National Hospital Insurance Fund Management Board v Kenya Union of Commercial Food and Allied Workers & another; Attorney General (Interested Party) (Petition E024 of 2024) [2025] KESC 37 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KESC 37 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION E024 OF 2024

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MAY 30, 2025

BETWEEN

NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT BOARD ..... APPELLANT

AND

THE KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... 1ST RESPONDENT

SALARIES AND REMUNERATION COMMISSION ..... 2ND RESPONDENT

AND

ATTORNEY GENERAL ..... INTERESTED PARTY

(Being an Appeal from the Judgment of the Court of Appeal at Kisumu (A. Makhandia, J. Mohammed & S. Kantai, JJ. A) delivered on 26th April 2024 in Civil Appeal No. 156 of 2016)

JUDGMENT

Representation

Mr. Colbert Ojiambo for the Appellant (ACORN Law Advocates LLP)

Mr. Benjamin Bogongo and Mr. Jairus Ondiegi for the 1st Respondent

(Benjamin Bogongo & Associates Advocates)

Mr. Patrick Barasa holding brief for Mr. Paul Nyamodi for the 2nd Respondent

(V.A. Nyamodi & Co. Advocates)

Mr. Oscar Eredi for the Interested Party

(The Office of the Attorney General)

A. Introduction

1. The Appeal dated 7th June, 2024 and filed on 24th June 2024 is premised on Article 163(3) of the *Constitution* of Kenya, Section 19(a) of the *Supreme Court Act*, Act No. 7 of 2011 and Rules 38, 39 & 40 of the Supreme Court Rules, 2020. The Appeal revolves around the question of whether the Appellant's, National Hospital Insurance Fund (NHIF) management board fell under the mandate of the 2nd Respondent, the Salaries and Remuneration Commission (the Commission) and whether the Commission's advice on the remuneration and benefits of State officers and Public Officers under Article 230(4) of the *Constitution* was binding on NHIF.

B. Background

2. On 4th July, 2012, the Commission published and issued guidelines to all public institutions through Circular No. SRG/CG/Vol. Vol III to the effect that the public service would adopt a 4-year review cycle applicable to all public service organizations with effect from 1st July, 2013; public service organizations were to immediately commence their remuneration analysis, collective bargaining negotiations and make proposals to the Commission for analysis and advice and forward their submissions by 31st December, 2012; that all existing collective bargaining agreements ("CBA") would expire on 30th June, 2013 to allow for new CBAs with a 4-year review cycle; and that all public service organizations were to submit their annual remuneration benefits data by December 2012.

3. In December 2012, the Appellant, NHIF, requested an extension of the deadline for submitting proposals for review of remuneration of its staff because it needed to conclude a CBA with the 1st Respondent, Kenya Union of Commercial Food and Allied Workers (the Union), for the period of 1st September 2012 to 30th June 2013. Subsequently, on 1st November, 2013, the NHIF forwarded the negotiated remuneration proposals for its unionisable staff to the Commission. Notably, these proposals were the result of negotiations between the NHIF and the Union through a CBA for the period 1st July 2013 - 30th June 2015, which negotiations were conducted without seeking the Commission's advice.

4. Viewing the information provided by the NHIF as insufficient to analyse the proposals, the Commission, by a letter dated 15th November, 2013, requested to be furnished with the NHIF's extract of approved budget estimates for 2013/2014, a copy of the last audited financial statements and the current source of funding for personal emoluments.

5. Upon receiving the said information, by a letter dated 10th December, 2013, the Commission informed the NHIF that it could not advise on the remuneration and benefits review for unionisable staff because the Report of the Presidential Taskforce on Parastatals Reform on State Corporations was at the time in the process of being implemented. Further, it requested the NHIF to resubmit the matter through its parent Ministry.

6. On 27th January, 2014, the NHIF resubmitted the CBA for the period 1st July 2013 - 30th June 2015 along with a copy of a letter from the Ministry of Health which communicated no objection to the proposals in the CBA, provided there would be no financial implications to the National Treasury in implementing the proposals. Subsequently, the Commission on 13th February 2014 held a meeting to analyse the CBA. In rejecting that CBA, the Commission observed that it did not comply with the guidelines issued on 4th July 2012, especially on the 4-year review cycle. It directed that the NHIF instead retain the existing remuneration and benefits structure for its employees.

7. On 9th April, 2014 and 7th May, 2014, the NHIF and the Union held joint meetings to renegotiate the proposed remuneration for the unionisable employees to comply with the Commission's guidelines. The renegotiated CBA that resulted from the joint meetings was forwarded to the Commission for approval by a letter dated 15th May, 2014.

8. The Commission held a meeting on 3rd July, 2014 to consider the said CBA. Upon considering the law, the economy's inflation rate, the NHIF's source of funds (that is, its members' contributions) and the NHIF's financial statements, it did not approve the CBA. Instead, it issued advice in its letter dated 16th July 2014 in the following terms: a one-off 5% increase for 2013/2014 for the management staff; a 5% annual increase for the unionisable staff for the period 2013-2017; unionisable staff allowances were to be awarded as per the 2013/2017 CBA and the management would get commuter and medical allowances as per table 5 of the said letter. It also communicated that the implementation of such directions was subject to the availability of funds.

9. However, this advice was not acceptable to the Union, which insisted on the execution and strict performance of the CBA it had negotiated with the NHIF. Further, it was of the opinion that the NHIF and its employees did not fall within the purview of the Commission and therefore its advice was inconsequential.

10. The NHIF declined to sign the renegotiated CBA and effected the remuneration structure as directed by the Commission. Aggrieved, the Union reported a trade dispute to the Ministry of Labour and Social Security Services upon which a conciliation process was initiated, it also called for a shop stewards' meeting and resolved to file the claim in court which action the NHIF deemed to be an unfair labour practice and meant to paralyse it's operations. In the meantime, the conciliator issued a certificate of unresolved dispute owing to the Union's insistence to proceed to court.

11. Within 4 days of being issued with the certificate of unresolved dispute, the Union then issued a notice dated 27th April 2015 for a strike that was set to commence on 18th May 2015. The strike notice was issued because, according to the Union, the NHIF had declined to sign the renegotiated CBA. Subsequently, by a letter dated 15th May 2015, the Union extended the strike notice by another seven days to facilitate execution of the renegotiated CBA. However, by a Court order dated 18th May 2015, the Employment and Labour Relations Court (Wasilwa, J.) in Petition No. 40 of 2015 restrained the NHIF's unionisable staff from participating in the strike.

C. Litigation History

i. At the Employment and Labour Relations Court (ELRC)

12. The Appellant, NHIF, filed an amended constitutional petition Petition No. 40 of 2015 before the ELRC on 18th May 2015 seeking the following reliefs:

    a. A declaration that the strike notice issued by the 1st Respondent (Union) on 27th April 2015 was unlawful.

    b. An order restraining the 1st Respondent from calling or proceeding with a strike in the circumstances.

    c. A determination by the Court on whether the Appellant fell under the mandate, province and statutory supervision of the 2nd Respondent (Commission) under the *Salaries and Remuneration Commission Act*, Cap 412D of the Laws of Kenya (SRC Act).

d. A declaration that the Appellant as constituted under the Act did not fall under the mandate of the 2nd Respondent.

e. A declaration that the *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013* (SRC Regulations) offend the intent and object of the *Labour Relations Act*, Cap 233 of the Laws of Kenya.

f. A declaration that the Appellant was at liberty to conclude the CBA reached in July 2013 with the 1st Respondent.

13. By a replying affidavit sworn by its Secretary General, Mr. Boniface Kavuvi, the 1st Respondent, while admitting the existence of the SRC Regulations, posited that the Commission's circular did not require the Appellant to negotiate a CBA and seek final approval from the Commission before implementation; and certainly not after a draft CBA had been prepared and presented for signing.

