Professor Groves M. in "The Rule Against Bias"[\[18\]](#) where he states:-

"... 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."

25. Regarding the invitation by **Dr. Khaminwa** that I reconsider my decision in *Ernst & Young LLP vs Capital Markets Authority & Another*, perhaps I should state that, whereas my decision or decisions of co-ordinate courts are not binding on this court, such decisions are highly persuasive. As a concept it is closely related to stare decisis. Such decisions will be followed in absence of a strong reason to the contrary.[\[19\]](#) Strong reason to the contrary means something that may indicate that the prior decision was "given without consideration of a statute or some authority that ought to have been followed." I note that there was no submission before me that the said decision was made without consideration of a statutory provision or authorities. The only submission is on the facts not the law, namely, in the present case, the Chief Executive Officer of CMA participated at the investigation stage, proceedings and the decision.

26. I had the benefit of determining the case I am being invited to re-consider. The essential difference between the two cases is that unlike in this case where the Respondent undertook the investigations, the inquiry and made the determination, in *Ernst & Young LLP vs Capital Markets Authority & Another* the Petitioner moved to court to challenge the investigations after he was served with the initial notice. The only similarity is that the Petitioner in the said case cited the same reasons, that is likelihood of bias arguing that the Respondent would be the investigator, the prosecutor, the jury and the hangman. In the present case, the Petitioner went through the entire process; that is, CMA received a complaint, it investigated it, it sent a notice to the Petitioner, the Petitioner received the notice, he responded to the allegations, CMA considered the response and invited the Petitioner for an oral session in which he was subjected to what CMA describes as an inquisitorial process. The Petitioner was accompanied by his advocate in the proceedings. Prior to the proceedings his advocate asked for more details which CMA says were supplied but the Petitioner states what was submitted was not adequate.

27. There is also a dispute on whether the proceedings were closed. The Petitioner's counsel states that at the end of the proceedings he asked for proceedings to enable him to prepare final submissions, and as he awaited for the proceedings the final decision was made. The Respondent disputes this. He argued that the proceedings were to be supplied as a formality and not to re-open. The Respondent further states even after supplying the Petitioner's Advocate with the proceedings, it waited for two weeks and since no submissions were forwarded to it, it rendered its determination.

28. Despite the similarity in the ground cited, that is, bias, as stated above, there is an essential difference that distinguishes the two cases. In *Ernst & Young LLP vs Capital Markets Authority & Another* I did make it clear that the Petitioner moved to court too early, just after being served with a notice. I observed that the Respondent has the legal power to undertake investigations. There was no evidence that the yet to be undertaken investigations were to be biased. In the said case I observed that the door was still open for CMA to exercise its discretion under the act and delegate the rest of the process to an independent body, that is an independent prosecutor and also a different person or body to hear and determine the dispute. In the present case the CMA investigated the case, prosecuted the case, it heard the case, it rendered a determination. The proceedings were concluded. CMA acted as the investigator, the prosecutor, the jury and the executioner. This raises a fundamental legal issue. On this note, the two decisions and tests applicable in determining bias or likelihood of bias differ.

29. In Ernst & Young LLP vs Capital Markets Authority & Another[20] after carefully considering the facts of the case, the relevant provisions of the act and comparable jurisprudence from other jurisdictions, I was clear that the functions of CMA to undertake the investigations, undertake an inquiry and to render sanctions is founded on clear provisions of the act. I also noted that the Petitioner in the said case had moved to Court too early citing apprehension of bias premised on the view that CMA was poised to be the investigator, prosecutor, jury and the hangman. I was clear that CMA had the legal mandate to investigate, and that the Petitioner in the said case had an option of seeking disqualification if at all the case proceeded before the same body that investigated it. I also noted that CMA had the option of exercising his discretion discussed below and delegate the process to another body. On those reasons, I declined to stop the investigations. There lies the ratio decidendi of the case.

30. The respondent has a statutory mandate to perform the functions in question. The bone of contention is whether to avoid the likelihood of bias, where CMA is involved in the investigations, it ought to use its discretion under the relevant provisions cited by **Dr. Khaminwa** and allow another person to undertake the trial. Alternatively, he argued, it ought to have allowed the investigations be undertaken by an independent person. Also, he argued that, the prosecution should have been undertaken by an independent person so that CMA does not perform the three roles. That way, he argued, the perception of bias would have been eliminated. To me this is a serious and valid legal argument which I appreciated and addressed in Ernst & Young LLP vs Capital Markets Authority & Another.

