Attorney General & another v Commission on Administrative Justice (Civil Appeal 7 of 2018) [2024] KECA 1157 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1157 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 7 OF 2018

MA WARSAME, S OLE KANTAI & P NYAMWEYA, JJA

SEPTEMBER 20, 2024

BETWEEN

THE HONOURABLE ATTORNEY GENERAL ..... 1ST APPELLANT

THE INSURANCE REGULATORY AUTHORITY ..... 2ND APPELLANT

AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (J.M. Mativo J.) (as he then was) dated 20th March 2017 in Nairobi Constitutional & Human Rights Petition No. 622 of 2014.)

The Motor Insurance Underwriting Guidelines are irrational, unreasonable and disproportionate

The appeal concerned the legality of Motor Insurance Underwriting Guidelines issued by the Insurance Regulatory Authority (IRA) under Circular No. IC 07/2009. The Commission on Administrative Justice (CAJ) challenged the guidelines, arguing they fixed premium prices, restricted competition, and violated consumer rights under the Constitution. The High Court (Mativo J.) ruled in favor of CAJ, declaring the guidelines unconstitutional and void. The Attorney General and IRA appealed, asserting IRA's regulatory authority. The Court of Appeal held that IRA had statutory power to issue guidelines but found the price controls irrational, unreasonable, and disproportionate, upholding the quashing of the guidelines.

Reported by John Ribia

Statutes *– regulations - legality of regulations - Motor Insurance Underwriting Guidelines - whether the Motor Insurance Underwriting Guidelines were irrational, unreasonable and disproportionate.*

Insurance Law *– Insurance Regulatory Authority – mandate – mandate to make regulations –- whether the Insurance Regulatory Authority had the authority to set the premiums to be paid for various insurance covers by insurance companies – Insurance Act (cap 487) section 3A(2).*

Insurance Law *– means of regulating the business of insurance - foundation for regulation of insurance - what were the means of regulation of the business of insurance - what was the economic foundation for the different types*

of insurance regulation - Constitution of Kenya articles 27, 43, 46, and 47; Insurance Act (cap 487) section 3A; Motor Insurance Underwriting Guidelines.

Words and Phrases *– regulation – definition - the act or process of controlling by rule or restriction - The Black's Law Dictionary, Ninth Edition.*

Brief facts

The appeal arose from a dispute over the legality of Motor Insurance Underwriting Guidelines issued by the Insurance Regulatory Authority (IRA) through Circular No. IC 07/2009. The Commission on Administrative Justice (CAJ) challenged the guidelines in the High Court, arguing that they were unlawful, unconstitutional, and beyond IRA's statutory powers. CAJ claimed the guidelines fixed insurance premium prices, restricted market competition, and violated consumer rights under the Constitution.

The High Court (Mativo J.) ruled in favor of CAJ, declaring the guidelines illegal, unconstitutional, and void. The Attorney General and IRA appealed, arguing that IRA had statutory authority under the Insurance Act to regulate the insurance industry, including setting premium rates.

Issues

i. Whether the Insurance Regulatory Authority had the authority to set the premiums to be paid for various insurance covers by insurance companies.
ii. What were the means of regulation of the business of insurance?
iii. What was the economic foundation for the different types of insurance regulation?
iv. What was the definition of the term "regulation" in relation to the statutory powers of Insurance Regulatory Authority?
v. Whether the Motor Insurance Underwriting Guidelines were irrational, unreasonable and disproportionate.

Held

1. Section 3A of the Insurance Act provided that the powers of Insurance Regulatory Authority (IRA) included ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya and issuing supervisory guidelines and prudential guidelines from time to time, for the better administration of the insurance business of persons licensed under the Act.
2. A statutory body may only act within the scope of the powers or duties conferred on it, and accordingly, where a body acted outside the powers which were prescribed for it, such an action was *ultra vires* and null and void. A statutory body may interpret and determine the scope of its powers or duties incorrectly, and as a result, act beyond its powers. A statutory body acted unlawfully if it incorrectly interpreted a statutory provision as conferring on it a power or a duty to act, when such provision conferred no such power or duty.
3. In interpreting a statutory enactment, the first recourse was to decide, by applying the plain meaning rule or on an informed basis, whether or not there was a real doubt about the legal meaning of an enactment. Where the legal enactment was grammatically capable of one meaning only, or where there was no doubt as regards the grammatical meaning intended by the legislator, the plain meaning rule was applicable to its interpretation. In discerning the intention of the legislator, the legislative history and the context of the statutory enactment were considered, including the mischief sought to be remedied by the enactment. If there was still doubt, then one moved on to the second stage of resolving the doubt by applying the various rules of statutory construction.
4. the Insurance Act does not define the term "regulate" or "regulation". Regulation was the act or process of controlling by rule or restriction. Section 3A(2) of the Insurance Act clarified that the objects of the supervision of insurers and reinsurers by IRA was to:
    1. promote the maintenance of a fair, safe and stable insurance sector;
    2. protect the interest of the insurance policyholders and beneficiaries; and
    3. generally, to promote the development of the insurance sector.