Rather, the Appellant was required to consult the Commission before the CBA negotiations as per Regulation 18 of the *SRC Regulations*, 2012. He also urged that a contrary interpretation would ostensibly violate Regulations 6, 9, 10 and 18 of the SRC Regulations.

14. He added that the Appellant violated the law by purporting to implement a CBA that had not been signed and registered with the ELRC under Section 60 of the *Labour Relations Act*.

15. It was the 1st Respondent's case that upon seeking the Appellant's permission, it called a shop stewards' meeting in the midst of the conciliation process after it became apparent that the Appellant was not committed to the conciliation process. Further, the conciliator issued a referral letter dated 21st April 2015 and therefore, the 1st Respondent's actions were within the law. It was only when the Appellant failed to respond to the 1st Respondent's letters on the CBA, that it issued a strike notice.

16. The 2nd Respondent, through a replying affidavit sworn on 24th June 2016 by Nicholas Pkech Siwatom, the Director, Remuneration Analysis, outlined its functions among which include advising the Government, including parastatals and State corporations, on the remuneration and benefits of their officers. He deposed that this mandate informs Regulation 18 of the SRC Regulations, 2012 which provides that the management of a public service organization must first seek the 2nd Respondent's advice before commencing any CBA negotiations. While the public service organizations may negotiate CBAs, the 2nd Respondent's role is to ensure that the same is compliant with Article 230(5)(a) of the *Constitution* on ensuring the fiscal sustainability of the total public compensation bill.

17. The Attorney General) supported the 2nd Respondent's submissions.

18. The ELRC (Abuodha, J.) by a Judgment delivered on 18th March 2016, crystallized the following issues for determination: whether the Appellant fell under the mandate of the Commission, whether the *SRC's Regulations 2012* offend the spirit of collective bargaining as envisaged by ILO Conventions, the *Constitution* and the *Labour Relations Act*, and whether the Appellant ought to conclude the CBA reached in July 2013 with the 1st Respondent.

19. On whether the Appellant fell under the mandate of the 2nd Respondent, the ELRC held that the Appellant was not subject to the direction of the 2nd Respondent because it was not a public office, since Parliament did not appropriate its funds for payment of the salaries and benefits of the Appellant's staff. Neither was the Appellant's employees' remuneration drawn from the Consolidated Fund. Furthermore, the Appellant drew its funding from its members' contributions, which membership was drawn from both the public and private sectors and as such did not constitute public funds.

The ELRC also found that the Commission's role concerning public officers was purely advisory as opposed to directly setting the remuneration thereof.

20. On whether the *SRC Regulations 2012* offended the spirit of collective bargaining, the ELRC held that according to Article 230(4) of the *Constitution*, the *SRC Regulations* only offered a guideline as opposed to binding parties, especially where the resultant negotiations were within the Commission's recommended margin. Therefore, the said regulations contradicted the spirit of collective bargaining as they allowed the Commission to dictate how the Appellant would participate in the CBA negotiations.

21. In the end, the Learned Judge made the following orders:

    a. A declaration that the Appellant as constituted under the *National Health Insurance Act* Cap 255 of the Laws of Kenya (NHIF Act) did not fall under mandate of the Commission.

    b. A declaration that the *SRC Act* and *SRC Regulations* in so far as they purported to confer on the Commission jurisdiction to set or restrict remuneration and benefits for public officers other than State officers are inconsistent with the *Constitution* hence null and void to that extent.

    c. The insistence by Commission that its advice to the Appellant was binding was counter to the principle of collective bargaining as envisaged under the *ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98)* and by virtue of Article 2(6) of the *Constitution*, unconstitutional.

    d. A declaration that the Appellant was at liberty to conclude the CBA reached in July 2013 with the 1st Respondent.

ii. At the Court of Appeal

22. Aggrieved, the Commission filed Civil Appeal No. 156 of 2016, which was anchored on 8 grounds and which the Court of Appeal (Makhandia, Mohammed &Kantai, JJ.A) condensed into the following 3 issues:

    a. Whether the Appellant as statutorily constituted fell under the mandate of the 2nd Respondent;

    b. Whether the ELRC usurped, downplayed and interfered with the 2nd Respondent's constitutional mandate; and

    c. Whether the advice given by the 2nd Respondent under Article 230(4) of the *Constitution* was binding.

23. The Commission argued that the Appellant's employees were public officers as provided for under Section 2 of the *Public Officers Ethics Act*, Cap 185B of the Laws of Kenya (POEA) as the Appellant's major source of funding was statutory fees from members' contributions. These funds translated into public funds under the *Exchequer and Audit Act*, Cap 412 of the Laws of Kenya. Further, the Appellant's employees discharged a public function and were public officers in line with the decision in *Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEHIA Workers) vs Salaries and Remuneration Commission* (Constitutional Application 294 of 2013) [2014] KEHC 8148 (KLR).

    As such, any negotiation or CBA concerning their compensation was subject to the Commission's approval.

24. The Attorney General supported the Appeal adding that Articles 260 and 232 of the *Constitution* must be read together so that the values and principles of public service as set out in Article 232(2) of the *Constitution* were understood and read to apply to all employees of State organs and State corporations.

Citing Section 2 of the *State Corporations Act*, Cap 446 of the Laws of Kenya, the Attorney General stated that the National Health Insurance Fund (Fund) was a State Corporation, and that since the State had a controlling stake in it, it followed that the Fund, as a State corporation, was a public entity and its officers, public officers. Lastly, he submitted that as per Regulations 18(1), (2) and (3) of the *SRC Regulations*, the Commission offers advice to State corporations, State organs and public service entities, but it did not engage directly with the 1st Respondent since trade unions are neither in the public service nor are they State offices or organs.

25. In a Judgment delivered on 26th April 2024, the Court of Appeal allowed the Appeal and set aside the Judgment of the ELRC. On whether the Appellant as statutorily constituted fell under the mandate of the 2nd Respondent, the Court of Appeal held that persons working in State corporations are public officers according to Article 260 of the *Constitution*. Since the Appellant was a body corporate established under an Act of Parliament as a State Corporation, the Appellant was deemed a public service institution and its officials and employees were public officers. Therefore, pursuant to Article 230(4)(b) as read together with Article 260 of the *Constitution* and Section 11 of the *SRC Act*, the Commission had jurisdiction over the determination of remuneration and benefits of the Appellant's employees.

26. Regarding whether the ELRC usurped, downplayed and interfered with the 2nd Respondent's constitutional mandate, the Court of Appeal held that, while the Appellant and the 1st Respondent could negotiate the terms and conditions of a CBA, the Appellant was under an obligation to consult the Commission before completing the negotiations. Therefore, in holding that the Commission's advice was not binding on the Appellant, the ELRC disregarded the Commission's constitutional duty to manage the country's compensation bill and keep it fiscally sustainable.

27. As to whether the advice given by the Commission under Article 230(4) of the *Constitution* was binding, the Court of Appeal relied on its decision in *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General* (Civil Appeal 196, 195 & 203 of 2015) [2015] KECA 239 (KLR) where it held that the Commission's advice was binding on state bodies and that holding otherwise would paralyse the Commission in discharging its constitutional functions. And that the *Constitution* provides for matters with the effect and force of the law, including advice from a constitutional body, and such advice is binding and capable of being enforced with attendant consequences.

iii. At the Supreme Court

28. Aggrieved, the Appellant filed the instant Appeal challenging the decision of the Court of Appeal on 6 grounds summarized as follows:

That the Learned Judges erred in law by:

a. Interpreting Article 260 of the *Constitution*, particularly the meaning of a 'public officer', 'public office' and 'public service'.

b. Failing to recognize that the Appellant's employees were not directly remunerated from the Consolidated Fund, and hence excluded from the 2nd Respondent's mandate.

c. Interpreting 'public office' to have a similar meaning to 'public service'.

d. Failing to distinguish between public servants and public officers and finding that all public servants were under the mandate of the 2nd Respondent contrary to Articles 260 & 230(4) of the *Constitution*.

e. Holding that the 2nd Respondent's advice was binding on the Appellant in negotiating the CBA with the 1st Respondent.

f. Failing to appreciate the principle of freedom of negotiation in CBAs.