31. It may be useful to reproduce the provisions of Section **11A** of the act which reads:-

Delegation of functions

1. The Authority may delegate any of its functions under this Act to—
 - a. a committee of the Board;
 - b. a recognized self regulatory organization; or
 - c. an authorized person.
2. The Authority may, at any time revoke a delegation made under this section.
3. A delegation made under this section shall not prevent the Authority from performing the delegated function.

32. In Ernst & Young LLP vs Capital Markets Authority & Another I stated:-

"It should be noted that the act ought to be read as a whole. Section **11A** of the act provides for delegation of functions. It provides that the Authority may delegate any of its functions under the act to a committee of the Board, a recognized self regulatory organization or an authorized person. It follows that if there is likelihood of bias or where circumstances and prudence so permit, the authority may delegate its duties as provided under this section. The fear of the first Respondent being the investigator, prosecutor and hangman may be real, but the process was as the initial stage and in view of the foregoing section, it cannot be said with certainty that the first Respondent was going to perform the said roles. Further, there is nothing preventing a person under investigation to ask for this section to be invoked." (Emphasis added)

33. As explained above, the point of departure between this case and the facts in Ernst & Young LLP vs Capital Markets Authority & Another[21] is that the Petitioner Ernst & Young LLP vs Capital Markets Authority & Another[22] moved to court after being served with the notice citing apprehension of bias premised on fears that CMA was investigating the case, it was to act as the prosecutor, judge and the hangman. The finding was that he moved to court too early. This is because the law permits CMA to undertake investigations. He ought to have waited and raise the objection if the trial commenced before the same body that was investigating. The reasoning of the Court was that CMA still had the option of invoking Section **11A** cited above. Also, as observed above, the Petitioner in the said case still had the option of raising the objection.

34. This is a case where the Respondent undertook the investigations, the same Respondent acted as the prosecutor in the proceedings and rendered the determination. The Petitioner subjected himself to the entire process and now feels that it was improper for the Chief executive officer of CMA to perform all the roles. In short, the Respondent acted as the investigator, prosecutor, judge and hangman. **Dr. Khaminwa** relied on the rule against bias, which is one of the cardinal principles of a fair process.

35. My decision in the above case was grounded on the use of the word "may" in the above cited section which in my view grants CMA the discretion to delegate its functions to an independent body to avoid performing evidently conflicting roles. I find solace in the decision of the Supreme Court of India[23] where the Apex Court construing the meaning of the word "may" in a statutory provision it stated:-

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

Thus, the question to be determined in such cases always is whether the power conferred by the use of the word "may" has, annexed to it, an obligation that, on the fulfillment of certain legally prescribed conditions, to be shown by evidence, a particular kind of order must be made. If the statute leaves no room for discretion the power has to be exercised in the manner indicated by the other legal provisions which provide the legal context. Even then the facts must establish that the legal conditions are

fulfilled... Where the power is wide enough to cover both an acceptance and a refusal of an application for its exercise, depending upon facts, it is directory or discretionary. It is not the conferment of a power which the word "may" indicates that annexes any obligation to its exercise but the legal and factual context of it." (Emphasis added)

36. The principle laid down in the above case has been followed consistently by Courts whenever it has been contended that the word "may" carries with it the obligation to exercise a power in a particular manner or direction. In such a case, it is always the purpose of the power which has to be examined in order to determine the scope of the discretion conferred upon the donee of the power. If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner.^[24]

37. Considerable attention has been given to the way in which the word "may" should be interpreted. The Constitutional Court of South Africa indicated that the use of the word "may" clearly showed an intention to grant a discretion.^[25] The majority in the Supreme Court of Appeal of South Africa, however, pointed out that the word "may" could simply signify an authorisation to exercise a power coupled with a duty to use it if the requisite circumstances were present.^[26] Therefore, the word "may" may be construed in one of two ways:-either to give a complete discretion, or simply to give authorisation together with the duty to act where the circumstances permit.