5. A contextual interpretation of the term regulation was necessary in light of the objectives of the section 3A(2) of the Insurance Act, which was to regulate the business of insurance. The three means of insurance regulation were:
    1. solvency regulation, which was justified by the fact that it was costly for consumers to properly assess an insurer's financial strength in relation to its prices and quality of service, and insurers could also increase their risk after policy-holders had purchased a policy and paid premiums, which was a "principal-agent" problem that may be very costly and difficult for policy-holders to control. The goal of optimal insurance solvency regulation therefore was to minimise or limit the social cost of insurer insolvency within acceptable parameters. The social cost in that respect was more than the lost equity of the insurer and included the effects on policy-holders and third parties who may be creditors of insurers. Regulators potentially limited insolvency risk by requiring insurers to meet a set of financial standards and taking appropriate actions if an insurer assumed excessive default risk or experiences financial distress.
    2. Price regulation, which was meant to curb incentives to incur excessive financial risk and engage in strategies that may result in inadequate prices, thereby preventing consumers from buying insurance from carriers charging inadequate prices without properly considering the greater financial risk involved. Another justification for the restrictions on prices in the insurance sector was that it was costly for insurers to ascertain consumers' risk characteristics accurately, and insurers already entrenched in a market had an informational advantage and that may create barriers to entry which diminish competition. The objective of price regulation was to enforce a ceiling that prevented prices from rising above a competitive level and enabling insurers to earn excess profits.
    3. Market conduct regulation, which regulated certain insurer market practices, such as product design, marketing and claims adjustment. Constraints on consumer choice and unequal bargaining power between insurers and consumers, combined with inadequate consumer information, could make some consumers vulnerable to abusive marketing and claims practices of insurers and their agents. The industry therefore took steps to mitigate market conduct problems through self-compliance measures and the establishment of a voluntary self-regulatory organisations.
6. The trial court erred to the extent that he found that regulatory powers of IRA under section 3A of the Insurance Act did not entail setting prices. The trial court did not interrogate the constitutionality or otherwise of the impugned guidelines whether in substance or effect, to support the order finding them unconstitutional. That finding was also in error to the extent that it did not have any basis.
7. A statutory body, even when acting within its powers, may still act unlawfully if its decision was irrational, unreasonable or disproportionate. A decision or action was unreasonable if it was objectively devoid of any plausible justification that no reasonable body of persons could have reached it, whereas it will be disproportionate where it was not commensurate with or does not justify the desired outcome.
8. The explanation provided by IRA for taking the route of price regulation was that an actuarial investigation had identified challenges facing the Kenya motor insurance industry, including underwriting losses and that that formed the basis of the impugned guidelines. While it was the indeed the position as urged by the Attorney General and IRA that regulation was necessary to maintain insurer solvency, compensate for inadequate consumer knowledge, ensure reasonable rates, and make the payment of insurance claims possible, no particular reason was provided by IRA to justify price regulation as opposed to the other means of regulation as the most appropriate intervention and measure of stabilising the motor insurance sector.
9. The justification was particularly relevant in light of the consequences of price regulation in the insurance industry. The problem arose when strong cost pressures compelled insurers to raise their prices and regulators to resist market forces in an ill-fated attempt to ease the impact on consumers.

Inevitably, severe market distortions occurred. Ultimately, insurance markets could be sucked into a downward spiral as the supply of private insurance evaporates and state mechanisms were forced to cover the gap. Rate suppression could also decrease incentives to reduce risk that could lead to rising claim costs that further increases pricing and market pressures. Together, those developments could create major crises in the cost and supply of insurance.

