**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**[CIVIL DIVISION]**

**MISCELLANEOUS CAUSE NO. 426 of 2019**

**ALTX EAST AFRICA LTD====================  APPLICANT**

**VERSUS**

**CAPITAL MARKETS AUTHORITY================RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed an application under 3, 4 and 6 of the Judicature (Judicature Review) Rules and Judicature Act for judicial review orders namely that;

1. An Order of Certiorari issues against the Respondent, her agents and servants quashing the Cancellation Notice issued by the Respondent Authority on the 20th day of November, 2019 against the applicant whereby the Respondent cancelled the Applicant's approval to operate as a securities exchange on the basis of an illegal additional share capital imposed by the Respondent for licensing stock exchanges in Uganda contrary to the strict provisions of the Capital Markets Act cap 84 as amended.

2. An Order of prohibition issues against the Respondent, her agents, and servants prohibiting the respondent from taking action purporting to gazette or publish in a newspaper the cancellation notice and from

issuing any further Notices concerning the affairs of the applicant to the applicant's licensed intermediaries and clients which are inconsistent with the Capital Markets Act Cap 84 as amended.

3. An Order of Mandamus compelling the respondent to dispose their statutory duties in accordance with the Capital Markets Act 84 as amended.

4. An Injunction restraining the respondents, her agents and servants or persons deriving authority from the agent interfering with the Applicant's right to operate as a stock exchange in Uganda and from taking such further action in relation to the cancellation of the applicant's approval to operate as a securities agent.

5. An Order that the respondent's compensate the Applicant by way of general damages, punitive and aggravated damages for the financial loss caused by the respondent's actions.

6. Costs are borne by the Respondent.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant by Joseph Kitamirike and Sameer Thakkar but generally and briefly state that;

1) The respondent is purporting to impose additional approval requirements/ directives for the operation of a securities exchange outside the scope and administration of the Capital Markets Act as amended. The actions are consequently illegal and therefore ultra vires the provisions of Section 24 and 28 of the Capital Markets Act cap 84 as amended.

2) That the Respondent Authority is in breach of its obligations and natural justice further denied the applicant an opportunity to be heard when they called for a short notice hearing on the 16th of October, 2019 and requested the applicant to appear on 17th of October, 2019 upon which the applicant requested an adjournment to an alternate date that was denied by the respondent.

3) That the applicant and the respondent as a regulator had several communications over the said demands or directives that required the applicant to do or rectify certain things in their business operations.

4) The applicant's lawyers challenged the respondent actions in their letter on ground that the Authority could only issue directives in respect of matters of administration of the Act and share capital was not a matter of the administration of the Act as such that the Notice to Show Cause had been issued illegally was ultra vires and they requested the Authority to immediately and unconditionally withdraw the notice to show cause.

5) The applicant stated that by letter dated 31st October, 2019 the respondent wrote a letter to the applicant through its lawyers and informed the applicant that the Board would consider a decision to withdraw the notice to show cause at its next board meeting that was to take place within 30 days from receipt of the letter.

6) That the respondent Authority in its letter dated 20th November, 2019 informed the applicant that the board of Directors of the Respondent Authority was not satisfied with the reasons advanced by the applicant and as such was proceeding to cancel the applicant's approval as a securities exchange and was proceeding to publish the cancellation in

a gazette and informing its intermediaries and clients of the decision of the respondent.

The respondent opposed this application and filed their respective affidavit in reply deposed by Denis Kizito- Market Supervision Manager at the Capital Markets Authority.

The respondent's in their affidavit they contended that;

1. The respondent's issued the applicant a conditional approval to operate stock exchange subject to the conditions outlined.

2. That in exercise of their mandate as the regulator of capital markets industry in Uganda, subsequently issued follow-up correspondences on the compliance with the conditions attached to the approval.

3. That in a letter dated 9th March 2018, sought a written explanation from the applicant addressing the issues raised in the inspection report. The issues raised in the inspection report included the following;
   i) Unfavourable going concern status
   ii) Unsupported related party transactions
   iii) Inadequate accounting system
   iv) Commingling of revenues earned by the applicant and its Depository ALTX Clearing Limited.
   v) Absence of the fidelity fund and Investor Compensation Fund.
   vi) Inadequate staffing
   vii) Other issues such as inconsistencies in share capital and rental expenditure.
4. The applicant's responses did not sufficiently address the concerns raised in the Notice to show cause why the approval to operate a

securities exchange should not be suspended and the applicant was invited for a hearing.

5. That the applicant constantly failed to comply with the requirements of the law and whenever the respondent required that they comply, the Applicant circumvented the request and on several occasions made unsubstantiated complaints to the Ministry of Finance, Planning and Economic Development and the Inspectorate of Government. The Respondent provided responses to the claims made with evidence of the Applicant's non-compliance.

6. That the applicant made responses to the directives, they did not comply fully within the stipulated time of three months running from the date of communication of the directives, that is, 10th April 2019 to 11th July 2019, and even with responses provided some where not to the respondent's satisfaction which included the unfavourable going concern of the applicant, unsupported related party transactions, inconsistencies in share capital, inadequate accounting systems and absence of fidelity fund and investor compensation fund.

7. That the applicant was notified of the hearing to be held on 29th October, 2019. The applicant stated via email that the notice period was inadequate however their lawyer confirmed attendance.

8. The applicant's lawyers attended the meeting and rejected an offer of extension of time within which to respondent to the notice to show cause why the approval to operate a securities exchange should not be cancelled, and instead insisted that the said notice and intended hearing should be immediately and unconditionally withdrawn by the 31st of October, 2019.

9. That the board of the respondent held a meeting on the 19th day of November 2019 and considered the applicant's response to the Notice to Show cause and the decision-cancelling the approval to operate a securities exchange was communicated to the Applicant on the 20th day of November 2019.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The following issues were formulated by court for determination;

1. ***Whether the decision cancelling the approval to operate a securities exchange of the applicant was made in accordance with the law?***

2. ***What remedies are available to the parties?***

The applicant was represented by *Mr. Byenkya Ebert, Mr. Kihika Oscar and Ms Jenna Mukasa* while the respondent was represented by *Ms Angella Kiryabwire Kanyima (Director Legal and Board Affairs) and Ms Sheila Watuwa Kirunda ( Senior Compliance Officer)*

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not

determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

***Whether the decision cancelling the approval to operate a securities exchange of the applicant was made in accordance with the law?***

*Applicants submissions*

The applicant's counsel submitted that this application for judicial review challenges the decision of the Respondent, a regulatory authority, to withdraw an approval previously granted by the said Respondent to the Applicant to operate a stock exchange in Uganda. The approval was granted on 15th September, 2014 and the applicant has been in lawful operation since.