38. It is also important to bear in mind the contextual scene. Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, we should also examine the context in which the word "may" is used. The importance of context in statutory interpretation was underlined by Schreiner JA.^[27] as follows:-

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."

39. Schreiner JA went on to point out that whatever approach is adopted, the court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is "the risk of verbalism and consequent failure to discover the intention of the law-giver."^[28] He emphasised that "the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."^[29]

40. It is necessary to add that the contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework.^[30] The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society. Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated in Article 10 of the Constitution and the Bill of Rights.

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

42. Also important while interpreting statutory provisions is to bear in mind what I would call the legislative intent. The provisions of the statute in question must be read in the context of not one but three different imperatives. The first is to enable CMA to effectively to carry out its specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for the CMA to resolve disputes through the application of the law. At the same time, however, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the decisions of the CMA affects the Petitioner, CMA is obliged not to act unfairly. The act must accordingly be construed so as to promote respect the Bill of Rights. A third dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body.^[31] Put differently, it could not have been the intention of the legislature to contemplate a situation whereby CMA would act as an investigator, prosecutor, jury and the hangman.

43. Also important is the statutory context. CMA is bound by the principle of legality. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law.

44. As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-

"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law"^[32]

45. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, CMA is

constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its operations.

46. Last is the factual context. The facts of each case must be evaluated and a decision made early enough to follow the correct legal path, so as to ensure the sanctity and integrity of the decision. The entire process, right from the investigations, the proceedings and the determination must pass the constitutional muster. This leads me to the question of the alleged bias.

47. The rule against bias is one of the twin pillars of natural justice. The first pillar --the hearing rule --requires that people whose rights, interests and expectations may be affected by a decision should be given sufficient prior notice and an adequate chance to be heard before any decision is made. The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. Although the bias rule originated in the courts, and was for many centuries applied only to courts and judges, it has now become a rule of almost universal application. The rule against bias applies to a vast range of decision-makers including tribunals,^[33] statutory authorities, government ministers, local councils, inquiries, and even private arbitrators.^[34]

48. As the bias rule has expanded to include a great range of decision-makers it has also become more flexible. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that “the contextual nature of the duty of impartiality” enables it to “vary in order to reflect the context of a decision maker's activities and the nature of its functions.”^[35] 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.^[36] 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.

49. 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.”^[37] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.^[38] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public.

50. The High Court of Australia explained that “Bias, whether actual or apparent, connotes the absence of impartiality.” Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.^[39] 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. ^[40]

51. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the actual views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision-maker.^[41] Each form of bias also requires differing standards of evidence.^[42] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy. ^[43] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer might conclude there was a real possibility that the decision-maker was not impartial.^[44]

52. 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.”^[45] 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.^[46]

53. Article 47 (1) of the Constitution provides that “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way.

54. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act^[47] sets out procedures that administrators must follow before they make decisions.

55. The Fair Administrative Action Act^[48] was enacted to give effect to the right to just administrative action guaranteed under Article 47 Constitution. The Act defines Administrative Action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates.^[49]

56. To be an administrative action, the decision taken must adversely affect rights. What does this mean? Adversely means that the decision must impose a burden or have a negative effect. This includes decisions that; Require someone to do something, to tolerate something or not to do something; Limit or remove someone's rights; or Decide someone does not have a right to something. This is called an “adverse

determination of a person's rights. It is not in dispute that the impugned decision imposed adverse sanctions against the Petitioner, hence it fits the above definitions. What is in dispute is whether it was arrived at in a manner that is consistent with the dictates of Article 47 of the Constitution.

57. As the Supreme Court of Appeal of South Africa observed^[50] "All statutes must be interpreted through the prism of the Bill of Rights." This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article 47 of the Constitution. It is beyond argument that Article 47 codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.^[51] These are the elements a Petitioner is required to establish in a case of this nature. In fact absence of one would be sufficient to invalidate the decision. Further there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.^[52]

58. Our 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. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order or a decision is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.^[53] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.^[54]

59. Section 4 of the Fair Administrative Act^[55] 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. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

60. Subsection 4 further obliges the administrator to accord affected persons an opportunity:- to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against hearing.

61. Section 7 (2) of the Fair Administrative Action Act^[56] provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

62. The decision complained of must affect a person's rights. There are two ways that a decision can affect a person's rights:- (i) The decision could deprive a person of their existing rights, or (ii) It could affect a person's right by determining what those rights are. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action." Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.