10. The economic foundation for the different types of regulation was to prevent or address specific market failures, and in price regulation, the main justification was the existence of monopolistic providers of a service. No evidence of such monopolies in the insurance sector was provided by IRA to justify the setting of premium prices.
11. Comparative insurance regulatory frameworks, such as those in the United Kingdom and Australia, normally have three pillars:
    1. prudential standards which set out minimum requirements in relation to capital, governance and risk management of the insurance companies;
    2. reporting standards which dictated the data that regulated entities must report on or provided and when that was to be done; and
    3. the guidelines setting out practices and steps that the regulated entities should follow in order to comply with the prudential and reporting standards.
12. The method of regulation was pre-emptive and was designed to prevent problems emerging, rather than providing a means to take action after harm was caused. It would have been more rational, reasonable and less costly for IRA to prevent a crisis or mitigate its impact, than to directly regulate the supply of insurance services through price fixing, especially given the likely market effects, and that no market justification was provided by IRA for this method of regulation. The price regulation by IRA through the impugned guidelines was not a rational, reasonable and proportionate form of regulation.

Appeal partly allowed.

Orders

i. *Orders made by the High Court in the judgment delivered on March 20, 2017 in Nairobi Constitutional & Human Rights Petition No 622 of 2014 were set aside.*
ii. *The Motor Insurance Underwriting Guidelines were irrational, unreasonable and disproportionate.*
iii. *Order of certiorari issued by the High Court in in Nairobi Constitutional & Human Rights Petition No 622 of 2014 to quash the Motor Insurance Underwriting Guidelines issued by IRA under Circular No IC 07/2009 dated November 20, 2009 was affirmed.*
iv. *Each party was to bear their own costs at the High Court and the Court of Appeal.*

Citations

Cases

Kenya

1. *ABN Amro Bank NV v Kenya Revenue Authority* Civil Appeal 111 of 2013; [2017] KECA 509 (KLR) - (Explained)
2. *Jabane v Olenja* Civil Appeal 2 of 1986; [1986] KECA 71 (KLR); [1986] KLR 661 -(Explained)
3. *Muiruri, Peter Ng'ang'a v Credit Bank Ltd & 2 others* Civil Appeal 203 of 2006; - (Explained)
4. *Republic v Insurance Regulatory Authority exparte Kenya Transport Association* Miscellaneous Application 89 of 2010 - (Explained)

United Kingdom

Associated Provincial Picture House Ltd v Wednesbury Corporation [19472] All ER 680 - (Explained)

Canada

R v Oakes [1986] 1 SCR 103 - (Explained)

Regional Court

1. *Mbogo & another v Shah* [1968] EA 93 - (Applied)
2. *Selle & another v Associated Motor Boats Co Ltd & others* [1968] EA 123 - (Applied)

Texts

1. Auburn, J., *et al* (Eds) (2013) *Judicial Review: Principles and Procedure* Oxford: Oxford University Press paras 12.05 to 12.07
2. Bennion, FAR., (Ed) (2008), *Bennion on Statutory Interpretation* London: LexisNexis Butterworth 5th Edn
3. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
4. Klein, RW., (2012), *Principles for Insurance Regulation: An Evaluation of Current Practices and Potential Reforms* Geneva Papers Vol. 37, at 175–199

Statutes

Kenya

1. Advocates Remuneration Order, 2014 (cap 16 Sub Leg) In general - (Cited)
2. Architects And Quantity Surveyors Act (cap 525) In general - (Cited)
3. Competition Act (cap 504) In general - (Cited)
4. Constitution of Kenya articles 27, 43, 46, 47- (Interpreted)
5. Consumer Protection Act (cap 501) part II - (Interpreted)
6. Fair Administrative Action Act (cap 7L) section 7(2) - (Interpreted)
7. Insurance Act (cap 487) section 3A - (Interpreted)
8. Price Control (Essential Goods) Act (cap 504A) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The appeal arises from a judgment by the High Court of Kenya at Nairobi (Mativo J) (as he then was) delivered on March 20, 2017 in Nairobi Constitutional & Human Rights Petition No 622 of 2014, that found merit in a petition that had been filed therein by the Commission on Administration of Justice, the respondent herein (hereinafter "CAJ"). The High Court found that the Insurance Regulatory Authority, the 2nd appellant herein (hereinafter "IRA"), acted outside its statutory power in issuing Motor Insurance Underwriting Guidelines, and that the said guidelines had not been gazetted, and did not therefore have the force of law. The High Court accordingly entered judgments in terms of the following orders:

    a. A declaration that Motor Insurance Underwriting Guidelines issued by IRA under Circular No IC 07/2009 dated November 20, 2009 are illegal, unconstitutional and therefore null and void for all purposes.

    b. A declaration that IRA had no legal, statutory and or constitutional mandate to issue Motor Insurance Underwriting Guidelines under Circular No IC 07/2009 or any other similar guidelines.

    c. An order of certiorari to quash the Motor Insurance Underwriting Guidelines issued by IRA under Circular No IC 07/2009 dated November 20, 2009.

    d. That 1RA pays the costs of the petition to CAJ.