29. The Appellant sought the following reliefs:

i. The Appeal herein be allowed.

ii. The Judgment of the Court of Appeal in Civil Appeal No. 156 of2016 delivered and dated at Nairobi on 26th April, 2024 be set aside in its entirety, and in its place the judgment of the ELRC dated 18th March, 2016 be upheld.

iii. Any other reliefs that this Honourable Court may deem fit to grant.

D. Parties' Submissions

a. Appellant's Submissions

30. In its submissions dated 28th August 2024 and filed on 27th September 2024, the Appellant condensed the issues into two: whether the Appellant as constituted fell within the mandate of the Commission and whether the Commission's advice was binding on the Appellant.

31. On whether the Appellant fell within the mandate of the Commission, the Appellant relied on Article 260 of the *Constitution* that defines a public officer as:

a. Any State officer; or

b. Any person, other than a State officer, who holds a public office.

A public office, on its part, is defined as 'an office in the national government, a county government or public service if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament'.

32. The Appellant faulted the Court of Appeal for widening this definition to include all persons serving the people of Kenya, and by parity of reasoning, holding that the Appellant's employees were public officers. While the *Constitution* defines a State organ to mean a commission, office, agency or other body established under the *Constitution*, the Appellant maintained that it was not a State organ since it was not a creature of the *Constitution* but of statute, so the Appellant posited; it also insisted that it was a private entity. Moreover, it urged that, since the Appellant's employees were not remunerated directly from funds drawn from Parliament or the Consolidated Fund, they were not public officers and not under the mandate of the Commission. The Appellant also faulted the Court of Appeal for relying on the definition of 'public officer' as provided for in the *Public Officers Ethics Act* (POEA) as opposed to the *Salaries Remuneration Commission Act* (SRC Act) which defers to the more limited definition provided for in the *Constitution*. On that account, the Appellant asserted, that since the meaning in the *Constitution* varied from the one in the *SRC Act*, then the latter ought to have prevailed.

33. The Appellant further submitted that the Court of Appeal erred in holding that Article 206(1)(b) of the *Constitution* empowers State organs to retain money received to defray expenses as empowered by an Act of Parliament. According to the Appellant, Article 206 of the *Constitution* defines the Consolidated Fund and provides that money received and retained by a State organ for defraying expenses, is not part of the Consolidated Fund. Likewise, that Section 35 of the repealed *NHIF Act* provided that the Board would cause the preparation of revenue and expenditure estimates, including payment of salaries, allowances and other charges for the Appellant's staff, for approval by

the Appellant, while Section 36 provided that it was the Appellant in consultation with the Cabinet Secretary, which would determine what sum of money to withdraw from the Fund for purposes of it's estimated expenses for any given financial year. On that basis, the

Appellant faulted the Court of Appeal for holding that the salaries of the Appellant's officers were paid from monies provided by Parliament, through the annual national budget fund, or funds retained by the Appellant under Article 206(1)(b) of the *Constitution*.

b. 1st Respondent's Submissions

34. The 1st Respondent filed a replying affidavit sworn on 11th July 2024 by its General Secretary, Bonface M. Kavuvi, and written submissions dated 12th September 2024 in support of the Appeal. The 1st Respondent raised the following issues for determination: whether the Appellant as constituted, and in their nature and operations, qualified as State entities whose workers' remuneration were subject to regulation by the 2nd Respondent, and whether the advice of the 2nd Respondent contravened the principles of collective bargain as envisaged under the *ILO Convention on the right to organize and collective bargaining No. 98* and hence unconstitutional for being in violation of Article 2(6) of the *Constitution*.

35. On whether the Court has jurisdiction, the 1st Respondent submitted that the Appeal was properly before the Court since it touches on the proper interpretation of Article 260 of the *Constitution* and the role of the Commission with respect to public officers and the public service, whose remuneration is not drawn from the Consolidated Fund.

36. As regards whether the Appellant was in public service and its officers' public officers, the 1st Respondent disabused this notion and urged that the Appellant did not draw funds from the Consolidated Fund or from funds authorized by Parliament. It stated that, while Section 15(1) of the *NHIF Act* provided that the Fund received contributions from the residents of Kenya who had attained the age of 18 years, Section 2 of the *State Corporations Act* placed the Appellant under the category of Commercial State Corporations, that is, corporations that generate income through various means other than from funding by the National Treasury.

37. Relying on Article 2(6) of the *Constitution*, the 1st Respondent asserted that the right to collective bargaining is a fundamental constitutional human right and that Kenya had ratified the *ILO Convention on the Right to Organize and Collective Bargaining, 1949 (No. 98)*. It argued that Article 41(5) of the *Constitution*, which provides the right of collective bargaining, should be construed liberally, dynamically and progressively as guided by Hon. Justice Isaac Lenaola, SCJ and Arnold Ochieng' in their book, "*Constitutional Law, Doctrines and Litigation of Fundamental Rights and Freedoms*".

38. For that reason, and considering the Commission's constitutional and statutory mandate, the Appellant submitted that a finding that the Appellant was under the jurisdiction of the Commission would greatly impede on Article 41(5) of the *Constitution*. It would also translate to imposing terms on employees contrary to Article 2 of the *Constitution* of Kenya and *ILO Convention No. 98*, since both the negotiations and collective bargaining between the NHIF and the Union would be dependent on the advice coming from the 2nd Respondent.

39. By the same token, the 1st Respondent further argued that since the Appellant was not under the jurisdiction of the Commission, it (the Commission) had no right or mandate to interrogate the Appellant's CBA negotiations. In addition, this would be contrary to *ILO Convention No. 98* to which Kenya is a signatory to it, as well as the report of the *Committee of Experts on the Application of*

Convention and Recommendations (2013) which provides that interference by the authorities in CBA negotiations violates the principle of free and voluntary negotiations.

c. 2nd Respondent's Case

40. In opposition to the Appeal, the 2nd Respondent filed a replying affidavit sworn on 17th July 2024 by the 2nd Respondent's Commission Secretary, Anne Gitau, and submissions dated 13th September 2024 and filed on 16th September 2024. It condensed the grounds into the following heads: whether the Appellant's employees were in the public service and therefore subject to regulation by the 2nd Respondent and whether the 2nd Respondent's advice with respect to the remuneration of the Appellant's employees was binding.

41. The 2nd Respondent submitted that the Appellant was a State Corporation since it was mandated to collect statutory deductions from the public and to protect the interests of contributors to the Fund. Although the Appellant could pay staff from the monies in the Fund under Sections 35 and 36 of the *NHIF Act*, those funds were public funds under Section 2 of the *Public Finance Management Act* ('PFMA') Cap 412A of the Laws of Kenya. Similarly, the Appellant's staff were public officers pursuant to Article 260 of the *Constitution* and Section 2 of the *POEA*, and therefore, the 2nd Respondent's advice ought to have been sought with regard to the Appellant's staff's salaries and remuneration. In this connection, the Appellant was bound by the 2nd Respondent's guidelines issued via circular no. SRG/CG/Vol. III dated 4th July 2012.

42. In crafting the guidelines in the circular, the 2nd Respondent submitted that it considered the economy's inflation rate for the period, which ranged between 4%-5.5%. The 5% increment was therefore in addition to the annual increment that the Appellant's staff were entitled to, noting that the staff's salaries and allowances had not been reviewed for some time.