63. The impugned decision must have a legal effect, the effect must be direct. This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights. Legal effect means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

64. As stated above, the Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. There are two parts to the idea of procedural fairness:- The first part is that it is unfair for an administrator to make a decision that adversely affects someone without consulting them first. As we know, a judge is not allowed to convict someone of a crime unless they have been given an opportunity to tell their side of the story. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. This idea is covered by the Latin phrase 'audi alteram partem' – which means one should hear what the person who will be affected by the decision has to say before deciding. The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, "justice must both be done and must be seen to be done." These two elements or at least one of them would be sufficient to invalidate an administrative decision.

65. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.^[57]

66. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).

67. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information,

or answer charges. A “reasonable opportunity to make representations” can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

68. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned.

69. Turning to the facts of this case, here is a situation whereby CMA was supplied with a Report prepared by KPMG. CMA studied the report and formed the opinion that it required some explanations from the Petitioner. CMA wrote to the Petitioner seeking some details. The Petitioner replied and offered some explanations. CMA deemed it fit to invite the Petitioner to offer some explanations orally. The Petitioner appeared with his lawyer and the proceedings were undertaken in what the Respondent describes as an inquisitorial manner. CMA rendered the decision which triggered this Petition.

70. It is not disputed that CMA acted as the investigator, prosecutor, judge the executer. Counsel for CMA argued that the law permits all these roles. In the circumstances of this case, can it be said there is a reasonable apprehension of bias? 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. The test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude.[58]A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly.[59]Would a reasonable person in the circumstances of this case think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.”[60]

71. The Rule Against Bias, (Nemo in propria causa judex, esse debet), i.e.; no one should be made a judge in his own cause, is the minimal requirement of the natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term “bias” suggests anything which tends a person to decide a case other than on the basis of evidences.

72. The rule against bias strikes against those factors which may improperly influence a judge or a decision maker against arriving at a decision in a particular case. The basic objective of this rule is to ensure public confidence in the impartiality of the administrative adjudicatory process, for as per Lord Hewart CJ, in R.v. Sussex, “justice should not only be done, but also manifestly and undoubtedly seen to be done.” A decision which is a result of bias is a nullity and the trial is “Coram non judge”. Principle of Natural Justice occupied the very important place in the study of the administrative law. Any judicial or quasi-judicial tribunal determining the rights of individuals must conform to the principle of natural justice in order to maintain the rule of law. Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker.

73. This is a case where CMA performed the three roles contrary to the rules of natural justice. To me, it was ill advised for CMA to investigate, prosecute, sit as the jury and convict. This was a proper case for CMA to invoke Section 11A cited above and delegate its functions to an independent body. CMA ought to have delegated some of the functions which is clearly permitted under the law as earlier discussed. I find that the Petitioner has established reasonable apprehension of bias which is a violation of Section 7 (2) of the Fair Administrative Action Act[61] which provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

Disposition

74. I find and hold that the entire process was undertaken in total violation of the principles 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.

75. In view of my analysis and determinations of the above issues, the conclusion becomes irresistible that the impugned decision was tainted by bias. The manner in which the entire process was conducted violates the sanctity of the rules of natural justice. No person can be a judge in his own cause. It was wrong for the Respondent to act as the investigator, prosecutor, judge and executioner. Such a decision cannot pass the constitutional muster. It cannot survive court scrutiny. The correct legal path, in my humble view, is what I prescribed in the case of Ernst Young. A reading of section 11A clearly shows that the law allows the Respondent wide discretion to delegate its functions to avoid perceived or real apprehension of bias. I find and hold that this Petition succeeds. Consequently, I allow the Petition and order as follows:-

i. **A Declaration** be and is hereby issued that that the investigations, proceedings and/or hearing instituted by the Capital Markets Authority against the Petitioner herein **Mr. Chadwick Okumu** on 25th October 2016 were conducted in a manner that violated the principles of natural justice and consequently, the said proceedings and the consequential decision arising there from dated 18th November 2016 is null and void for all purposes.

ii. **An order of certiorari** be and is hereby issued quashing the investigations, proceedings and/or hearing conducted by the Capital Markets Authority against the Petitioner herein **Mr. Chadwick Okumu** on 25th October 2016 and the subsequent determination dated 18th November 2016 and all consequential orders arising from the said decision.

iii. No orders as to costs

Orders accordingly.