2. The Attorney General (the 1st Appellant herein) and IRA are aggrieved with the said judgment and lodged the instant appeal, in which they seek to set it aside. The said appellants have raised eight (8)

grounds of appeal in a memorandum of appeal dated January 9, 2018 and lodged on January 10, 2018, namely:

1. The learned judgeerred in fact and in law by finding that IRA had no statutory power to issue the Motor Insurance Underwriting Guidelines issued under Circular No IC 07/2009 dated November 20, 2009.

2. The learned judgeerred in law and fact in departing from the findings of a court of equal jurisdiction. The issue had been litigated and contrary decision reached in Mombasa High Court Misc Application No 89 of 2010- *Republic v the Insurance Regulatory Authority ex parte Kenya Transport Association*, Mombasa branch.

3. The learned judgeerred in law in allowing the legality of the guidelines to be litigated in a manner that amounted to an appeal.

4. The learned judgeerred in law in finding that IRA had no powers to issue the guidelines without finding fault with the sections of the Insurance Act that donated those powers

5. The learned judgeerred in quashing the guidelines after making a finding that IRA, as a regulator, had power to ensure effective regulation, enforce standards and ensure the financial solvency of insurance companies

6. The learned judgeerred in finding that the guidelines did not meet the reasonableness, legality and proportionality test.

7. The learned judgeerred in law and fact in quashing the guidelines which would prejudice IRA's statutory and regulatory powers and cause prejudice to the public interest.

8. The learned judgeerred in law in finding that the guidelines did not have the force of law yet they were issued as administrative circulars under the Insurance Act.

3. We shall commence with a brief background of the appeal. CAJ's claim in the High Court was that on or about November 20, 2009, in purported exercise of the statutory powers and mandate of regulating and prescribing standards for the insurance industry, IRA issued to all insurance and reinsurance companies a Circular No IC 07/2009 headed 'Motor Insurance Guidelines', in which it gave a wide ranging directive which set the prices of premiums which all commercial insurance companies in the insurance industry would charge the Kenyan public in respect of all forms of motor insurance cover and services provided. According to CAJ, the effect of the guidelines was that they constituted price fixing; supported monopolistic and cartel behaviour; outlawed competition and the free inter play of market forces thereby eliminating choices; and were ultra vires IRA's statutory mandate which did not extend to fixing prices. Additionally, the purported guidelines also meant that there was no computation in terms of prices for the provision of motor insurance cover, thereby killing incentive in the provision of quality and affordable services.

4. It was CAJ's claim that the guidelines were in violation of the economic, social and consumer rights of Kenya provided in article 43, 46 and 47 of the *Constitution*, and the right to fair administrative action provided in article 47 and were also discriminatory to the extent that they gave special rights and privileges and treatment to one commercial interest group. They stated that although the matter was previously unsuccessfully litigated in Mombasa HC Misc App No 89 of 2010 - Kenya Transport Association Mombasa v Insurance Regulatory Authority ex parte Republic, it was not framed as a constitutional dispute, and the current Constitution had also not been promulgated. IRA pleaded that the guidelines were contrary to the current *Constitution*, the *Insurance Act* and the Insurance

Amendment Act No 11 of 2008 and the *Price Control Act* and Monopolies Act and the *Consumer Protection Act* and were therefore unconstitutional, unlawful, and null and void *ab initio*.

5. The Attorney General and IRA opposed the petition by way of a replying affidavit sworn on September 29, 2016 by Sammy Mutua Makove, the then Commissioner of Insurance and IRA's Chief Executive Officer. His position was that the *Price Control Act* and the Monopolies Act were unknown in law and therefore incapable of being violated; price fixing and monopolies are instead prohibited under the *Competition Act*, 2010, which CAJ had not specifically pleaded; even if it were pleaded, the *Competition Act*, 2010 did not apply in the circumstances of the case because IRA did not engage in trade; that industry price regulation which is aimed at stabilizing the industry to the benefit of consumers is neither a consumer right under Part II of the *Consumer Protection Act*, 2012 nor an unfair trade practice under Part III thereof; and that IRA was neither a competitor nor an active provider engaged in underwriting of insurance business, rather it was a statutory regulatory body established under section 3A of the *Insurance Act*, for the purposes of ensuring the effective administration, supervision, regulation and control of insurance and reinsurance in Kenya.