Approvals to operate an exchange are granted under S. 24 of the Capital Authority Act as amended. It provides as follows:

*24(3) , The Authority may, by notice in writing, approve a person as a stock exchange or commodities exchange if it is satisfied that –*

*a) The applicant is a limited liability company whose liability is limited by shares.*

b) *That the applicant's board of directors is constituted in a manner prescribed by the Authority : and*
c) *The applicant has made and adopted rules in compliance with the Act and any regulations made under this Act.*

According to the applicant's counsel, other than the simple and clear conditions set under this provision; <u>there are no other legal requirements for a person to be approved to operate a stock exchange. Significantly, there is no power set out thereunder to introduce any new conditions for approval except those set out in the law by Parliament.</u>

Secondly, approval is <u>exclusively</u> governed by S. 24 of the Act. Nowhere in that section does the law provide for any "continuing approval requirements". Approval is a one off process. Therefore one cannot withdraw an approval on the basis of grounds that do not constitute lawful approval requirements. That would have the effect of allowing the regulator to amend and adjust the approval requirements as it pleases which was never the intention of parliament. Approval requirements must be objective not subjective.

The law does provide a power to the Authority to withdraw an approval. However this power <u>**is a limited power**</u> exercisable only under circumstances prescribed by Parliament.

One of the remarkable aspects of the decision of the Respondent to withdraw the Applicant's approval to operate a stock exchange, is the apparent lack of awareness demonstrated by the Respondent that it can only commence approval proceedings in the "public interest". This public interest requirement is embedded in our law in Section 24(7) of the Act which provides:

*" Where the Authority* ***is of the opinion*** *that an approval granted to a stock exchange under subsection (3)* ***should be withdrawn in the public interest*** *, it may serve on the council of the stock exchange a written notice; and ,* ***after giving an opportunity to the council to be heard*** *on the matter , it may cancel the approval made under subsection (3) except that the cancellation shall not take effect until after the expiration of three months from the date on which the cancellation is published in the Gazette and in one daily Newspaper. "*

This provision makes it clear that before the Authority can even issue a notice for cancellation of the approval **it must have formed an opinion that withdrawal of the approval is in the public interest. Furthermore, this provision does not provide for any other basis for withdrawal of an approval except the public interest.**

In light of this clear statutory requirement the applicant's counsel invited court to critically examine all the relevant correspondence between the Applicant and the Respondent that led up to the withdrawal of approval. It is significant that in all of these documents authored by the Respondent no mention is made whatsoever of the "public interest". Nowhere in the deliberations or discussion of the Board, as evidenced by the discovery documents, is reference made to any conduct of the applicant being inimical to the public interest. No document records any "opinion" of the Board expressed in a formal resolution, that it had concluded, on a considered basis, that the public interest would be best served by withdrawal of the applicant's approval to operate an exchange. The notice of withdrawal letter does not state that it is issued on a public interest basis or on the basis of the Board's opinion to that effect. The minutes of the meeting referred to in the letter do not reflect either a discussion on public interest or an opinion formed on that basis. The final cancellation of approval letter does not make any reference to the decision to withdraw the approval being made on the basis of the public interest.

The public interest power of a regulator in securities markets is not a new one to be found only in Ugandan law. It is a well-known and well established power whose parameters and principles have been considered by common law courts and regulators in jurisdictions with developed capital markets. Fortunately for Uganda, this means we need not reinvent the wheel.

The applicant's counsel made reference to the Canadian Supreme Court case of COMMITTEE FOR THE EQUAL TREATMENT OF ASBSTOS MINORRITY SAHREHOLDERS 2001 2 SCR

That case considered a provision of Canadian Securities law with language similar to that of S. 24 of the Ugandan Capital Markets Act. The provision reads:

*127. The Commission may make one or more of the following orders if <u>in its opinion</u> it is in <u>the public interest</u> to make the order or orders…..*

The Court then considered the scope of the power to make orders in the public interest as follows:

***"However the public interest jurisdiction of the OSC is not unlimited.*** *Its precise nature and scope should be considered by considering S. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard.* ***<u>First it important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act…, namely to "provide protection to</u> investors from <u>unfair , improper or fraudulent practices ´and ´to foster faster, fair and efficient capital markets and confidence in capital markets."</u>*** *(Emphasis supplied)*

The court went on to explain;

*" The role of the OSC is to protect the public interest by removing from the capital markets those* ***whose past conduct is so abusive as to warrant apprehension***

***of future conduct detrimental to the integrity of the Capital Markets …in*** *contradistinction,* ***it is for the Courts to punish or remedy past conduct."***

And again:

*'In summary, pursuant to S. 127(1) the OSC has jurisdiction and a broad discretion to intervene in Ontario capital Markets if it is the public interest to do so.* ***However the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in capital markets generally.***

*And finally from this judgment****;***

*"****Was the OSC decision reasonable?***

***The OSC was cautious in the application of its public interest jurisdiction in this case****. This approach was informed by* ***the OSC's previous jurisprudence and by four legitimate considerations*** *inherent in S. 127(1) itself i)* ***the seriousness and severity of the sanction applied for , ii ) the effect of imposing such a sanction on the efficiency of and public confidence in Ontario Capital markets, iii a reluctance to use the open-ended nature of the public interest jurisdiction to police out of province activities and iv) a recognition that S. 127 powers are preventative in nature.´***

The Supreme Court in the ASBESTOS case also relied on the case of RE CANADIAN TIRE CORPORATION 1987 Carswellont 128.

Regarding the question of intervention in the public interest the court said;

*"The commission was cautious in its wording in CABLECASTING and we repeat the caution here.* ***To invoke the public interest test …. The conduct or transaction must be clearly demonstrated to be abusive of shareholders in particular and of the capital markets in general. A showing of abuse is different from and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover the abuse must be such that it can be shown to the Commissioners' satisfaction that a question of the public***

***interest is involved. That almost invariably will mean some showing of a broader impact on the Capital markets and their operation. "***

According the applicant's counsel, from these cases it is clear that the standard for applying a public interest test is very high indeed.