43. Upon considering the Appellant's financial statements, budgetary provisions and financial projections for the period under review, the 2nd Respondent determined that the proposals in the CBA were unsustainable. It also noted that in arriving at the proposals in the CBA, the Appellant and the 1st Respondent erroneously interpreted the monies collected by the Appellant as constituting its income that could be used to fund its recurrent expenditure.

44. On whether the Appellant's employees were in the public service and therefore subject to regulation by the 2nd Respondent, the 2nd Respondent posited that the Appellant was a State corporation and a public service institution, established under the *NHIF Act*. Further, the Appellant's Board members were drawn largely from the civil service and the Government, with the chairman of the Board being appointed by the President and the Chief Executive Officer being appointed by the Appellant subject to the advice of the 2nd Respondent. The Appellant's Board members' remuneration was subject to the consultation with the Minister in charge of health, while the Appellant's accounts were audited by the Auditor General with the report being submitted to the relevant Minister who would then transmit it to Parliament. To this extent, therefore, the 2nd Respondent argued that the Appellant held the status of a parastatal.

45. Furthermore, the 2nd Respondent disputed the Appellant's rendition of Article 260 of the *Constitution* and submitted that by virtue of the *NHIF Act*, the Appellant collected funds from the public under the direction of Parliament. In the totality of its submissions and further relying on this Court's interpretation of a 'public officer' in the case of *Fredrick Otieno Outa vs Jared Odoyo Okello & 4 Others*, Section 2 of the *POEA* and the *Exchequer and Audit Act*, it was the 2nd Respondent case that the Appellant's employees were in public service and were public officers.

46. On whether the 2nd Respondent's advice was binding on the Appellant, the 2nd Respondent asserted that its advice was binding under Article 259(11) of the *Constitution* which provides that where certain functions are to be exercised under the *Constitution* on the advice, recommendation, consultation or approval of another body, the said function can only be exercised upon obtaining the said advice, recommendation, consultation or approval.

47. It further submitted stated that the issue of the binding nature of the advice given by a constitutional commission was properly settled in the case of *In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application No. 2 of 2011) [2011] KESC 1 (KLR) and the persuasive decision of the Court of Appeal in *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General* (Supra).

48. Therefore, according to the Commission, its advice was binding on the Appellant in accordance with Articles 230(4) and 259(1) of the *Constitution* and as was held in the case of *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General* (Supra). As such, the CBA renegotiated by the Appellant and the 1st Respondent, was void to the extent that it did not incorporate the advice of the 2nd Respondent's. Finally, the Commission submitted that the ELRC in its Judgment had misapplied and misinterpreted the *Constitution* by holding that its advice was not necessary and not binding in the CBA negotiations between the Appellant and the 1st Respondent.

d. Interested Party's Case

49. We note that the Attorney General was a substantive party before the superior courts below, but has been inexplicably served and referred to as an interested party in the proceedings before this Court. Rule 24 of the *Supreme Court Rules* provides the procedure for joining an interested party to proceedings. Similarly, in *Muruatetu & Another vs Republic; Kenya National Commission on Human Rights & 2 Others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* (Petition Nos. 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR), we outlined the criteria a party must meet before they are admitted as interested parties. Further, one should move the Court through a formal application and its success determined at the Court's discretion. The Appellant therefore of its own motion, cannot enjoin the Attorney General as an interested party. That said, we note that we are at the final stage of these proceedings and since the Attorney General has already filed and submitted its pleadings, we shall proceed with the matter as is.

50. In opposition to this Appeal, the Attorney General associated fully with the 2nd Respondent's submissions. The Attorney General also relied on submissions dated 9th September 2024 and filed on 20th September 2024 delineating the following issues for determination: whether the Fund was a public body; and whether the Appellant's employees were public servants and therefore subject to the mandatory advice of the 2nd Respondent on increments and allowances.

51. On whether the Fund was a public body, it was submitted that the Appellant was a public body and its officers were public officers, because it was a statutory public body established to perform a public function; operated under the supervision of the Ministry of Health and the policy direction of the Cabinet Secretary for Health; the Minister in charge of Finance provided for its administration expenses; some of the Appellant's board members were appointed by the President; the Appellant was established pursuant to Section 28 of the *Exchequer and Audit Act* and therefore was subject to the provisions relating to the collection, issuance, payment and audit of public monies; the Appellant had

to comply with the financial reporting requirements as provided for under the *PFMA*; and lastly, that the Appellant collected funds from employees in both the private and public sectors with the singular aim of providing healthcare insurance for Kenyans aligned with state provision to the right to health as provided under Article 43 of the *Constitution*.

52. The Attorney General urged that courts have previously held that a public body is one that is established to serve public functions. To this end, counsel relied on several cases including *John Mining Temoi & Another vs Governor of County of Bungoma & 17 Others* [2014] eKLR, *Harrison Mumia vs Public Service Commission & 2 Others* [2018] eKLR, and *Republic vs Kenya National Examination Council & 2 Others, Ex-parte Audrey Mbugua Ithibu* Judicial Review Case No. 147 of 2013; [2014] eKLR among others.

53. As regards whether the Appellant's employees were public servants, counsel for the Attorney General stated that they were indeed public servants by virtue of performing public functions, but they were not civil servants since they were not employed by the Public Service Commission (PSC). In this way, the Appellant and its employees fell squarely within the definitions of public office and public officer as espoused in Article 260 of the *Constitution*. Furthermore, para. 6(5) of the First Schedule of the Transitional Provisions of the *Social Health Insurance Act*, Act. No. 16 of 2023, (SHIA) provides that the Appellant's employees, not appointed under para.6(2), could opt to either retire from public service or be redeployed within the public service because they were public officers. Moreover, employees of statutory bodies, like the Appellant's employees, were in effect public servants and as such, were in the public service.

E. Analysis

54. Having considered the pleadings, and the parties' respective submissions, we find that the issues arising for determination before this Court are:

    i. Whether the Court has jurisdiction to determine the instant Appeal.

    ii. Whether the Appellant fell under the jurisdiction of the 2nd Respondent.

    iii. Whether the 2nd Respondent's advice was binding on the Appellant.

    iv. What orders should issue?

i. Whether the Court has jurisdiction to handle the instant Appeal.

55. Upon perusing the pleadings, it is our considered opinion that it is pertinent to address whether this Court has jurisdiction to hear this matter. This is in view of the Appellant's preamble in its Appeal, to wit, that the Appeal is predicated on Article 163(3) of the *Constitution*, Section 19(a) of the *Supreme Court Act* No. 7 of 2011 and Rules 38, 39 & 40 of the *Supreme Court Rules, 2020.*

56. Article 163(3) of the *Constitution* of Kenya provides for this Court's jurisdiction to hear and determine disputes relating to presidential elections, appellate jurisdiction to hear Appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation. Clearly, the Appellant has however failed to narrow down and specifically cite the jurisdiction under which it approaches this Court. We have on numerous occasions underscored that parties must specifically identify which jurisdiction of the Court they are invoking. See *Sonko vs County Assembly of Nairobi City & 11 Others* (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR), *Njihia vs Kimani & Another* (Civil Application 3 of 2014) [2015] KESC 19 (KLR), *Ibren vs Judges and Magistrates Vetting Board & 2 Others* (Petition 19 of 2018) [2018] KESC 75 (KLR) and *Warrakah & 2 Others vs Mbwana & 5 Others* (Petition 12 of 2018) [2018] KESC 76 (KLR).