6. It was IRA's assertion that the guidelines were not a strategy to restrict competition, and only set minimum premium rates to be charged by insurance companies, to mitigate against underwriting losses and risk exposures due to application of the previous motor vehicle insurance rating based on flat rate, and to avoiding undercutting. Furthermore, the alleged abuse of article 27, 43, 46 and 47 of the constitution was imprecise and lacked sufficient details of the alleged violations, and that the said articles did not have retrospective effect and application, since the impugned guidelines came into force before the promulgation of the *Constitution of 2010* . While making reference to the objects and functions of the IRA as spelt out in section 3A of the *Insurance Ac*, it was further contended that the mandate therein included the power to control, formulate, regulate and enforce standards for the conduct of insurance and reinsurance business in Kenya, as well as to issue supervisory guidelines and prudential standards.

7. The IRA additionally made reference to the findings of an actuarial investigation into the Kenyan motor insurance industry commissioned by the Association of Kenya Insurers (AKI) in 2008, and the challenges identified as bedevilling the Kenya motor insurance industry including underwriting losses, which it stated formed the basis and rationale to introduce measures to stabilize the motor insurance sector and the impugned guidelines on November 20, 2009. It was IRA's conclusion that the guidelines were not only made lawfully and within its powers, but also in the best interest of the wider public. In particular, that the guidelines stabilized the insurance industry by significantly reducing the risk of collapse of insurance companies; and increased business and the performance of the insurance companies thus enabling the insurers to pay the insurance claims as contracted.

8. After hearing the parties, the learned trial Judge found that IRA acted outside its statutory powers held as follows:

> "My reading of the provisions of the Insurance Act is that the functions of the first respondent (IRA) are: -to ensure effective regulation, supervision; development of insurance in Kenya; to formulate and enforce standards; to issue licences; to protect the interests of insurance policy holders and insurance beneficiaries; to promote the development of the insurance sector; to ensure prompt settlement of claims; to investigate and prosecute insurance fraud.
>
> In my view, regulation entails ensuring that players comply with the provisions of the Insurance Act. Supervision means the oversight function the first respondent exercises over the operations of insurance companies. Among the supervisory functions are; Ensuring the

viability of applications for licensing, ensuring that all board members are fit & proper, ensuring that all senior management staff fit & proper, ensuring that insurers have adequate capital at all times, approval of insurance products, inspection, investigation, analysis of accounts and returns, intervention and withdrawal of licenses among others.

From the foregoing explanation derived from my interpretation and understanding of the provisions of the statute on what regulation and supervision entails, I find nothing to suggest, even in the slightest manner that regulation and supervision entails setting prices. I find no express or implied mandate in the statute to suggest that the first respondent had powers to issue the said guidelines."

9. These findings are the genesis of this appeal, which we heard on this court's virtual platform on January 29, 2024. Learned counsel Miss Mwangi appeared for the Attorney General and IRA, while learned counsel Mr. Weche who appeared for the CAJ, informed the court that he did not have instructions to prosecute the matter on appeal. We declined to adjourn the hearing, after noting that this appeal was filed in 2018, and Mr. Weche had not filed any notice to withdraw from acting.

10. In commencing our determination of the appeal, we are mindful of our duty as set out in *Selle & another v Associated Motor Boats Co Ltd & others* [1968] EA 123, namely, to reconsider and evaluate the evidence, and draw our conclusions of fact and law. Additionally, we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or where its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] EA 93.

11. The counsel for the Attorney General and IRA identified six (6) issues for determination in written submissions dated May 3, 2022. These issues can be collapsed to one issue, namely whether IRA acted outside its statutory powers when it issued the impugned guidelines. It was counsel's assertion that section 3A (a), (b), (d) and (g) of the Insurance Act empowered IRA to control, formulate regulate and enforce standards for conduct of insurance and reinsurance business in Kenya as well as issue supervisory guidelines and prudential standards, and that it was common ground that the said section was not declared unconstitutional by the trial Court except for the guidelines that were issued. Counsel placed reliance on the decision by Ibrahim J (as he then was) in the case of Mombasa High Court Misc Application No 89 of 2010- *Republic v The Insurance Regulatory Authority exparte Kenya Transport Association*, Mombasa, Kenya, where the learned Judge found that IRA had powers to issue the same guidelines.