- Responsible regulators exercise extreme caution in invoking the power and consciously address their minds to whether or not the circumstances call for the exercise of the public interest power. (The Respondent did not do this.)
- Responsible regulators conduct full, public and proper hearings where they give meaningful opportunity to affected parties to make representations in their own defence before they invoke the power.(The Respondent did not do this.)
- Responsible regulators take cognizance of the fact that the power is not for the purposes of punishment but for prevention of future abusive conduct by regulated players in the market based on past abusive conduct. {The respondent did not do this.)

My Lord we further rely, for comparison, on examples of appropriate due process involving the conscious and cautious application of public interest principles by regulators in other jurisdictions. We have enclosed two regulatory rulings made in hearings conducted by the Securities Commission of District Columbia to compare how they went about the exercise of the public interest power.

These are the decision of the Securities Commission of District of Columbia in RE HAMILTON 2018 BCSECOMM 299 and RE Carnes 2015 BSCECCOM 187.

In both cases you will note, your Lordship that

- The commission is properly constituted for a formal hearing before it considers the exercise of its special interest power.
- Extensive hearings are conducted with legal representation and submissions on facts and law.

- Invariably the Commission is considering a complaint from an independent person, usually one of the participants in the regulated environment. The regulator is never itself a party to the matter It is investigating. It considers the issues impartially after taking evidence from two opposing sides and listening to legal arguments from both sides.
- The Commission gives a reasoned ruling explaining in detail the basis of its decision.
- The Commission carefully examines what it means to exercise a public interest power and reminds itself of the appropriate principles for its exercise. In particular, it cautions itself on overreaching.
- In cases where there is no abusive behavior by the person whose conduct is being investigated the commission declines to use its public interest power.

There is no reason why , in Uganda, a regulator should fall so far short of the established standard that it fails to even acknowledge , in its decision making process or any correspondence related thereto, that it can only withdraw an approval of a securities exchange <u>in the public interest</u>. There is also no reason why the Courts of Uganda or the people of Uganda should accept such a low standard particularly when it has such drastic and destructive consequences.

On this basis alone, the applicant's submitted that the decision of the Respondent to withdraw the applicant's approval to operate a securities exchange was ultra vires.

The applicant's counsel also submitted that, It is true that the Respondent has some power to issue directives to a stock exchange under S. 28 of the Capital Markets Authority Act. However, my lord, this power to issue directives must also be based on a public interest premise. The relevant provision provides:

*"28. **Power of the authority to issue directions to a stock exchange.***

1) *The Authority may,* ***where it appears to be in the public interest*** *, issue directions to a stock exchange:-*

   a) *With respect to trading on or through the exchange facilities of that stock exchange or with respect to any security*
   b) *With respect to the manner in which a stock exchange carries on its business , including the manner of reporting off market purchases; or*
   c) *With respect to any other matters which the Authority considers necessary for the effective administration of this Act*
   d) *And the stock exchange shall comply with any such direction.*

It was his contention that satisfying the public interest threshold is a pre-condition to the exercise of the power to issue directions under S. 28. Therefore in issuing those directions, the Respondent is required to demonstrate that it actively identified a matter detrimental to the public interest arising from "past abusive conduct" by the Applicant. It must have met, discussed it carefully and determined what public interest was being jeopardized by the conduct of the Applicant. It must have considered whether the conduct of the Applicant met the standard of "abuse of the capital markets". It must have characterized that conduct as "being unfair, improper or fraudulent". This is in his view is clarified from the case law cited as established to be the threshold. It in only then that the Respondent would have been entitled to issue directions.

The applicant's counsel further submitted that, it is also significant that the directions dealt with matters that do not fall within the ambit of S. 28 of the Act which we have reproduced above. The essence of the directions is that they were purported to address the capital adequacy of the Applicant. In short the Respondent's Board introduced a new capital requirement into Ugandan law which was not authorized by Parliament.

According to counsel there are no capital requirements in the substantive law for any person to operate a securities exchange in Uganda. The rationale for this is obvious. In simple terms, a securities exchange is simply a market

place. It is a forum, nothing more, where people go to trade in securities. The stock exchange does not invest or hold any money on behalf of any investors. That investing, holding and trading is done by customers directly or by brokers. The stock exchange is not custodian of any investor funds, nor does it involve itself in the settlement of funds. That is done by a separate clearing entity. In effect, just like any market place where one goes to buy or sell a commodity, the customer has no legitimate concern how much money the market owner has in his bank account because he stands to lose or gain nothing by it. In short my lord, there is no likelihood whatsoever that the investor in any particular security traded on the stock exchange is likely to be endangered by the state of the exchange's coffers. It is for this simple reason my Lord that capital adequacy has never been a requirement for approval of a securities exchange in Uganda. If Parliament had thought it necessary that there should be minimum capital requirements for operating a stock exchange it would have put it in the law.

It was also the applicant's submission that under the Capital Markets Act there is provided a specific remedy for the disobedience of directions issued by the Authority and it does *not* include cancellation of approval to operate a stock exchange.

Under S. 28(2) it is provided as follows:

*" A Stock exchange which, without reasonable cause fails to comply with a direction given under subsection 1) commits an offence and is liable on conviction to a fine not exceeding one million shillings and to a further fine of fifty thousand shillings for each day on which the noncompliance continues*.

If the Respondent was of the opinion that the Applicant had failed to comply with its directions, its **only option** was to imitate a prosecution of the Applicant. The question of whether or not noncompliance is established is not for the Respondent's Board to determine. It is for a court of law. In Court

the decision would be based on firstly, whether or not the Applicant had indeed failed to comply and then, secondly, on whether or not it had reasonable grounds for noncompliance. This being a criminal offence, the standard of proof of non-compliance is beyond reasonable doubt. That is the well-established standard for criminal offences. It is not a matter of the subjective opinion of the accuser, in this case the Respondent's Board. Finally the punishment is prescribed. It is a fine of **UGX. 1,000,000 (One Million Shillings only).**

In counsel's view, if Parliament had thought it appropriate that failure to comply with the regulator's directions pursuant to S. 28 should result in the withdrawal of approval to operate a stock exchange they would put it in the law.