Dated at Nairobi this 2nd day of May 2018

John M. Mativo

Judge

[1] Established pursuant to Section 5 of the Capital Markets, Cap 485A, Laws of Kenya

[2] Act No. 4 of 2015

[3] Cap 485A, Laws of Kenya

[4] Act No. 4 of 2015

[5] **25A** Imposition of additional sanctions and penalties

(1) Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under [section 11\(3\)\(cc\)](#)— (a) with respect to a licensed person, listed company, securities exchange or other approved person—

[6] Counsel cited Sir William Wade & Christopher Forsyth, Administrative Law, 10th Edition, Page 96

[7] {2017}eKLR

[8] Act No.4 of 2015

[9] Counsel cited Dry Associates Limited vs Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd {2012}eKLR

[10] Act No 4 of 2015

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

[12] {2015}eKLR

[13] {2012}eKLR

[14] Counsel relied on Judicial Service Commission vs Gladys Boss Shollei & Another {2014}eKLR and Brosseau vs Alta Securities Commission {1989}1 S.C.R 301

[15] {2017}eKLR

[16] {1948} No. 23-34

[17] Supreme Court No. 11 of 2016

[18] {2009} U Monash LRS 10

[19] See R. v. Nor. Elec. Co., [19] McRuer C.J.H.C. stated:—"...The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary.

[20] Supra

[21] Supra

[22] Ibid

[23] In [Official Liquidator vs. Dharti Dhan \(P\) Ltd](#) {1977} 2 SCC 166

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

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

[26] Ibid

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

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

[29] Ibid

[30] See Article 259 of the Constitution

[31] Article 50 (1)

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

[33] [Groves, M. "The Rule Against Bias" {2009} UMonashLRS 10](#), citing [Cheung v Insider Dealing Tribunal](#) [2000] 1 HKLRD 807; [Lawal v Northern Spirit Ltd](#) [2003] UKHL 35; [2004] 1 All ER 187 (HL); [Gillies v Secretary of State for Work and Pensions](#) [2006] 1 All ER (HL); [Grant v Teacher's Appeals Tribunal \(Jamaica\)](#) [2006] UKPC 59. The rule also clearly extends to public sector disciplinary tribunals and their proceedings. See, eg, [Rowse v Secretary for Civil Service](#) [2008] HKCFI 549; [2008] 5 HKLRD 217 and [Lam Siu Po v Commissioner of Police](#) [2007] HKCA 461; [2008] 2 HKLRD 27.

[34] Ibid

[35] [Imperial Oil Ltd v Quebec \(Minister for Environment\)](#) (2003) 231 DLR (4th) 477.

[36] [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”).

[37] [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.

[38] 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”.

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

[40] [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).

[41] [Groves, M. "The Rule Against Bias" \[2009\] UMonashLRS 10](#)

[42] Ibid

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

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

[45] [1993] UKHL 1; [1993] AC 646 at 670.

[46] [Porter v Magill](#) [2001] UKHL 67; [2002] 2 AC 357.

[47] Act No.4 of 2015

[48] Act No.4 of 2015

[49] *Ibid*, Section 2

[50] [Serious Economic Offences vs Hyundai Motor Distributors \(Pty\) Ltd: In re Hyundai Motor Distributors \(Pty\) Ltd v Smit NO](#) and [2000]

[51] Article 47(1) of the Constitution of Kenya, 2010

[52] Article 47(2) of the Constitution of Kenya, 2010

[53] [Kioa v West](#) (1985), Mason J

[54] See [Onyango v. Attorney General](#), {1986-1989} EA 456, **Nyarangi, JA** asserted at page 459 that:–“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.” At page 460 the learned judge added:–“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

[55] Act No. 4 of 2015

[56] Act No. 4 of 2015

[57] Section 6 of the Act

[58] [Committee for Justice and Liberty v. Canada \(National Energy Board\)](#), [1978] 1 S.C.R. 369

[59] *Ibid*

[60] [Committee for Justice and Liberty v. National Energy Board](#) {1978} 1 S.C.R. 369.

[61] Act No. 4 of 2015