12. Therefore, that the learned trial Judge erred by allowing the issue of legality of the guidelines to be re-litigated and arriving at different finding and holding that IRA had no powers to issue the guidelines. Additionally, that the conduct and holding of the trial Judge amounted to sitting on an appeal of a judgment from a court of concurrent jurisdiction. Reference was made to the holding by this court in *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 others*, Civil Appeal No 203 of 2006, that a judge of concurrent jurisdiction could not supervise fellow judges. Counsel contended that the issue of the guidelines being in line with the Insurance Amendment Act had equally been well settled by Ibrahim J (as he then was) in Mombasa High Court Misc Application No 89 of 2010 - *Republic v Insurance Regulatory Authority ex parte Kenya Transport Authority*, Mombasa Branch.

13. Lastly, counsel submitted that the reason for the guidelines was to ensure motor vehicles insurance claims were paid and motor insurance companies stay afloat, which is in the best interest of the public. IRA therefore met the proportionality and reasonableness test in issuing the guidelines, and which were for a legitimate purpose in fulfilment of its mandate under section 3A of the Insurance Act.

14. It is not in dispute that section 3A of the Insurance Act provided that the powers of IRA included ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya, and issuing supervisory guidelines and prudential guidelines from time to time, for the better administration of the insurance business of persons licensed under the Act. The singular question which we need to address is whether the said provisions empower IRA to set the premiums to be paid for various insurance covers by insurance companies. In the decision by Ibrahim, J in Mombasa High Court Misc Application No 89 of 2010 - *Republic v the Insurance Regulatory Authority ex parte Kenya Transport Authority*, Mombasa Branch, the learned Judge dismissed a suit that had challenged the same guidelines made by IRA, and his view on this issue was as follows:

> "It is clear to me that the respondent has powers under section 3A to formulate and enforce standards for the conduct of insurance and re-insurance business in Kenya. Such standards can definitely include prices for services. If the problem is undercutting and market forces have failed then regulation comes in. This is the economic reality that all public administrators must live with. It is good to place faith in the invisible hands of the markets but they can fail at times. When they fail, regulation moves in to fill the vacuum of course there are those who will feel that regulation unnecessarily constrains freedom of the markets but on the other hand others will unload the public body for being bold to regulate. The interpretation contended by the ex parte Applicants is too restrictive to fulfill the intention of the legislature. Regulation in terms of setting minimum prices is not strange to the insurance service industry alone. I am familiar with the *Advocates Remuneration Order* which contains provisions for minimum fees payable to Advocates. Similar provisions are to be found in the *Architects and Quantity Surveyors Act*."

15. It is settled law that a statutory body may only act within the scope of the powers or duties conferred on it, and accordingly, where a body acts outside the powers which are prescribed for it, such an action is *ultra vires* and null and void. Likewise, a statutory body may interpret and determine the scope of its powers or duties incorrectly, and as a result, act beyond its powers. Put another way, a statutory body will act unlawfully if it incorrectly interprets a statutory provision as conferring on it a power or a duty to act, when such provision confers no such power or duty. See in this respect sections 12.05 to 12.07 of *Judicial Review: Principles and Procedure* (2013), by Jonathon Auburn, Jonathan Moffet and Andrew Sharland, and section 7(2)(a) (i) and (ii) of the *Fair Administrative Action Act*, which makes such actions or decisions reviewable by the courts.

16. Given the differing interpretations of the term "regulation" in relation to the statutory powers of IRA in Mombasa High Court Misc Application No 89 of 2010 *Republic v The Insurance Regulatory Authority ex parte Kenya Transport Authority*, Mombasa Branch and the decision appealed against, it is necessary to engage in a process of statutory interpretation of the said term to determine the first question before us, which is whether or not IRA acted within its statutory powers.

17. In interpreting a statutory enactment, a two stage approach is identified in *Bennion on Statutory Interpretation*, Fifth Edition at pages 548-592. The first is to decide, by applying the plain meaning rule or on an informed basis, whether or not there is a real doubt about the legal meaning of an enactment. There will be no doubt where the legal enactment is grammatically capable of one meaning only, or where there is no doubt as regards the grammatical meaning intended by the legislator. In discerning the intention of the legislator, the legislative history and the context of the statutory enactment is considered, including the mischief sought to be remedied by the enactment. If there is still doubt, then one moves on to the second stage of resolving the doubt by applying the various rules of statutory construction.