There can be no doubt that the cancellation of the Applicant's approval was solely premised on its supposed non-compliance with the directions of the Respondent. Again, on these facts alone, the cancelation of approval was ultra vires.

**The applicant further submitted that the applicant was denied the right to a fair hearing and or the Respondent violated the principles of natural justice.**

Firstly they purported to act as accuser, investigator, prosecutor, judge, and even executioner in this matter. The facts are quite clear from their own documents and evidence.

I) The Respondents have not provided any evidence that they received any complaint from any members of the public or other participants in the market about any improper conduct by the Applicant.

II) The Respondents initiated the events that culminated in the cancellation by way of an inspection of the Applicant's books of account under S. 20 of the Act. The inspectors were either the Respondent's staff or their agent appointed by the Respondent

pursuant to S. 20(2). Therefore the inspection was the action of the Respondent in all respects.

III) Based on the "draft inspection report" (your Lordship should note that no final inspection report was ever provided to the Applicant despite repeated requests), the Respondent's board commenced a process of consideration and further inquiry through correspondence and meetings between the Respondent's management and the Applicant. In so doing the Respondent took on the role of an investigator.

IV) Subsequently the Respondent's management, presumably, made to the Respondent's Board an accusation that the Applicant had failed to comply with the directions issued by the Board. In this case the Respondent took on the role of accuser.

V) This was followed by the Respondent acting on its own accusations to find the Applicant to be non-compliant with its own directions. In this case it took on the role of a judge. (As we have pointed out the law reserves this right to a criminal court.)

VI) Finally, the respondent then took action, based on its own investigation and accusations, to cancel the applicant's approval to operate a stock exchange and further, proceeded to gazette and publish the cancellation. In this case it took on the role of not only judge but also executioner!

The applicant's counsel submitted that, no principle of justice is better established in law than that one cannot combine all these roles. The only way the Respondents could have acted properly in this matter was to institute prosecution under the provisions of S. 28 of the Act and leave it to court to take on the role of an independent arbiter to decide whether or not the Applicant was in non-compliance with the Respondent's directions and , if so, what the appropriate sanction would be.

The right of a stock exchange to be heard before the regulator can withdraw approval of its licence is entrenched in S. 24 (7) of the Act. It is not a matter within the discretion of the Respondent.

On the 20th November, 2019 without responding to the request by Applicant's counsel and without communicating the outcome of any board meeting to consider withdrawal of the notice to show cause, the Respondent proceeded to cancel the Applicant's approval to operate a stock exchange without hearing the Applicant.

The Respondent led the Applicant to believe that the withdrawal of the notice to show cause was going to be seriously considered by the Respondent's Board. He categorically promised to communicate to the Applicant's advocates the outcome of their deliberations on withdrawing the notice. He never did!

Even if the Board declined to withdraw the notice, it was obliged to communicate that decision to the Applicant before taking any further action on the notice to show cause.

Thereafter it was bound to set a new hearing date and communicate it to the Applicant as requested by Applicant's counsel. By failing to do so the Respondent clearly violated the Applicant's right to be heard and failed in its statutory duty to provide the applicant an opportunity to be heard. This constituted a violation of the principles of natural justice and also constituted an ultra vires act.

The applicant's counsel finally submitted that the Respondent's decision to cancel the Applicant's approval to operate a stock exchange was both ultra vires and carried out in violation of the principles of natural justice. This entitles the Applicant to the judicial review prayers made in the Application.

***Respondent's Submissions***

It is the Respondent's case on the other hand that the cancellation of the Applicant's approval to operate a securities exchange was a lawful decision

that resulted from the Applicant's refusal to comply with the requirements of the law relating to the regulation of securities exchanges in Uganda despite being given guidance, audience and several opportunities to be heard by the Respondent.

That the cancellation was neither irrational nor illegal and that at all times the Respondent followed the right procedure to cancel the approval for the Applicant to operate a securities exchange.

According to the respondent's counsel, Section 24(3) should not be read in isolation. Indeed, all statutes must be read as a whole.

Section 24 of the CMA Act prescribes the basic requirements for approval of a securities exchange.

It provides as follows:

> *(3) The Authority may by notice in writing, approve a person as a securities exchange or commodities exchange if it is satisfied that—*
>
> *(a) the applicant is a limited liability company whose liability is limited by shares;*
>
> *(b) that the applicant's board of directors is constituted in a manner prescribed by the Authority; and*
>
> *(c) the applicant has made and adopted rules in compliance with the Act and any regulations made under the Act.*

Section 28 (7) of the CMA act deals with cancellation of approval.

It provides as follows:

> *(7) Where the authority is of the opinion that an approval granted to a securities exchange or commodities exchange under subsection (3) should be*

*withdrawn in the public interest, it may serve on the council of the securities exchange a written notice and after giving an opportunity to the council to be heard on the matter, it may cancel the approval made under subsection (3), except that the cancellation shall not take effect until after the expiration of three months from the date on which the cancellation is published in the Gazette and in one daily newspaper.*

Section 24 (10) provides as follows:

*(10) An approved securities exchange or commodities exchange shall comply with requirements of the Authority and shall pay an annual fee to the Authority at a rate determined by the Authority.*

Regard must also be had to the following provisions: the Long title of the CMA Act; Section 4B- Objects of the Capital Markets Authority; Section 5- Functions of the Capital Markets Authority; Section 101- Power of the Authority to make regulations for carrying out or giving effect to the Act.

It was their contention that all the relevant statutory provisions cited above must be taken into account in determining the powers and procedures for approval, operations and cancellation of approval.

The respondent's counsel contended that it is correct that under section 24 (7) of the CMA Act, the Authority may cancel an approval if it is of the opinion that the approval should be withdrawn in the "public interest".

The Applicant submitted that the Respondent did not disclose to it any evidence of public interest that was being violated prior to the cancellation of the approval to operate a securities exchange and that no issue was made of any interest of members of the public trading on the Applicant exchange

that was put to risk on account of the conduct of the Applicant in the running of its business.