57. We reiterated the reason for specifying the jurisdiction being invoked in the case of *Ibren vs Judges and Magistrates Vetting Board & 2 Others* (Supra) in the following terms:

> " 41. .. In the *Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone* [2013] eKLR, this Court stated that "it is trite law that a Court of law has to be moved under the correct provisions of the law". In this Court, this is not an idle requirement but has its rationale anchored in the 'specialized' nature of the jurisdiction of the Supreme Court as provided in Article 163(3) of the *Constitution*. Appeals to this Court from the Court of Appeal are therefore not as a matter of course as the Supreme Court was not established as another tier of court in the judicial hierarchy. Not every Appeal from the Court of Appeal is also Appealable to this Court."

58. We reiterate our rationale in *Sonko vs County Assembly of Nairobi City & 11 Others* (*Supra*), "...90. It can never be the role of the court to wander around in the maze of pleadings and averments to ascertain by way ofBeli ination which of the two limbs of Article 163(4) a party intends to rely on." The instant case is even more unsightly viewing as the Appellant has purported to invoke almost all the limbs of jurisdiction of this Court. It is even more perturbing that the Appellant cited Section 19(a) of the *Supreme Court Act*, which provision was repealed by the *Supreme Court Act*, (Act No. 26 of 2022), Cap 9B of the Laws of Kenya.

59. We have consistently discouraged such a lackadaisical approach to drafting pleadings, especially at the apex court, where serious constitutional matters and matters of general public importance find their way. In the *Sonko vs County Assembly of Nairobi City & 11 Others* (*Supra*), we held as follows:

> ' 95. In an apex court, there is no room for indolent and lackadaisical approach to preparation and presentation of cases. We expect nothing but precision, diligence and above all, professionalism. It is for these reasons that the court has repeatedly cautioned in several decisions such as *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*, SC Applic No, 4 of 2012; [2013] eKLR, *Daniel Kimani Njihia v Francis Mwangi Kimani & another* [supra], *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* [supra], and *National Rainbow Coalition Kenya (NARC Kenya) Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)*, SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022), against sloppiness in the invocation of the court's jurisdiction.'

60. So important is this requirement that in the case of *Njihia vs Kimani & Another* (Supra), we held that the issue is not a mere procedural technicality, but one that goes to the very jurisdiction of this Court. Going by the time-honored words of Nyarangi, JA in *Owners of the Motor Vessel 'Lillians' vs Caltex Oil Kenya Limited* [1989] KLR 1, jurisdiction is everything, and without it, a court must immediately down its tools. To lay credence to these words, this Court has in the past, struck out suits where the parties failed to specify the jurisdiction they sought to invoke. See *Njihia vs Kimani & Another* (Supra) and *Warrakah & 2 Others vs Mbwana & 5 Others* (Supra).

61. That said, looking at the matter before us, we appreciate that it raises weighty matters that must be set to rest finally by this Court, that is, the definition of a public officer and public office, and the place of the 2nd Respondent in the negotiation of CBAs affecting this cadre. Considering this Court's hierarchical rank in the judicial system, we have a constitutional obligation to settle weighty matters

such as this and develop rich jurisprudence. Indeed, in the *Sonko vs County Assembly of Nairobi City & 11 Others* (*Supra*), we held:

"

" 99. By the very nature of its position in the hierarchy of courts, the Supreme Court has a constitutional obligation to develop jurisprudence and guide the courts below it on matters of general public interest, as well as on those involving the interpretation and application of the *Constitution*. This duty cannot be curtailed by a decision of any court, just the way Justices of this court cannot be rendered superfluous, or their work made perfunctory and mechanical. The function of the court in resolving questions of interpretation and application of the *Constitution* is to remove any doubts and ambiguities in the law; mitigating hardships and correcting wrongs and not avoiding them. This was succinctly expressed in the following passage in the concurrent decision of Mutunga, CJ & President of the court, *In Re the Speaker of the Senate & another v Attorney-General & 4 others* [Supra] (paragraph 156):

> 'Each matter that comes [up] before the court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents [Constitution- making] does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.'

The following passage drawn from the court's judgment in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others*, [supra] is equally instructive;

> 'The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations. Going forward it will be good practice for this court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it." [our emphasis]' "

62. This should not be read to mean that this Court has gone beyond its jurisdictional dictates, rather, this is an opportunity for this Court to develop rich and quality jurisprudence and settle with finality, sensitive and weighty constitutional matters in adherence to its constitutional obligation. In consonance with our rationale in the case of *Sonko vs County Assembly of Nairobi City & 11 Others* (Supra), this Court will, in appropriate cases such as the instant one seize the opportunity to settle the law and meaningfully conclude a dispute. Similarly, in *Aramat & Another vs Lempaka & 3 Others* (Petition 5 of 2014) [2014] KESC 21 (KLR), this Court stated that it shall rise to the occasion and settle all unsettled issues touching on the interpretation and application of the *Constitution* noting that such an exercise is necessary to complete the anchoring pillars of constitutional governance.

63. We believe we have said enough to demonstrate that, despite the infractions on the non-citation of the correct provision of the *Constitution*, this Court has jurisdiction to hear and determine the instant Appeal.

i. Whether the Appellant fell under the jurisdiction of the 2nd Respondent

64. Article 230(4) of the *Constitution* sets out the powers and functions of the 2nd Respondent. It reads:

> '(4) The powers and functions of the Salaries and Remuneration Commission shall be to—
>
> a. set and regularly review the remuneration and benefits of all State officers; and
>
> b. advise the national and county governments on the remuneration and benefits of all other public officers.'

65. In addition, the *SRC Act* that operationalizes the 2nd Respondent provides as follows with regard to the 2nd Respondent's functions:

> '11. Functions of the Commission
>
> In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall—
>
> a. inquire into and advise on the salaries and remuneration to be paid out of public funds;
>
> b. keep under review all matters relating to the salaries and remuneration of public officers;
>
> c. advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector;
>
> d. conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
>
> e. determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
>
> f. make recommendations on matters relating to the salary and remuneration of a particular State or public officer;
>
> g. make recommendations on the review of pensions payable to holders of public offices; and
>
> h. perform such other functions as may be provided for by the *Constitution* or any other written law.'

66. It follows, therefore, that from the afore-mentioned powers and functions, it is discernible that for the Appellant and its staff to have come under the jurisdiction of the 2nd Respondent, the following criteria ought to have been met:

a. That the Appellant and its staff were in the public sector; or

b. That the Appellant and its staff were either State officers or public officers; or

c. That the Appellant and its staff's remuneration was paid out of public funds.

67. Our understanding of the impasse before us is that the Appellant has urged that its staff were not public officers neither were they in public service, so as to bring them under the 2nd Respondent's jurisdiction. To settle that issue, it is incumbent upon us to delve into the definition of a public officer.

68. The bulk of the contention appears to be borne by the definition of 'public officer' and 'public office' as appears in Article 260 of the *Constitution*. The definitions are worded as follows:

> ' "public officer" means—
>
> a. any State officer; or
>
> b. any person, other than a State Officer, who holds a public office;
>
> " public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;
>
> "public service" means the collectivity of all individuals, other than State officers, performing a function within a State organ;
>
> "State organ" means a commission, office, agency or other body established under this Constitution; ...'

69. We are alive to our decision in *Outa & Another vs Okello & 5 Others* (Supra) which has also featured prominently in the submissions during the instant Appeal. It is notable that the majority finding on the definition of a public officer was within the context of electoral law. In her concurring opinion, Lady Justice Njoki Ndungu took a more encompassing approach, in which she stated that a public officer should not be viewed against a narrow lens but with a more comprehensive outlook in terms of Article 259 of the *Constitution*. We do, in the present context, agree. This entails considering the related concepts evinced in statute, legal dictionaries and case law. In this connection, *Black's Law Dictionary*, 9th Edition, defines public office as "public office is a position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period" and public service as "a service provided or facilitated by the government for the general public's convenience and benefit. Government employment; work

> performed for or on behalf of the government; broadly any work that serves the public good, including government work and public interest."