18. In the present appeal, the Insurance Act does not define the term "regulate" or "regulation". The *Black's Law Dictionary*, Ninth Edition in this respect defines regulation as "the act or process of controlling by rule or restriction". It is notable in this respect that section 3A (2) of the *Insurance Act* clarifies that the objects of the supervision of insurers and reinsurers by IRA shall be—

    a. to promote the maintenance of a fair, safe and stable insurance sector;

    b. to protect the interest of the insurance policyholders and beneficiaries; and

    c. generally to promote the development of the insurance sector.

19. A contextual interpretation of the term regulation is therefore necessary in light of the objectives of the said section and of the Insurance Act, which is to regulate the business of insurance. Three means of insurance regulation are identified in an article on "*Principles for Insurance Regulation: An Evaluation of Current Practices and Potential Reforms*" by Robert W Klein published in The Geneva Papers, (2012) Vol 37, at pages 175–199. The first is solvency regulation, which is justified by the fact that it is costly for consumers to properly assess an insurer's financial strength in relation to its prices and quality of service, and insurers can also increase their risk after policy-holders have purchased a policy and paid premiums, which is a "principal-agent" problem that may be very costly and difficult for policy-holders to control.

20. The goal of optimal insurance solvency regulation therefore is to minimise or limit the social cost of insurer insolvency within acceptable parameters. The social cost in this respect is more than the lost equity of the insurer, and includes the effects on policy-holders and third parties who may be creditors of insurers. Regulators potentially limit insolvency risk by requiring insurers to meet a set of financial standards and taking appropriate actions if an insurer assumes excessive default risk or experiences financial distress.

21. The second means of insurance regulation is price regulation, which is meant to curb incentives to incur excessive financial risk and engage in strategies that may result in inadequate prices, thereby preventing consumers from buying insurance from carriers charging inadequate prices without properly considering the greater financial risk involved. another justification for the restrictions on prices in the insurance sector is that since it is costly for insurers to ascertain consumers' risk characteristics accurately, insurers already entrenched in a market have an informational advantage and this may create barriers to entry that diminish competition. According to this view, the objective of price regulation is to enforce a ceiling that will prevent prices from rising above a competitive level and enabling insurers to earn excess profits.

22. The last means of regulation identified by the writer is that of market conduct regulation, in which regulates certain insurer market practices, such as product design, marketing and claims adjustment. This is because constraints on consumer choice and unequal bargaining power between insurers and consumers, combined with inadequate consumer information, can make some consumers vulnerable to abusive marketing and claims practices of insurers and their agents. The industry therefore takes steps to mitigate market conduct problems through self-compliance measures and the establishment of a voluntary self-regulatory organisations.

23. Arising from these different types of regulation of the insurance industry, we find that the learned trial Judge did err, to the extent that he found that regulatory powers of IRA under section 3A of the *Insurance Act* does not entail setting prices. We also note that the learned trial Judge did not interrogate the constitutionality or otherwise of the impugned guidelines whether in substance or effect, to support the order finding them unconstitutional. This finding was therefore also in error to the extent that it did not have any basis.

24. Having found that the setting of premium prices was within the statutory powers of regulation of IRA under section 3A of the *Insurance Act*, the next question we need to answer is whether this was a rational, reasonable and proportionate exercise of its power. These grounds of review of actions and decisions by public bodies are provided in section 7(2)(i), (k) and (l) of the *Fair Administrative Action Act*. A statutory body, even when acting within its powers, may still act unlawfully if its decision is irrational, unreasonable or disproportionate. Section 7(2)(i) of the said Act provides that an administrative action or decision will be irrational where it is not connected to-

    i. the purpose for which it was taken;

    ii. the purpose of the empowering provision;

    iii. the information before the administrator; or

    iv. the reasons given for it by the administrator.

25. On the other hand, a decision or action is unreasonable if it is objectively devoid of any plausible justification that no reasonable body of persons could have reached it, whereas it will be disproportionate where it is not commensurate with or does not justify the desired outcome. This court (Musinga, Gatembu & Murgor, JJA), while citing the English case of *Associated Provincial Picture House Ltd v Wednesbury Corporation* (1947) 2 All ER 680, expounded on the tenets of unreasonableness in the case of *ABN Amro Bank NV v Kenya Revenue Authority* [2017] eKLR as follows:

> "It has frequently been used and is frequently used as a general description of the things that must be done. For instance a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters that he must consider. He must exclude from his consideration matters that are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said to be acting "unreasonably." Similarly, there must be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