The Respondent is mandated to regulate the capital markets industry in Uganda. This mandate is bestowed on the Respondent by the Capital Markets Authority Act Cap. 84 and includes among others the following;

i. *Section 4B which states the objects of the Authority as: promote confidence in the capital markets, ensure honesty and transparency in the capital markets, carry out investor education, protect investors and reduce systemic risk.*
ii. *Section 5 further gives the functions of the Authority. For purposes of this case the Respondent highlights S. 5 (1):*
*(e) to implement regional and international standards and best practice in securities markets, securities regulation and supervision; and*
*(f) to protect investor interests*
*and*
*S. 5 (2)*
*l) monitor the solvency of the licence holders and take measures to protect the interests of the customers where solvency of any licence holder is in doubt and*
*m) protect the integrity of the securities market against any abuses*

The Respondent's mandate is set out in the Capital Markets Authority Act Cap 84 and includes under section 5; the power to implement regional and international standards and best practices in securities markets, securities regulation and supervision, grant approvals to operate a securities exchange and conduct any investigation relevant to the securities market and publish any report arising from such investigation. Sections 19 and 20 give the Respondent the power to carry out investigations and inspect books, accounts documents and transactions of an approved person respectively.

Further, the Respondent is a member of the International Organisation of Securities Commission (IOSCO), the international body that sets the global standards for securities market regulation. IOSCO sets out principles against which the securities markets are governed. The following principles set out the establishment and powers of the regulator:

i) *Principle 5 states that the Regulator should have or contribute to a process to identify, monitor, mitigate and manage systemic risk, appropriate to its mandate;*
ii) *Principle 10 states that the regulator should have comprehensive inspection, investigation and surveillance powers;*
iii) *Principle 11 states that the regulator should have comprehensive enforcement powers; and*
iv) *Principle 12 states that the regulatory system should ensure an effective and credible use of inspections, investigation, surveillance and enforcement powers and implementation of an effective compliance program.*

The Respondent submits that Parliament in its wisdom found it necessary to entrust the Respondent with all the above powers to ensure that the capital markets industry in Uganda is well regulated. The Applicant cannot then challenge the said powers in an application for judicial review. Instead such challenge can be presented to the Constitutional court challenging the alleged "excessive powers" for the Respondent and any other regulatory authority.

Members of the public invest in the capital markets industry through the Applicant. The Applicant has wrong books of account and this can lead to

financial fraud and mismanagement which can have a catastrophic effect on not just the investors, the capital markets but the whole financial industry.

Respondent's counsel submitted further that given the importance of a securities exchange, it is pertinent for the Respondent to keep a keen eye on securities exchanges. The Applicant was well aware that the Industry is heavily regulated and that the conduct of business is subject to heavy scrutiny not just locally but globally under IOSCO.

It is of utmost importance for the Respondent as a regulator to take measures to ensure that the public is protected from unnecessary financial loss which can lead to catastrophic results. The Respondent needs to create and promote confidence in the capital markets. Failing to take action against errant intermediaries or persons destroys confidence of the public in the capital markets.

It was their contention that the Respondent exercises its mandate in the interest of the public; that is, both the investors and the intermediaries; and is actually obliged, as shown above, to protect investors from loss and not to wait for investors' complaints before any action can be taken to prevent potential losses and build confidence in the markets as mandated by law.

The Respondent/regulator having conducted inspections and several hearings with the Applicant was certain that the manner in which its business was being conducted exposed the members of the public that invest through the Applicant's exchange to a great risk. Such losses, have a ripple effect on the entire economy of the nation and affects the public's confidence in the market.

They submitted that the Respondent's decision to cancel the Applicant's approval to operate a securities exchange in the public interest was intra vires and proper and lawful exercise of the statutory powers bestowed on the Respondent by the Capital Markets Authority Act.

The respondent contended that the Applicant is improperly going beyond the purview of judicial review by asking court to inquire into the merits of the decision instead of the decision making process. This is not an appeal.

The Applicant alleges that the Respondent issued directives to the Applicant relating to the capital adequacy of the Applicant; a matter which, according to the Applicant does not fall within the jurisdiction of the Respondent.

*Section 5 (1) (e) of the Capital Markets Authority Act Cap 84 requires the Respondent to implement regional and international standards and best practice in securities market, securities regulation and supervision.*

*Section 35 of the Act further states that an approved person shall, meet such minimum financial requirements, educational qualifications and other requirements as may be determined by the Authority.*
*Principle 29 of the IOSCO principles cited above states that regulation should provide for minimum entry standards for market intermediaries and Principle 30 states that there should be initial and on-going capital and other prudential requirements for market intermediaries that reflect the risks that the intermediaries undertake.*

*Principle 31 states that the market intermediaries should be required to establish an internal function that delivers compliance with standards for internal organisation and operational conduct, with the aim of protecting the interests of clients and their*

*assets and ensuring proper management of risk, through which management of the intermediary accepts primary responsibility for these matters.*

Capital adequacy is one of the ways of bolstering confidence in the market which is essential for any business in the financial services sector. The Applicant's allegations that this is not an essential requirement displays a lack of appreciation of how to promote confidence for the investors, brokers, potential issuers of securities on the exchange. It is the Applicant's way of downplaying the potential risks that arise as a result of insufficient capital which is the biggest risk for such an industry that deals with money collected from the public.

The Securities Exchange is an important component of the Capital markets industry because it provides an avenue where investors can make long term investment decisions and also offers access for issuers to raise patient capital to spur growth of an economy. The capital market comprises of complex institutions and mechanisms through which medium-term funds and long-term funds are pooled and made available to individuals, business and governments. The capital market functions through the securities exchange market. A securities exchange is a market which facilitates buying and selling of shares, securities, bonds, securities and debentures. In fact, the capital market is related to the supply and demand for new capital, and the securities exchange facilitates such transactions.

From the Applicant's claims and conduct, it is clear that the Applicant company wants to carry out business in a heavily regulated industry but is unwilling to meet the terms that govern the trade in which they seek to participate. Such conduct is most unfortunate and should be treated with contempt by the Courts of law.

The Applicant being a company and dealing with other people's money is required to have its "house" in order is obliged to comply with the provisions and standards of all the laws that can affect the business of the Applicant which include the Companies Act No. 1 of 2012. It is therefore absurd to suggest that the Respondent should ignore the non-compliance with the Companies law which non-compliance directly affects the securities business since it reflects in the financials of the Applicant and which financials the Respondent is mandated to supervise.

*Section 9 of the Capital Markets Authority Act provides for examination of any books that may be found on those premises or that may be in possession of the approved person or that may in any way relate to the business of the approved person or to matters listed in subsection (6). Subsection 6 refers to books relating to (a) the business or affairs of an approved person or former approved person (b) the integrity, competence, financial standing (c) the compliance by those persons with this Act…*

*Section 9 (9) further provides that the Authority may instruct an accountant or other expert to examine the books or any of them the report to the Authority.*

The Applicant's approval to operate a securities exchange was not cancelled on the basis of additional/new conditions for approval; which according to the Applicant, are not provided for in the law, but as demonstrated by the provisions cited by the Respondent above, the cancellation was a result of a protracted series of non-compliance with express provisions of the law. In the premises, the Applicant cannot claim that the cancellation of their approval to operate a securities exchange was unreasonable.

While exercising its mandate, the Respondent carefully considers how to respond to breaches of the law. It takes into account a range of factors when determining how to investigate and enforce to ensure that its' finite resources

are appropriately deployed. The Respondent has for the past 2 years been dedicating its entire technical team together with the Board to address issues raised by the Applicant, reviewing their rules, advising, guiding, attending meetings, responding to concerns raised and so forth with the Applicant.

The Applicant has consistently been adamant and refused to address most of the issues on which it has been guided. The Applicant disregards the provisions of the law and the mandate of the Respondent. According to the Applicant the Respondent needs to only approve their applications and then step aside and let them do as they please regardless of what the law requires. Where a response is given on any matter, as long as it doesn't favour the Applicant it is disregarded.

The Respondent is committed to growing and expanding the capital markets industry in Uganda. In the spirit of growing the industry and despite the Applicant's consistent non-compliance, the Respondent continued to extend goodwill to the Applicant and took every effort possible in its capacity as a regulator to help the Applicant operate its business within the law which the Applicant but the Applicant has constantly abused this goodwill.

From the foregoing, and considering the effort made by the Respondent to help the applicant conduct their business within the acceptable confines of the law to no avail, and given the uncooperative and defiant behaviour of the Applicant, any reasonable authority in similar circumstances would have arrived at the same decision that the Respondent did. The Respondent's decision was rational.

In response to the Specific remedy for disobedience of directives, the respondent's counsel submitted that criminal prosecution is the only remedy for failure to comply with directives.

The Respondent acted within its statutory mandate and powers when it decided to cancel the approval of the Applicant to operate a securities exchange.

The respondent denies having failed to accord the applicant a fair hearing or following the rules of Natural justice.

Following the Applicant's continued non-compliance, the Respondent invited the Applicant for further hearing to show cause why the approval to operate a securities exchange should not be withdrawn. The Applicant requested for a postponement of the hearing and proposed convenient dates for their lawyers to attend. The Respondent then notified the Applicant of the hearing to be held on 29th October, 2019. The Applicant stated via email, that the notice period was inadequate however, their lawyer confirmed attendance.

The Applicant through their lawyers, Byenkya Kihika & Co. Advocates, subsequently demanded inter alia, that the said notice be immediately and unconditionally withdrawn, failing which, legal proceedings would be instituted against the Respondent.

According to the respondent's counsel the Applicant REJECTED the chance of an oral hearing.

The Respondent gave the Applicant the option to apply for extension of time within which to respond to the notice to show cause which the Applicant's lawyer rejected. The Respondent took the various responses by the Applicant into consideration before cancelling their approval to operate a securities exchange as it did not meet the standards under the law.

The Applicant was given a fair hearing and the Respondent followed the principles of natural justice. In the circumstances therefore, the Applicant's claim for procedural impropriety falls short.

The Applicants' refusal to accept the decision made by the Respondent and the reasons for it does not amount to a denial of natural justice. The Respondent as regulator of the capital markets industry in Uganda cannot be expected to tolerate non-compliant market players.

The respondent contends that the Respondent acted legally, reasonably and within its mandate as provided for under the law and therefore the decision to cancel the Applicant's approval to operate a securities exchange fall far from a breach of natural justice.

The Respondent applied the law comprehensively including the Acts of Parliament, Regulations, Rules and International Standards that Uganda is a party to and acted independently when it cancelled the Applicant's approval to operate a securities exchange.

***Determination***

The purpose of judicial review/administrative law is to identify the excesses of power and endeavours to combat them. Power may be exercised for purposes other than those for which it has been conferred by the Constitution or the law.

The will of the power-holder becomes the sole justification for the exercise of power. This is the essence of arbitrariness. It is clear that if powers are used outside the ambit of statutory purposes, it is not only ultra vires but also one of arbitrariness.

Where a public authority or decision maker has directed itself correctly in law, the court on judicial review will not interfere, unless it considers the decision was irrational. The court will however only quash a decision if the

error of law was relevant to the decision making process. This could be ascertained where there is ulterior purpose or motive.

Powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time the powers are conferred. If a court finds that powers have been used for unauthorised purposes, or purposes 'not contemplated at the time when the powers were conferred', it will hold that the decision or action is unlawful.

Power or discretion conferred upon a public authority must be exercised reasonably and in accordance with law. An abuse of discretion is wrongful exercise of discretion conferred because it is the exercise of discretion for a power not intended. Accordingly, the courts may control it by use of the *ultra vires doctrine.* The courts task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances. See *Minister of Environment Affairs and Tourism v Bato Star Fishing (Pty) Limited 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) para 49.*

It can equally be said that fettering of one's discretion is to abuse that discretion. The law expects that public functionaries would approach the decision making process with an open mind. Reason and justice and not arbitrariness must inform every exercise of discretion and power conferred by statute. See ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132***

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament conferring it is presumed to have intended.

The powers conferred under The Capital Markets Authority where never intended to be exercised in such a way that would defeat the entire spirit of the Act of regulating operations of the stock exchange. The decision rendered by the respondent cannot be objectively capable of furthering the purpose for which the power was given under the Capital Markets Authority Act and

for which the decision was purportedly taken ***cancelling the approval to operate a securities exchange of the applicant***.

It is a requirement of the rule of law that exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect, arbitrary and inconsistent with this requirement. See *Pharmaceutical Manufacturers Association of SA In Re:Ex Parte Application of President of the RSA 2000 (3) BCLR 241(CC)*

The respondent seems to have taken the powers given under the Act in its nebulous form and failed to apply the same in manner that avoids arbitrariness and or unfairness. It is true the whole Act must be read as whole and certain powers conferred must not be used to defeat the entire Act.

The respondent clothed themselves with the 'public interest' considerations while exercising the wider powers in order to achieve an intended aim of ***cancelling the approval to operate a securities exchange of the applicant***.

The respondent was clear in their affidavit in reply that the applicant was offered a conditional approval to operate a stock exchange subject to the conditions outlined. In addition, the respondent issued directives which in their opinion the applicant failed to comply with.

The respondent took a rather different legal path of invoking public interest considerations for failure to rectify the concerns raised in their inspection report that resulted in issuance of directives rather than applying the available remedy for non-compliance with the directives.

Section 28(2) of the Capital Markets Authority Act provided for making directives for better exercise of the regulatory function. The respondent indeed issued the said directives in accordance with the law.

Under S. 28(2) it is provided as follows:

*" A Stock exchange which, without reasonable cause fails to comply with a direction given under subsection 1) commits an offence and is liable on conviction to a fine not exceeding one million shillings and to a further fine of fifty thousand shillings for each day on which the noncompliance continues*.

It is quite clear under the law that there are procedural steps that had to be taken in case the applicant failed to comply with the directives. The respondent decided to exercise a broader power which is the exercisable as the last resort to achieve its intended aim as an exercise of power in public interest.

The exercise of power in public interest must be with extreme caution since it used for a purpose in different legislations. It is a ceiling for the exercise of power and any decision maker who acts in public interest must justify his or her action or decision to the satisfaction of the public interest threshold.

It is not enough for a public officer or decision maker like the respondent to jump onto public interest principle to justify wrongful exercise of power.

Public interest, if it can be defined serves as a fundamental criterion for establishing the legitimation of power. Exercise of power, then, is legitimate and necessary, and even acceptable, only in as much as it can be established that it serves public interest.

Consensus or general assent does not always represent public interest or public good. Decisions regarding public interest should be taken as close as possible to the persons involved. Therefore public interest cannot be defined on a consensual basis.

Acting in public interest has two separate components; The objectives and outcomes of the decision making process are in public interest and secondly, the process adopted and procedures followed by decision-makers in exercising their discretionary powers are in public interest. Parochial

interests, i.e interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern can never amount to public interest.

*"The public interest"* is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (i.e., more 'public') concern.

While the meaning of "the public interest" stays the same, the answer to the question what is "in" the public interest will depend almost entirely on the circumstances in which the question arises. It is this variable content which makes the term so useful as a guide for decision-makers.

This court agrees with the applicant's counsel to the extent that the respondent did not set any public interest justification for recalling or cancellation for approval to operate a stock exchange by the applicant. The record as presented to court does not show any considerations of public interest.

Determination of public interest decision taking may involve a due process through which it can be established that the tenets and criterion is specifically met by the public body. The cases cited by the applicant's counsel are very persuasive on this point; where the Court then considered the scope of the power to make orders in the public interest as follows:

***"However the public interest jurisdiction of the OSC is not unlimited.*** *Its precise nature and scope should be considered by considering S. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard.* ***First it important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act…, namely to "provide protection to investors from unfair , improper or fraudulent practices ´and***

***´to foster faster, fair and efficient capital markets and confidence in capital markets."*** *(Emphasis supplied)*

The court went on to explain*;*

*" The role of the OSC is to protect the public interest by removing from the capital markets those* ***whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the Capital Markets …in*** *contradistinction,* ***it is for the Courts to punish or remedy past conduct."***

And again:

*'In summary, pursuant to S. 127(1) the OSC has jurisdiction and a broad discretion to intervene in Ontario capital Markets if it is the public interest to do so.* ***However the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in capital markets generally.***

*And finally from this judgment****;***

*"****Was the OSC decision reasonable?***

***The OSC was cautious in the application of its public interest jurisdiction in this case****. This approach was informed by* ***the OSC's previous jurisprudence and by four legitimate considerations*** *inherent in S. 127(1) itself i)* ***the seriousness and severity of the sanction applied for , ii ) the effect of imposing such a sanction on the efficiency of and public confidence in Ontario Capital markets, iii a reluctance to use the open-ended nature of the public interest jurisdiction to police out of province activities and iv) a recognition that S. 127 powers are preventative in nature.´***

The Supreme Court in the ASBESTOS case also relied on the case of RE CANADIAN TIRE CORPORATION 1987 Carswellont 128.

Regarding the question of intervention in the public interest the court said;

*"The commission was cautious in its wording in CABLECASTING and we repeat the caution here.* ***To invoke the public interest test …. The conduct or transaction must be clearly demonstrated to be abusive of shareholders in particular and of the capital markets in general. A showing of abuse is different from and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover the abuse must be such that it can be shown to the Commissioners' satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the Capital markets and their operation. "***

It is clear from the above that the standard for applying a public interest test is very high indeed.

The respondent acted illegally or unlawfully when it decided to cancel the approval of the Applicant to operate a securities exchange.

*Natural Justice/Fair Hearing*

The applicant also contended that it was denied a right to a fair hearing and or rules of natural justice where violated before the decision was taken by the respondent.

Fairness is highly a variable concept. Therefore, courts will readily accept that fairness is not something that can be reduced to one-size-fits-all formula. This therefore means that the courts shall answer questions of fairness on a case by case basis, having regard to factors such as complexity and seriousness of the case.

Essentially, procedural fairness involves elementary principles that ensure that, before a right or privilege is taken away from a person, or any sanction is otherwise applied to him or her, the process takes place in an open and transparent manner. It is also called fair play in action and embraces the means by which a public authority, in dealing with members of the public, should ensure that procedural rules are put in place so that the persons affected will not be disadvantaged.

The applicant contended that the respondent purported to act as accuser, investigator, prosecutor, judge, and even executioner in this matter. The facts are quite clear from their own documents and evidence.

In working out what is fair the courts are wary of over-judicialising administrative process. They recognise that administrative decision-makers are not courts of law, and that they should not have to adopt the strict procedures of such court.

When the law envisages giving an opportunity of hearing before a decision is made against a person, then this means giving an effective hearing not merely a cosmetic hearing to justify a decision taken or to be taken.

It is the duty of the public body which has been given different roles of investigator, prosecutor and adjudicator to ensure that they exercise the different roles in any manner that ensures fairness is achieved.

Government agencies are obliged to observe principles of natural justice before taking decisions that may affect the livelihood of citizenry like cancellation of licences. There is an increasing feeling that natural justice ought to be given to a licensee as far as possible, as licensing is ultimately connected with livelihood or with property rights or right to practice a profession or carry on a trade.

The respondent in this matter argued that the applicant rejected the right to be heard, when he was summoned for hearing. The applicant challenged the proposed hearing contending that it was wrong to issue a Notice to show cause why its approval to operate as a stock exchange should not be withdrawn. Secondly they contended that the notice given to the directors to attend a meeting was short.

The respondent did not accord the applicant's a hearing since they never responded to their request of the short notice and that their directors would not be able to attend. It would appear they interpreted the contestation of the

whole process of a hearing and the short notice as a refusal to attend a hearing.

The respondent should have given the applicant a benefit of doubt rather assume that they had refused to attend a hearing. The applicant never rescheduled the hearing date. The applicant was entitled to demand or request for more time to prepare for a hearing by whatever reason they could have advanced. This is intended to assist them prepare for a case and they must not be taken by surprise.

Procedural fairness generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they are in position to defend themselves. Individuals should not be taken unfairly by surprise. In our system of law surprise is regarded as the enemy of justice. See ***Anifrijeva v Southwark LBC[2004] 1 AC 604***

This court in the matter of ***Dr. Kasozi Charles vs The Attorney General & Health Service Commission Misc. Cause No. 206 of 2018*** cited the case of *Council of Civil Service Union v. Minister for the Civil Service 1985 AC 374* where court held that;

*"It's a fundamental principle of natural justice that a decision which affects the interests of any individual should not be taken until that individual has been given an opportunity to state his or her case and to rebut any allegations made against him or her."*

The applicant was never accorded a hearing and the argument that he rejected a hearing is untenable since it sought for more time to be able to appear for hearing.

***<u>Legitimate Expectation</u>***

The applicant further contended upon its challenge of the issuance of the notice to show cause challenged the respondent in its letter which the respondent later replied to and informed the applicant that the board would

consider a decision to withdraw the notice to show cause at its next board meeting that was to take place within 30 days.

According to the applicant, the Respondent's letter led the Applicant to believe that the withdrawal of the notice to show cause was going to be seriously considered by the Respondent's Board. He categorically promised to communicate to the Applicant's advocates the outcome of their deliberations on withdrawing the notice which he never did!

Even if the Board declined to withdraw the notice, it was obliged to communicate that decision to the Applicant before taking any further action on the notice to show cause. The applicant indeed legitimately expected to be heard as a holder of the approval to operate a stock exchange and this was not done and the individual ought to be able to plan his or her action on the basis that the expectation will be fulfilled.

If a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power. The applicant legitimately expected to be heard on the consideration to withdraw the notice to show cause. At that stage the applicant would have made a case to reverse the early decision to issue a notice to show cause.

It was clear and unambiguous in the letter that the respondent's board would consider the application to withdraw the notice and it was reasonable for them to rely on such letter. The respondent will be bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed on it.

The applicant expected to have their request to have the notice to show cause withdrawn to be considered fairly upon receiving the letter dated 31st

October 2019. The respondent never gave the applicant any decision and it is not clear whether it was ever considered. The applicant expected to be treated in some way that would ensure fairness.

No public authority has unfettered discretion; it possesses powers only to use them for the public good. This imposes the ‘duty to act fairly’ on all public authorities, and the due observance of this obligation as part of good administration raises a “reasonable or legitimate expectation in every citizen to be treated fairly in its interaction with the state and its instrumentalities, with this element forming a necessary component of the decision-making process in all state actions. See ***Article 42 of the Constitution.***

The respondent was in breach of the applicant’s legitimate expectation of being treated fairly when the respondent failed to determine the request to withdraw the notice to show cause and also to respond to the same or availing reasons for its decision which was taken.

This issue is resolved in the affirmative

***What remedies are available to the parties?***

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case.

See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

***Certiorari***

The applicant has sought an order of certiorari to quash and reverse the decision of the respondent.

Certiorari is one of the most powerful public law remedies available to an applicant. It lies to quash a decision of a public authority that is unlawful for one or more reasons. It is mainly designed to prevent abuse of power or unlawful exercise of power by a public authority. See ***Public in East Africa*** *by Ssekaana Musa page 229*

Certiorari is simply concerned with the decision-making process and only issues when the court is convinced that the decision challenged was reached without or in excess of jurisdiction, in breach of rules of natural justice or contrary to the law.

The effect of the order of certiorari is to restore *status quo ante*. Accordingly, when issued, an order of certiorari restores the situation that existed before the decision quashed was made.

This court therefore issues an Order of Certiorari quashing the decision of respondent for the Cancellation of Approval to Operate a Securities Exchange as communicated in letter dated 20th November 2019.

***General, Exemplary and Punitive damages***

The applicant prayed for general damages, punitive and aggravated damages for the financial loss caused by the respondent's actions.

In judicial review court does not award those categories of damages but rather in deserving circumstances where there is justification may award damages.

The habit of seeking damages as if it is an automatic right in every application for judicial review should be discouraged. Judicial review is more concerned with correcting public wrongs and not a way to demand or seek to recover damages or compensation.

An individual may seek compensation against public bodies for harm caused by the wrongful acts of such bodies. Such claims may arise out of the exercise of statutory or other public powers by statutory bodies.

The fact that an act is *ultra vires* does not of itself entitle the individuals for any loss suffered. An individual must establish that the unlawful action also constitutes a recognizable tort or involves a breach of contract. See ***Public Law in East Africa by Ssekaana Musa pg 245-249***

The nature of damage envisaged is not necessarily categorized as special or general or punitive/exemplary damage. But such damage is awarded for misfeasance or nonfeasance for failure to perform a duty imposed by law.

The tort of misfeasance in public office includes malicious abuse of power, deliberate maladministration and perhaps also other unlawful acts causing injury.

The applicant has not made out any case for award of damages. There is no single evidence for such damage leading to financial loss which has been presented to this court. No damages are awarded.

***Costs***

The applicant is granted costs of the application.

I so Order.

***SSEKAANA MUSA***
***JUDGE***
***28th/02/2020***