70. Against this backdrop, we note that various statutes define 'public officer' in the following manner:

a. The *Public Officer Ethics Act* states that "public officer" means any officer, employee or member, including an unpaid, part- time or temporary officer, employee or member, of any of the following— (a) the Government or any department, service or undertaking of the Government; (b) the National Assembly or the Parliamentary Service; (c) a local authority; (d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; (e) a co-operative society established under the *Co-operative Societies Act* (Cap. 490): Provided that this Act shall apply to an officer of a co-operative society within the meaning of that Act; (f) a public university; (g) any other body prescribed by regulations for the purposes of this paragraph;

b. The *Interpretation and General Provisions Act*, Cap 2 of the Laws of Kenya- "public office" means an office or employment the holding or discharging of which by a person would constitute that person a public officer;

> "public officer" means a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid;"

c. The *Anti-Corruption and Economic Crimes Act*, Cap 65 of the Laws of Kenya- "public officer" means an officer, employee or member of a public body, including one that is unpaid, part-time or temporary;"

71. Further we adopt the approach taken by Lady Justice Njoki Ndungu in *Outa* (Supra) when she stated as follows:

'186. Thus, in arriving at the true meaning of 'public officer' under the *Constitution*, then, and in line with the provisions of Article 259, one must then fully examine the different concepts carried therein. In the instant matter, four key questions in determining whether any person is a public officer, within the meaning of the *Constitution*, will apply:

a. Is the person concerned in an office in the national government, the county government or the public service?

b. Does that person receive remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament?

c. Does that person perform a function within a state organ or a state corporation?

d. Was the person holding public office under the terms of the former Constitution?

If one or more of those questions were answered in the affirmative, then the person concerned would rightly be considered within the proper meaning of the term 'public officer'.'

72. We are further fortified in this approach in view of para. 129 of the majority decision in the said Outa matter, where we stated that one must consider the plurality of laws relating to public service, that is the *Constitution*, statute and regulations, and stated:

'129. In ascertaining who a public officer is, we have to take into account the plurality of laws emanating from the *Constitution*, statutory law, and regulations in relation to public service.'

73. If we are to apply the foregoing questions to the present set of facts to the Appellant and its employees, what conclusion would we arrive at? The first issue to ascertain is whether the person concerned is in an office in the national government, the county government or the public service. In addition, whether the Appellant and its employees perform a function within a state organ or a state corporation. Strictly speaking and going by the definition of a State organ, the Appellant's employees are not in any State organ and therefore, not State officers. However, Chapter 13 of the *Constitution* makes provision for the public service, where at it outlines the values and principles of public service, which in accordance with Article 232(2) applies to public service in all State organs at both levels of government and all State corporations. In this regard, we agree with the High Court's (Lenaola, J (as he then was)) decision in *Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEHIA Workers) vs Salaries Remuneration Commission* (Supra) where he stated that the principles of public service govern both employees of State organs and those of State corporations. It follows, therefore, that State organs and State corporations are in public service, and that their employees are public officers.

74. In the above context, we note that NHIF is a State corporation under Section 2 of the *State Corporations Act* by virtue of being established under an Act of Parliament, the NHIF Act. By parity of reasoning, therefore the Appellant is bound by the values and principles of public service under Article 232. Additionally, in a bid to interpret the *Constitution* holistically as per the edicts of Article 259 of the *Constitution*, it then follows, that Article 260 should be read together with Article 232 of the *Constitution*. If there is any doubt as to the same, the preamble in Article 260, fortifies our view as it reads: 'In this Constitution, unless the context requires otherwise-....' Furthermore, we have, in a myriad of cases, underscored the need and importance of reading the *Constitution* as a whole. See *Communications Commission of Kenya & 5 Others vs Royal Media Services & 5 Others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR; and *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (Advisory Opinion Application 2 of 2012) [2012] KESC 5 (KLR). For instance, in *Law Society of Kenya vs Attorney General & 4 Others* (Petition 45 of 2019) [2023] KESC 19 (KLR) we pronounced ourselves as follows:

'46. The concept of holistic interpretation of the *Constitution* was explained in In the Matter of Kenya National Commission on Human Rights, SC Reference No 1 of 2012; [2014] eKLR, by the court as follows:

> "But what is meant by a 'holistic interpretation of the *Constitution*'? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

47. To construe the import and tenor of any provision of the *Constitution*, the entire Constitution has to be read as an integrated whole, because the *Constitution* embodies certain fundamental values and principles which require that its provisions be construed broadly, liberally and purposively to give effect to those values and principles. Where words used in any provision of the *Constitution* are precise and unambiguous then they must be given their natural and ordinary meaning. The words themselves alone in many situations declare the intention of the framers because, to borrow the words of Burton, J in Warburton v Loveland, (1832) 2 D & Cl 480, the language used "speak the intention of the legislature."

48. Those values and principles reflect our historical and political realities and the people's aspirations for a democratic State, built on the rule of law and respect for human rights.

In reading the *Constitution* holistically, we must conclude that the Fund, being a State corporation, is in the public service and therefore, its employees who discharge their duties under the umbrella of a State corporation would be officers in the public service. Further, Regulation 6(5) of the First Schedule of the *SHIA*, which repealed the *NHIF Act*, provides that the Appellant's employees not employed under *SHIA* could either opt to retire from public service or be deployed elsewhere within the public service. The obvious conclusion to be made then, in answer to the first issue is that they are officers working within the public service.

75. We turn now to the second question as to whether the Appellant and its employees receive funds or remuneration or benefits payable by the Consolidated fund or directly by moneys provided by Parliament. We note that 1st Respondent argued that the funds the Appellant handled were sourced from the contributions of its members, some of whom are not in public service, and therefore, did not

constitute public funds. Is this indeed the case? Section 2 of the *Public Audit Act*, Cap 412B of the Laws of Kenya, defines 'public funds' as:

'(a) all money that comes into possession of, or is distributed by, a State organ including the national or county governments and intergovernmental entities and money raised by a private body under statutory authority;

(b) money held by State organ or public entities in trust for third parties and any money that can generate liability for the government;'

Furthermore, the aforementioned Act defines a 'public entity' as 'includes any department or agency of the government and any authority, body or other entity declared to be a government entity under the *Public Finance Management Act* (Cap. 412A)'.

76. Similarly, Section 2 of the *Exchequer and Audit Act*, Cap 412 of the Laws of Kenya, defines "public moneys" to include:

'(a) revenue;

(b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not;'

Correspondingly, in the aforementioned Act, an "officer" is defined as 'any person in the employment of the Government.'

77. It is also noteworthy that Section 28 of the *NHIF Act* provided that the Fund would be deemed to be a fund established under Section 28 of the *Exchequer and Audit Act* which section is under Part VI (Audit of Accounts of Local Authorities). Section 28 of the *NHIF Act* proceeded to state that the Fund was, therefore, subject to Part V of the *Exchequer and Audit Act* (Audit of Public Accounts and Protection of Public Property). Notably, Parts V and VI of the *Exchequer and Audit Act* were subsequently repealed in 2003 by the *Public Audit Act*. The *Public Audit Act*, on its part, was enacted to provide for the audit of government, State corporations and local authorities to provide for economy, efficiency and effectiveness, including providing for certain matters relating to the Controller and Auditor-General and the Kenya National Audit Office. In both cases, that is the audit of local authorities and State corporations under the *Public Audit Act*, the audit was undertaken by the Controller and Auditor General. The resultant report was then submitted to the Minister responsible for Finance and subsequently tabled before the National Assembly. Evidently, and in view of having the Fund's accounts audited under the various legislation regimes that ideally deal with public property and public funds, the Legislature intended for the Fund's members' contributions to constitute public funds.

78. Likewise, the *PFMA* defines "public money" in Section 2 as follows:

'(a) all money that comes into possession of, or is distributed by, a national government entity and money raised by a private body where it is doing so under statutory authority; and

(b) money held by national government entities in trust for third parties and any money that can generate liability for the Government;'

79. Correspondingly, Section 4(1) of the *PFMA* empowers the Cabinet Secretary for matters relating to finance to declare, by publishing in the Kenya Gazette, a State corporation, authority or body whose functions fall under the national government, to be a national government entity for the purposes of the Act. Section 4(4) also empowers the Cabinet Secretary to publish when a national government entity so declared ceases being one. Likewise, Regulation 211 of the *Public Finance Management*

(National Government) Regulations categorises these national government entities based on whether they are State organs, national Government owned enterprises, regulatory agencies among others. Annexed to the aforementioned Regulations is an explanatory memorandum which provides the purpose of the Regulations to be, inter alia:

'(i) 'to harmonize and standardize their application throughout government service in controlling and managing the finances;

ii. to set out a standardized financial management system for use in Government service which is capable of producing accurate and reliable accounts free from errors, fraud and which will be useful in management decisions and statutory reporting;

iii. to provide for the conduct of fiscal relations between the national and county governments; and

iv. to ensure accountability, transparency and the effective, economic and efficient collection and utilization of public resources.'

80. We note that the National Health Insurance Fund was declared a national Government entity by *Legal Notice No. 33 of 2015* contained in Kenya Gazette Supplement No. 31 published on 20th March 2015, under Schedule 4, category National Government Entities (Executive Agencies, Research Institutions, Public Universities, Public Tertiary Education and Training Institutions, National Referral Health Facilities, Boards and Commissions (Financed through the Exchequer), Fund Management Corporations and any other Entity to Perform any other Public Functions. While this categorization and designation occurred in 2015, we understand the same advanced the intention of the Legislature to have established the Fund for purposes of, among other things, handling public money.

81. As observed elsewhere in this decision, the Fund's accounts were initially subject to the *Exchequer and Audit Act* and later, to the *Public Audit Act*. Subsequently, Section 37 of the *NHIF Act* provided that the Appellant's accounts would be audited in accordance with the *PFMA* and the *Public Audit Act*. The preamble of the *PFMA* reads that it was enacted to provide for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies, and for connected purposes. The *Public Audit Act*'s preamble reads that it is a statute enacted to provide for the functions of the office of the Auditor-General in accordance with the *Constitution*, and for connected purposes. This then raises the query as to why a private entity, as posited by the Appellant, would have the Auditor General audit its accounts unless it was a public entity?

82. The *PFMA*, in particular, sets out intricately the obligations of State corporations and accounting officers of national government entities, like the Fund. For instance, Section 12(2)(j) of the *PFMA* empowers the National Treasury to monitor the financial performance of State corporations. Section 68 places an obligation on a national government entity's accounting officer to be accountable to the National Assembly for ensuring that the entity's resources are used lawfully, effectively, efficiently, economically and transparently. Section 68(2) of the *PFMA* proceeds to set out the factors that the accounting officer must consider including, preparing and submitting estimates of expenditure and revenue to the Cabinet Secretary responsible for the State corporation for approval. Similarly, it provides that a national government entity's financial statements for a given financial year shall be forwarded to the national Treasury. Part III of the *PFMA*, specifically Section 86 thereof, provides that a State corporation shall be established or dissolved with the prior approval of the Cabinet Secretary for matters relating to finance. The Cabinet Secretary is also tasked with monitoring the financial performance of a State corporation and government-linked corporations under Section 88 of the

PFMA. Further, the Cabinet Secretary is tasked under Section 88(2) of the *PFMA* to analyse the financial and other reports of a State corporation, report to the Cabinet and propose measures that can improve a State corporation's financial performance. These are just a few of the provisions that bound the Appellant in terms of its financial reporting. The only logical conclusion to be drawn from the foregoing is that the Appellant was required, under statute, to adopt these reporting standards by virtue of handling public funds and being in the public service.

83. The foregoing settles several issues; Firstly, the Fund discharged public functions and was therefore, ostensibly, in public service. Secondly, the Fund was a national government entity which explains why the financial reporting had to be in conformity with the *PFMA* and the *Public Audit Act*. It, therefore, was not a private entity. Thirdly, under the *PFMA*, the Fund handled public money since the Fund's members remitted their contributions to it. In addition, it handled public funds under the *Public Audit Act* since the Fund, being a national government entity, held the funds in trust for third parties, its members. Similarly, under the *Exchequer and Audit Act*, the Fund handles public money by virtue of being a national government entity that collected contributions from the public.

84. Moreover, a reading of the *NHIF Act* indicates that the Appellant collected contributions from the Fund's members. The Appellant held these monies for the purposes outlined in the *NHIF Act*, including, but not limited to, paying out the members' benefits. Out of these contributions, the Appellant's expenses were met and its members' needs were met. Specifically, Section 36 of the *NHIF Act* provides that the expenses for administering the Fund would, in consultation with the Cabinet Secretary, be paid out of it (the Fund) while Section 35 of the *NHIF Act* provides for the annual estimates of the Appellant's revenue and expenditure, which the Appellant would approve. These monies no doubt came into the Appellant's hands by virtue of the *NHIF Act*. In the circumstances, we find and hold that the Appellant handles public funds and as such, fell squarely within public service, and its employees, by parity of reasoning, were public officers.

85. As was stated earlier, in *Outa* (supra,) we stated that in ascertaining who a public officer is, a court ought to take into account the plurality of laws emanating from the *Constitution*, statutory law, and regulations in relation to public service. We would add that the intersectionality with other public bodies would also make a good indicator of the public service character of a body or person. In the instant matter we would add that not only does the very title and nature of the Appellant speak to a public character, but the interplay between the Appellant and other actors within the government is so clear, that we cannot reasonably justify arriving at a different conclusion. For instance, according to the *NHIF Act*:

    a. the Appellant's chairperson is appointed by the President;

    b. the Appellant is constituted by persons drawn largely from public service, including but not limited to, the Principal Secretaries for health and finance, two persons nominated by the Council of County Governors who are not Governors themselves, and 2 officers (who are not public officers) appointed by the Cabinet Secretary,

    c. the Appellant advises the Cabinet Secretary (for health) on matters relating to national health insurance;

    d. the Appellant can only charge its immovable property subject to acquiring the approval of the Cabinet Secretary;

    e. the Appellant's remuneration is subject to consultation with the 2nd Respondent;

    f. the Cabinet Secretary, in consultation with the Appellant, may make regulations for registration of members to the Fund;

among other areas as listed in the NHIF Act and the PFMA.

86. Considering the specific provisions of the *NHIF Act*, Sections 1A,2,5 and 15(1), of the *NHIF Act* provide that contributions to the Fund are mandatory, while Section 18 was a penal provision for failure to remit or for late submission of contributions. Section 15(2A) of the *NHIF Act* provided that an employer, other than the national government or county government, would be exempt from paying a matching contribution equal to the employee's deduction where the employer had in place private health insurance for its employees whose benefits were equal or better than what the Fund offered. Section 22(5) proceeded to delineate the limits of what the Fund would cater for and the extent to which private insurance would be applied. Clearly, the Fund and private insurance were separate and distinct, and the Fund could not reasonably be understood to be a private entity as advanced by the Appellant.

87. We are clear in our minds that the provisions as captured above and in the *NHIF Act*, were included because it was the intention of the Legislature that the Appellant ought to be regarded as a public office, offering a public service, and its employees, public servants. We so hold.

88. We hasten to add that we are alive to the fact that the *NHIF Act* was repealed by *SHIA*. That said, we note that not only does SHIA bear a striking commonality with the *NHIF Act* in terms of the majority of the provisions, but Rule 3 of the First Schedule thereof which bears the transitional provisions, stipulates that the Social Health Authority (SHA) shall absorb all the rights, powers, liabilities and duties that vested with the Appellant, including all actions, suits or legal proceedings pending. To that extent, we expect that no difficulty will arise from the fact that the Appellant is now defunct.

iii) Whether the 2nd Respondent's advice was binding on the Appellant?

89. Having established that indeed the Appellant is in the Public Service and its employees, public officers, then we can now address ourselves to the only outstanding issue, that is, whether the 2nd Respondent's advice was binding on the Appellant. The Appellant and 1st Respondent contended that the 2nd Respondent's advice was not binding on the Appellant, while the 2nd Respondent and Attorney General advanced a contrary argument. The ELRC held that the decision of the 2nd respondent was only advisory while the Court of Appeal was of the opinion that it was binding.

90. In addition to the 2nd Respondent's constitutional mandate as set out elsewhere in this judgment, it is equally guided by the following principles:

'230.

5.) In performing its functions, the Commission shall take the following principles into account—

a. the need to ensure that the total public compensation bill is fiscally sustainable;

b. the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

c. the need to recognise productivity and performance; and

d. transparency and fairness.'

91. Article 259 of the *Constitution* reads:

'(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on

consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.'

92. Further, being a constitutional commission under Chapter 15 of the *Constitution*, the 2nd Respondent is bound by the objectives set out in Article 249 of the *Constitution*. They are:

'249.

(1) The objects of the commissions and the independent offices are to—

a. protect the sovereignty of the people;

b. secure the observance by all State organs of democratic values and principles; and

c. promote constitutionalism.'

93. In addition to the 2nd Respondent's powers and functions as set out in the *SRC Act* which have been set out elsewhere in this decision, the *SRC Regulations 2013* provide for the procedure for the submission, review and advise on the remuneration and benefits of State and public officers. Regulation 12 lists the factors to be considered when communicating advice on the remuneration of public officers. They include: legal, social, economic and environmental issues; results of job evaluation, performance, productivity and market studies; market rates from the result of comparative market surveys; CBAs; cost of employment against the organization's capacity to pay; salary structures in the public service; equity and competitiveness among other factors. Before the 4-year-cycle review is conducted, the 2nd Respondent is tasked under Regulation 5 to conduct a study that will establish the labour market efficiency and dynamics; prevailing economic situation; and a comprehensive job evaluation. This study informs the basis for review. The review is then communicated to the Cabinet Secretary responsible for matters relating to finance, the Judicial Service Commission, the Parliamentary Service Commission and the National and County Governments for inclusion in the subsequent budgetary estimates. The review is then implemented by Parliament in phases depending on the budgetary allocations approved by Parliament.

94. Therefore, before rendering its advice on the remuneration and allowance of public officers, the 2nd Respondent is required by the law to engage in a rigorous exercise that determines the suitability of the proposed remuneration and allowances all in a bid to ensure the country's fiscal health is sustainable. It would be absurd to have the 2nd Respondent, vested with ensuring the fiscal health of our country, demoted to a mere advice-minting body.

95. In the case of *Muthuuri & 4 Others vs Attorney General & 2 Others* (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR), we upheld the Court of Appeal's decision in *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT), Kenya Union of Post Primary Education Teachers (KUPPET), Salaries and Remuneration Commission (SRC) & Hon. Attorney General (Supra)* and held that, according to Article 259(11) of the *Constitution*, the National Police Service Commission had to seek the advice of the 2nd Respondent herein before determining the remuneration and benefits of the National Police Service, which advice was binding. Similarly, having established that the Appellant was in public service and was under the jurisdiction of the 2nd Respondent, it follows that the 2nd Respondent's advice was binding on the Appellant.

96. The rationale is rather apparent since the 2nd Respondent cannot reasonably discharge its constitutional obligations if its advice were merely a suggestion that one may opt to adhere to or not. Specifically, the 2nd Respondent is tasked with ensuring that the total public compensation bill is fiscally

sustainable, and this cannot reasonably be achieved without the attendant force of law. Indeed, the ELRC noted in para. 35 of its judgment that the 2nd Respondent was formed to address the disparities in wages and salaries in public service, and the amount of revenue the Government was spending on the public wage bill at the expense of development and other essential programmes. As rightly held by the Court of Appeal in the *Teachers Service Commission Case*, a contrary finding would constitute going back to the pre-2010 Constitution era which would defeat the transformative constitutional dispensation we are under.

97. We are further fortified in this finding in view of the composition of the 2nd Respondent which is drawn from persons in the public service appointed by the President, which denotes that its advice should be given high premium.

98. Further, *in The Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR), faced with determining whether its advisory opinion is binding, this Court held that given the fact that an advisory opinion affects the legal, policy, political, social and economic landscape in Kenya, it would be inappropriate to hold that an advisory opinion is not binding. By the same token, the advice from the 2nd Respondent affects the economic, fiscal and even social landscape of the country and it would be remiss to hold that its advice is merely advice, that may be adhered to or not.

99. By way of distinction, *In the Matter of Council of Governors & 47 Others* (Reference 3 of 2019) [2020] KESC 65 (KLR), we appreciated that the impugned recommendation emanated from a constitutional commission (Commission for Revenue Allocation) and as such, its recommendation was not a suggestion. However, Article 218(2) of the *Constitution* specifically provided that Parliament can deviate from the Commission of Revenue Allocation's recommendation with reasons and as such, the said recommendation was not binding.

100. However, in the instant case, there is no proviso barring the binding force of the 2nd Respondent's advice. If anything, Regulation 21 of the SRC Regulations, 2013 provides that the 2nd Respondent's advice concerning the remuneration and benefits of all other public officers will hold and will only be varied under the provisions of Article 259(11) of the *Constitution*. Therefore, from our exposition hereinabove, there cannot be any other rational conclusion than that the advice of the 2nd Respondent was binding.

101. As to the exact point in time when the Appellant was required to obtain the 2nd Respondent's advice, the relevant portion of the *SRC Regulations, 2013* provides as follows:

> '18. Negotiations with Trade Unions
>
> 2. The management of a public service organization with unionisable employees shall seek the advice of the Commission before the commencement of any collective bargaining process with the respective union on the sustainability of the proposal of the union.
>
> 3. Where the collective bargaining process referred to in paragraph (2) is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission.'

In this context, Rule 2 associates itself with the definition of public office as provided under Article 260 of the *Constitution* while 'public service organization as 'a State organ, a state corporation or national or county government entity and includes any organization in the public service established by law'.

In this regard, it is manifestly evident that the Appellant was under a statutory duty to seek the 2nd Respondent's advice prior to entering any CBA.

102. It follows therefore, and we agree with the Court of Appeal, that the advice of the 2nd Respondent was binding upon the Appellant. In addition, the Appellant ought to have sought the 2nd Respondent's advice before completing the CBA negotiations with the 1st Respondent. It therefore follows, that any CBA entered between the Appellant and the 1st Respondent, absent the advice and approval of the 2nd Respondent prior to entering the said CBA, was of no legal consequence.

ii. What orders should issue?

103. In the end, we agree with the findings of the Court of Appeal and as such, we uphold its Judgment delivered on 26th April 2024.

104. Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate of & 4 Others*, (Petition 4 of 2012) [2014] KESC 31 (KLR, we find that due to the public interest nature of this matter, each party should bear its costs.

Final Orders:

105. In the end, we issue the following orders:

a. The Appeal dated 7th June 2024 and filed on 24th June 2024 is hereby dismissed.

b. The Judgment of the Court of Appeal delivered on 26th April 2024 is hereby affirmed.

c. Parties shall bear their respective costs.

d. We hereby direct that the sum of Kshs.6,000 deposited as security for costs upon lodging of this Appeal be refunded to the Appellant.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY, 2025.

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PM MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

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

REGISTRAR,

SUPREME COURT OF KENYA.