26. As regards proportionality, the Supreme Court of Canada explained in *R v Oakes* [1986] 1 SCR 103 that the measures adopted in a decision or action must be carefully designed to achieve the objective in question; should impair as little as possible any relevant rights or freedoms, and there must be a proportionality between the effects of the measures, and the objective. The explanation provided by IRA for taking the route of price regulation was that an actuarial investigation had identified challenges facing the Kenya motor insurance industry, including underwriting losses and that this formed the basis of the impugned guidelines. While it is the indeed the position as urged by the Attorney General and IRA that regulation is necessary to maintain insurer solvency, compensate for inadequate consumer knowledge, ensure reasonable rates, and make the payment of insurance claims possible, no particular reason was provided by IRA to justify price regulation as opposed to the other means of regulation as the most appropriate intervention and measure of stabilising the motor insurance sector.

27. This justification is particularly relevant in light of the consequences of price regulation in the insurance industry, which were described in the aforementioned article as follows:

> "The reality is that in most states and markets, at a given point in time, regulators do not attempt to impose severe price constraints.

The problem arises when strong cost pressures compel insurers to raise their prices and regulators resist market forces in an ill-fated attempt to ease the impact on consumers. Inevitably, severe market distortions occur. Ultimately, insurance markets can be sucked into a "downward spiral" as the supply of private insurance evaporates and state mechanisms are forced to cover the gap. Rate suppression also can decrease incentives to reduce risk that can lead to rising claim costs that further increases pricing and market pressures. Together, these developments can create major crises in the cost and supply of insurance."

28. Additionally, the economic foundation for the different types of regulation is to prevent or address specific market failures, and in price regulation, the main justification is the existence of monopolistic providers of a service. As noted by the same writer:-

> "With respect to solvency, regulators should seek to prevent insurers from incurring excessive financial risk and limit the cost of insurer insolvencies. As for market conduct, regulators should take steps to discourage and sanction insurers and intermediaries that take unfair advantage of consumers, such as misrepresenting the terms of insurance contracts and failing to pay legitimate claims. There appears to be little justification for the regulation of insurance prices in competitive markets in which entry/exit barriers are low or non-existent."

29. No evidence of such monopolies in the insurance sector was provided by IRA to justify the setting of premium prices. Lastly, comparative insurance regulatory frameworks, such as those in the United Kingdom and Australia, normally have three pillars. These are, firstly, prudential standards which set out minimum requirements in relation to capital, governance and risk management of the insurance companies; secondly, reporting standards which dictate the data that regulated entities must report on or provide and when this is to be done; and thirdly, the guidelines setting out practices and steps that the regulated entities should follow in order to comply with the prudential and reporting standards. Therefore, this method of regulation is pre- emptive and is designed to prevent problems emerging, rather than providing a means to take action after harm is caused.

30. From the foregoing analysis, it would have been more rational, reasonable and less costly for IRA to prevent a crisis or mitigate its impact, than to directly regulate the supply of insurance services through price fixing, especially given the likely market effects, and that no market justification was provided by IRA for this method of regulation. We therefore find that the price regulation by IRA through the impugned guidelines was not a rational, reasonable and proportionate form of regulation.

31. In conclusion, this appeal therefore partially succeeds with respect to the finding that IRA acted within its powers in issuing the impugned guidelines, in the exercise of its mandate of regulation of the insurance industry. We therefore set aside the following orders made by the High Court in the judgment delivered on March 20, 2017 in Nairobi Constitutional & Human Rights Petition No 622 of 2014:

> "a) A declaration be and is hereby issued declaring that Motor Insurance Underwriting Guidelines issued by the first respondent under circular No IC 07/2009 dated 20/11/2009 are illegal, unconstitutional and therefore null and void for all purposes.
>
> b) A declaration be and is hereby issued declaring that the first Respondent had no legal, statutory and or constitutional mandate to issue Motor Underwriting Guidelines under circular No IC 07/2009 dated 20/11/2009 or any other similar Guidelines."

32. We have however found that the impugned guidelines were irrational, unreasonable and disproportionate. We accordingly affirm and uphold the order of certiorari issued by the High Court in the said judgment to quash the Motor Insurance Underwriting Guidelines issued by IRA under Circular No IC 07/2009 dated 20/11/2009 for this reason.

33. We also note that the CAJ pleaded that it had filed the petition in the High Court in furtherance of its constitutional mandate and powers to investigate any act or omission in public administration and complaints of abuse of power by public bodies, and the petition was therefore brought in the public interest. We therefore order that each party bears their costs of the suit in the High Court and of this appeal in the circumstances.

34. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

M. WARSAME

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR.