IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 10 of 2018

In the matter between

1.	**HON. KOMAKECH GEOFFREY OGINGA**	**}**	
2.	**HON. OCAMA AMIDI**	**}**	
3.	**HON. LUBOYO DOREEN ABER**	**}**	**APPLICANTS**
4.	**HON. ACAN SUSAN**	**}**	
5.	**HON. LANGWEN PETER**	**}**	

And

GULU MUNICIPAL COUNCIL **RESPONDENT**

Heard: 12 February 2019

Delivered: 28 February 2019

Summary: judicial review of decision to curtail Standing Committees' term of office.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application for the prerogative orders of certiorari, mandamus and prohibition, and orders declaring as illegal resolutions made by the respondent;- dissolving standing committees chaired by the applicants, convening the meetings at which those resolutions were taken and the election of new chairpersons to the committees. The applicants jointly and severally seek orders

quashing those decisions, re-instating them as chairpersons of the respective standing committees and restraining the respondent from further interference with the activities of those committees. They also seek an award of general damages and costs. The application is by notice on motion pursuant to section 36 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Rule 6 of *The Judicature (Judicial Review) Rules, 2009*. The application is supported by the affidavits of the respective applicants. The respondent opposes the application by way of an affidavit in reply sworn by Mr. Francis Barabanawe, the respondent's Town Clerk.

Preliminaries:

[2] When the application came up for hearing, counsel for the applicants moved court under the provisions of Order 19 rule 2 of *The Civil Procedure Rules*, to cross-examine Mr. Francis Barabanawe on his affidavit in reply, and leave was granted. As a result of that cross-examination, it turned out that the minutes of the respondent's Council meeting of 29th June, 2018 although signed by the Chairperson and the Secretary of the Council, have not been read to and approved by Council. The Chairperson and the Secretary of the Council signed them only because they were required as evidence in the proceedings. This revelation triggered the Courts consideration of whether or not these minutes could be relied upon by either party as a true record of the proceedings of the impugned meeting, and if so, whether they represent a decision of the respondent that can be the subject of judicial review. The latter is a jurisdictional issue.

[3] At the hearing and determination of any suit, there ought first and foremost, to exist jurisdiction. Every court has a duty to consider whether it has jurisdiction and competence to adjudicate on the suit before it, not only at the time the case was filed but also at the time of commencement of trial. It is the duty of court to first ascertain whether it has or lacks jurisdiction as jurisdiction cannot be assumed in the interest of justice. In this context, jurisdiction is the combination

of a consideration of a status of the parties and the subject matter of the application. The applicant has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction and that it is justiciable.

[4] The question as to jurisdiction may arise either on the pleadings or the existence of jurisdictional facts. When the respondent challenges the applicant's pleadings, the determination pivots on whether the applicant has alleged sufficient facts to demonstrate the court's subject matter jurisdiction over the matter. When the respondent challenges jurisdictional facts, the court considers the evidence submitted by the parties to address the jurisdictional issues raised.

[5] In deciding the issue as to jurisdiction, the court may not consider the merits of the case, but only the applicant's pleadings and the evidence pertinent to the jurisdictional inquiry. The court must look to the allegations in the pleadings, liberally construe them in the applicant's favour, and look to the applicant's intent. In doing so, the court considers the facts alleged in the pleadings and, to the extent relevant to the jurisdictional issue, any evidence the parties submitted thereafter to the court. If the pleadings do not contain sufficient facts to affirmatively demonstrate the court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of sufficiency of pleading and the applicant should be afforded the opportunity to amend. If the pleadings affirmatively negate the existence of jurisdiction, then an objection to jurisdiction may be granted without allowing the applicant an opportunity to amend. Upon a finding that the court lacks subject matter jurisdiction, it must dismiss the application.

[6] The main principle of administrative justice is that the court exercises control on the lawfulness of all acts or conduct and decisions of administrative authorities. Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker had the

necessary authority, used the correct legal reasoning or followed the correct legal procedures in making the decision. Natural persons and legal entities may challenge all administrative acts and decisions that affect their rights or legal interests. The preliminary question that arose during the hearing of the application was whether or not the respondent at the Council meeting of 29th June, 2018 made any decision or performed an act that can be the subject of judicial review. This entails the concept of ripeness of action. Ripeness focuses on when that action may be brought. Action for judicial review of a decision or act is not ripe until an administrative decision has been made or act has been performed.

i. Administrative decisions;

[7] The expression " decision" ordinarily refers to an announced or published ruling or adjudication. It signifies a determination of any question of substance or procedure or, more narrowly, a determination effectively resolving an actual substantive issue. Even if it has that more limited meaning, the word can refer to a determination whether final or intermediate or, more narrowly again, a determination which effectively disposes of the matter in hand.

[8] Administrative decisions have a combination of three elements;- matters of law, matters of fact and exercise of discretion. It follows that a person aggrieved by a decision may wish to challenge any or all of these elements, i.e., argue that the decision is defective because the decision-maker got the law wrong, because it, he or she got the facts wrong or because he or she exercised the discretion inappropriately. For purposes of judicial review of administrative action, Regulation 5 (1) of *The Judicature (Judicial Review) Rules, 2009*, requires that an application for judicial review is to be made promptly and in any event within three months from the date when "the grounds of the application first arose."

[9] A reviewable decision is the ultimate determination required or authorised by statute rather than merely a step taken in the course of reasoning on the way to

the making of the ultimate decision. It denotes a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, effectively resolving an actual substantive issue.

[10] Ripeness concerns whether, at the time the application is filed, the facts have developed sufficiently such that an injury has occurred or is likely to occur, rather than being contingent or remote. Ripeness is a threshold issue that concerns subject matter jurisdiction, which emphasises the need for a concrete injury for a justiciable claim to be presented. By focusing on the concreteness of injury, the ripeness doctrine allows a court to avoid premature adjudication and issuance of advisory opinions. A case is not ripe when the determination of whether the applicant has suffered a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass, uncertain or contingent future events that may not occur as anticipated or may not occur at all.

[11] A threat of harm can constitute a concrete injury, such as may justify issuance of an injunction under section 38 of *The Judicature Act* and Regulation 3 of *The Judicature (Judicial Review) Rules, 2009* but the threat must be direct and immediate rather than conjectural, hypothetical, or remote. The facts must be indicative of threatened action in the immediate future which seems unavoidable, even though the differences between the parties as to their legal rights have not reached the state of an actual controversy.

[12] In *Australian Broadcasting Tribunal v. Bond (1990) 94 ALR 11*, a decision of the High Court of Australia, the court explained the distinction between "decision" and "conduct" in *The Administrative Decisions (Judicial Review) Act 1977*. The facts briefly were that *The Broadcasting Act, 1942* allowed the Australian Broadcasting Tribunal (ABT) to suspend or revoke a commercial television licence if the licensee was "no longer a fit and proper person to hold the licence." The licences were owned by companies associated with a one Mr. Bond. Prior to

making any decision to suspend or revoke the licences, the ABT held an inquiry into various matters, ruled that Mr. Bond was guilty of improper conduct under the Act and accordingly determined that he, and the licensee companies (which the ABT held he controlled) would not be found to be fit and proper persons to hold broadcasting licences. Neither ruling was itself the ultimate decision under *The Broadcasting Act* that the licensees were not fit and proper persons. Bond and the licensees sought a review of these actions and findings.

[13] It was held that generally speaking, the term "decision" in the Act entailed a substantive determination which is final, operative or determinative of the issue or fact to be ascertained under the relevant statute; but that conversely the word "conduct" in the Act, refers to action of a procedural nature which may be taken as a step on the way to a decision. Further, that such action may amount to a "decision" under the Act if the relevant statute provided for a finding or ruling at that intermediate stage. The majority of the High Court held that the finding that the licensees were not fit and proper persons was a substantive determination required to be made under the statute prior to the ultimate decision and was thus a reviewable "decision" under the Act. The court though found that finding Mr. Bond (not himself a licensee) not to be a fit and proper person, was not such a "decision." It was merely a step along the way to a decision. It was not a substantive determination contemplated by The Broadcasting Act. The finding could not be attacked as "conduct" as the challenge did not relate to the conduct of the proceedings engaged in before the making of a "decision."

[14] In short, it was held that the decision to the effect that the associated companies were not "fit and proper" persons was reviewable, because *The Broadcasting Act* provided for it as a substantive and essential determination to the making of the ultimate decision to revoke the licenses. However, the ground on which that decision was made, namely that Mr. Bond himself was not a "fit and proper person," was an intermediary finding of fact not provided for in the statute, and therefore not a "decision" reviewable under the powers of judicial review. The

High Court held that the Act only applied to decisions which had the character or quality of being final in nature. Intermediary actions were not reviewable as decisions or conduct.

[15] It can be deduced from that decision that the characteristics of an administrative decision are; (i) a final or decisive and unilateral declaration, act or determination taken while directly fulfilling public interests or a public mandate, that is a result of a general administrative procedure, regarding a concrete situation; (ii) the determination is based on public law, i.e. it must derive its legal efficacy from a statute; (ii) it concerns the establishment, existence, non-existence, extent, amendment or withdrawal of rights or imposing a condition or restriction or obligations that affect identifiable individuals; (iii) it is a declaration of will made with the intention to cause legal effects.

[16] The decision may also simply confirm the existing legal situation, hence providing legal certainty for the party requesting such a decision. It should be noted that these prerequisites do not describe a certain form but rather substantive elements. Indeed, the form is not an element of an administrative decision but rather its consequence. Although desirable, an administrative decision need not be handed down in writing, be denominated as such, give reasons and inform on possible legal remedies. If the form is defective, the administrative decision does not cease to be a decision but is simply contestable on those grounds.

[17] A decision may be the subject of judicial review if it is of an administrative character made under an enactment. In other words, an administrative decision is a declaration, act or determination undertaken by a competent public administration authority, based on the norms of administrative law upon completing legally defined proceedings stipulated by the law. It is a decisive and unilateral declaration of will of the competent public administration authority, that decides on the rights and obligations of the particular or identifiable individuals concerning specific situations.

[18] Judicial review is limited to decisions which finally or conclusively determine an issue such that interim rulings or decisions which do not finally and conclusively determine the issue, but are only a primary step towards the decision, are not judicially reviewable. An intermediary conclusion reached as a step along the way to an ultimate decision is not reviewable, unless provided for in by the applicable statute. Where a provision is made by enactment for the making of a report or recommendation before a decision is made, the making of such report or recommendation is deemed the making of a decision.

[19] A significant reason for the requirement that decisions subject to judicial review should have the character of being final or determinative is the reduction of the risk of judicial review proceedings being used as a tactical means to frustrate or delay the administrative process of arriving at such a decision. That is, if decisions that are not final can be subject to judicial review then the process of arriving at a final decision could be drawn out over years as every decision made on the way to the final decision is challenged through the courts. To be the subject of judicial review, it should be final, operative and determinative. An interim decision can be reviewable if it is a finding expressly required under the Act, provided that the statute in question expressly creates this interim decision as a step, but it must be a decision which is substantive rather than procedural.

[20] Under section 22 (1) and (2) of *The Local Governments Act,* and Rule 66 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), district councils may appoint such standing committees as are necessary, not exceeding the number of secretaries, for the efficient performance of its functions. The chairperson and members of such committees are elected by simple majority through secret ballot from the members of the council who are not members of the executive committee.

[21] Section 14 (1) and (2) of *The Local Governments Act,* and Rule 102 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), provides that the chairpersons of such committees may be

removed for specified reasons by a resolution supported by two-thirds of all the members of the council, after a notice in writing signed by not less than one-third of all the members of the council being submitted to the speaker; (a) stating that they intend to pass a resolution of the council to remove the chairperson on any of the specified grounds set out; and (b) setting out the particulars of the charge supported by the necessary documents, where applicable, on which it is claimed that the conduct of the chairperson be investigated for purposes of his or her removal.

[22] The minutes of the respondent's Council meeting of 29th June, 2018 (annexure C_2 to the affidavit in support of the notice of motion) show what appears to be a substantive determination that was final and operative, not regarding the removal of the applicants for any of the specified reasons, but regarding the conclusion of the applicants' term of office. Minute 35/FC/MAY/2017/18 is entitled "Closure." It contains remarks made by the Town Clerk, the Mayor and the Speaker at the close of the meeting. In his closing remarks, the Speaker made the following statement;

> It is a requirement that after two and a half years, there should be dissolution of Chairpersons of Standing Committees and members. He dissolved the committee and said that in the next full Council, there will be an election of new members and Chairpersons of the Committee (sic).

[23] Evidence of a decision by an administrative authority may be presented by way minutes or by overt official action. Minutes are a written record of notes taken during a meeting of the items that have been discussed. They are used to confirm the actions agreed upon, the members or staff allocated to each agreed action and the timeline of each action. Since minutes provide the official version of decisions made and are intended to offer clarity on any agreements or resolutions that have been made, their confirmation and adoption at a subsequent meeting is intended to check them for accuracy and to ensure that

they are an accurate account of what took place and that all members agree on the items recorded for the avoidance of any misunderstandings.

[24] The minutes (annexure C_2 to the affidavit in support of the notice of motion) are not signed. Although the respondent presented a version signed by the Chairperson and the Secretary of the Council (annexure R1 to the affidavit in reply), the respondent's Town Clerk Mr. Francis Barabanawe while under cross-examination explained that this was done simply for evidential purposes before court, but that they had not been read to and approved by Council by the time they were presented in court as evidence. In the circumstances, the court cannot rely on these minutes as a true record of the deliberations of and resolutions taken by Council on that day. Once excluded, the applicants are left without evidence of a substantive determination that was final and operative regarding the end of the their term of office.

ii. Administrative acts or conduct;

[25] Apart from administrative decisions, courts exercise control on the lawfulness of all acts or conduct of administrative authorities. For an act or conduct to be reviewable, it must be part of the decision making process and involve something which is procedural, and not substantive. "Conduct" for the purposes of making a decision includes the doing of any act or thing preparatory to making a decision, for example taking evidence, holding an inquiry or investigation. While "decision" refers to administrative activity that is substantive and final or operative, "conduct" refers to administrative activity preceding a decision that may reveal a flawed procedural processes, as opposed to substantive issues. The expression refers to action of a procedural nature which may be taken as a step on the way to a decision.

[26] Administrative conduct or acts relate to activities that are necessary to carry out the intent of a statute, i.e. those acts required by legislative policy as it is expressed in laws enacted by the legislature. It must be an explicit deed of

volition or an act of volition expressed with action or inaction of an administrative authority which is empowered for that by law and that act of volition engenders r ights and obligations or directly influences rights, liberties or legal interests of individual citizens or organisations, as well as the refusal such an act to be issued.

[27] They include acts of volition with which rights and obligations which have already emerged, are declared, asserted or the process of discharging of rights and liabilities. Therefore the refusal of an administrative authority to do or to refrain from doing or performing a definite action is also an administrative act. Activity, which consists of a unilateral and express manifestation of willingness to create, modify or extinguish rights and obligations, in achieving public power, under the main control of legality of the courts, will be construed as an administrative act or conduct.

[28] In order to be reviewable, the administrative act or conduct should be one of volition forming part of the procedure of reaching an administrative decision but rather, have the character of being final or determinative. Court then determines whether or not that administrative act corresponds to the legislative requirements, i.e. (i) whether the administrative act was performed by a competent authority; (ii) whether it was expressed in the required form; (iii) whether there is any material infringement of the administrative procedural rules, that respect the rights and interests of the individuals affected by those decisions. That the decision reached is an appropriate exercise of any discretion that the decision-maker has; and (iv) whether it conforms to the material legal provisions and the aim of the law, the decision should in general advance the purposes of the administrative scheme in question, other generic objectives of public policy such as economy and efficiency, and important decision-making values such as consistency, transparency and respect for human rights.

[29] In the instant case, following the pronouncement attributed to the Speaker in his closing remarks in the yet to be approved Minute 35/FC/MAY/2017/18 of the meeting of Council that took place on 29th June, 2018, according to paragraphs 4 and 6 of the affidavit in reply, the Council indeed went ahead on 30th June, 2018 to resolve that the standing committees be dissolved and new ones appointed in their place. Indeed new committees were duly constituted at the Council meeting of 18th July, 2018 (annexure R2 to the affidavit in reply). The move by Council to constitute committees is an administrative act. This act though does not form part of the procedure of reaching an administrative decision but rather, has the character of being final or determinative and therefore may not be reviewed as administrative conduct. It is instead an overt official action that provides circumstantial evidence of a decision by the respondent as an administrative authority.

[30] The difference between the criminal standard of proof in its application to circumstantial evidence and the civil one is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter one needs only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise a reasonable and definite inference. In the instant case, the overt act of constituting new committees is an appropriate basis from which an inference may be made that at an earlier occasion, the respondent decided to dissolve the standing committees that existed hitherto. I therefore found and ruled that at the time of filing the application on 19th July, 2018, the respondent had made a final, operative and determinative decision that can be the subject of judicial review, as manifested by its official action of constituting new standing committees on 18th July, 2018.

General principles:

[31] The limits within which courts may review the exercise of administrative discretion were stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1947] 2 ALL ER 680: [1948] 1 KB 223*, which are;- (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) the common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker. Having outlined the general principles that ought to be borne in mind in applications of this nature, the court now proceeds to examine the grievances presented by the applicant under the three prisms of judicial review.

First issue; Whether the decision to dissolve the respondent's standing committees and replace them with new ones, is bad for illegality.

[32] A public authority will be found to have acted unlawfully if it made a decision or did something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended

bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

[33] Decisions made without the legal power (*ultra vires* which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: The second covers abuse of power and defects in its exercise) include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

[34] It is the applicants' case that by dissolving the standing committee each one of them chaired, before expiry of their term of office, the respondent acted beyond its statutory power, or in abuse of its power, or exercised its power in a defective manner. It is not in dispute that each of the applicants took office as chair of his or her respective standing committee on 18th July, 2016 (annexure "A" to the affidavit in support of the notice of motion). Under section 170 of *The Local Governments Act,* the term of office of a Chairperson (where "Chairperson" is

defined by Rule 1 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition as including the Chairperson of a standing committee), is supposed to be four years. The implication is that their respective terms of office would *prima facie* expire on or about 18th July, 2020, yet by 18th July, 2018 their term had been terminated, two years prematurely.

[35] It is the respondent's contention in paragraph nine of the affidavit in reply that "the applicants were fully aware of the discussions in Council at the time they were constituted that their term of office would last for two and a half years and thus there was no malafides whatsoever as alleged by the applicants." This particular averment was material to the facts in issue yet it was never traversed by the applicants. It is trite law that each material allegation of fact should be dealt with specifically in one's subsequent pleading (see Thesiger, LJ, in *Byrd v. Nunn [1877] 7 Ch D 284, at p 287*). An allegation of fact not specifically traversed will be taken to be admitted, whether this was intended or not and once treated as admitted, the party who makes it need not prove it. A party who makes an allegation of fact admitted expressly or constructively need not prove the fact admitted by his or her opponent (see *Pioneer Plastic Containers Ltd v. Commissioner of Customs and Excise [1967] 1 All E R 1053*).

[36] Secondly, when the deponent, the respondent's Town Clerk Mr. Francis Barabanawe, appeared in court and was cross-examined by counsel for the applicants, he was never cross-examined regarding this particular aspect. It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*).

[37] Both on account of the applicants' failure to traverse this averment and their failure to impeach the deponent on its existence as a fact, yet it cannot be assailed as inherently incredible or possibly untrue, I find that the respondent adopted as a convention, the practice of limiting the term of office of standing committees to two and a half years. Conventions are accepted practices that do not have the authority of law but depend instead on the force of shared values and expectations. They are uncodified, informal rules and practices by which political institutions operate. Conventions are said to be rules of political practice, which are regarded as binding by those to whom they apply and may be enforced by courts where they have acquired the force of law, in which case they may modify the application or enforcement of rules of law.

[38] The main purpose of such conventions is to ensure that the legal framework retains its flexibility to operate in tune with the prevailing values of the period. Although conventions are not legally enforceable and the sanction behind them is moral and political, yet some conventions which set norms of behaviour of those in power or which regulate the working of the various parts of the statutes and their relations to one another, may be as important and of significance, as the written word of the statutes themselves.

[39] In order to establish the existence of a convention three questions must be asked; what are the precedents? Secondly, did the actors in the precedents believe that they were bound by a rule? Thirdly, whether there is a good reason for the rule? A single precedent with a good reason may be enough to establish the rule. It was contended in paragraph seven of the affidavit in reply that "....this was to ensure that committee is (sic) constituted of fresh members and also to accord other persons with (sic) the opportunity to serve within their political term."

[40] Conventions grow out of and are modified by practice. This practice of limiting the terms of office of Chairpersons of standing committees to half the electoral term of office of the Council appears to have been inspired by Rule 132 (1) of

The Rules of Procedure of the Parliament of Uganda, 2006 which provides that; "the Standing Committees of the House shall have tenure of office of two and a half years." It is a fact that conventions lubricate the room left at the joints in the legal structure and protect statutes against ossification. Although it is a fact that some conventions are well-established and may be relied upon absolutely, but it is also a fact that some are vague and may lead to manipulation for political purposes, hence the need for codification.

[41] Once conventions are codified, the effect of that codification is to give jurisdiction to the courts to enforce the codified conventions. Then in such a scenario the flexibility of the conventions will be lost. Although codified laws cannot cover any and every situation that might arise, due to the risk of manipulation for political purposes and the instability in governance that may result, it makes no sense to leave a convention of this nature unmodified. Moreover, conventions are dynamic and practices once considered appropriate or desirable may later be found wanting to the extent that they are either no longer considered worthy of observance or demand some kind of response by political actors to address any perceived absence. Just this practice was codified by Rule 132 (1) of *The Rules of Procedure of the Parliament of Uganda, 2006* with regard to the Standing Committees of Parliament, so should it be codified with regard to Local Government Councils in those areas that want to adopt a similar practice.

[42] On the other hand, notwithstanding the fact that *The Local Governments Act,* provides a legal framework regulating the functions, powers and procedures of Local Government Councils, section 175 (1) thereof empowers the Minister by statutory instrument, to make regulations for better carrying into effect the provisions of this Act. Parliament left some degree of discretion in respect of such matters to the Minister. The Minister by way of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition) provided guidance on a range of matters of procedure but the rules are silent regarding the term of office of Standing Committees of Local Government

Councils. However, Rule 113 thereof allows for the adaptation of the rules with such modifications as may be necessary for the proper conduct of Council business, subject to such modifications first obtaining approval of the Minister.

[43] The respondent's convention of limiting the term of office of its standing committees to two and a half years is in a way an uncodified adaptation and modification of *The Standard Rules of Procedure for Local Government Councils in Uganda*, which by Rule 113 (4) thereof would require approval of the Minister. The respondents did not prove before this court that they secured such approval before the implementation of that convention. Rule 113 (3) of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition) requires that in the process of modification, adaptation and customisation of the rules for the proper conduct of Council business, Local Government Councils should ensure compliance with *The Constitution*, *The Local Governments Act* and other existing laws. Therefore, a validly adapted, customised or modified rule must be statutorily authorised and should be promulgated properly, to avoid the risk of its manipulation for political purposes and the instability in governance that may result when it remains uncodified.

[44] However by virtue of the earlier finding that based on the applicants' failure to traverse this averment and their failure to impeach the deponent of the affidavit in reply on its existence as a fact, this convention was regarded as binding by both parties. In the specific circumstances of this case, that convection was an uncodified adaptation, customisation or modification of *The Standard Rules of Procedure for Local Government Councils in Uganda*. Taken from that perspective, the period of two and a half years' term of office for the applicants, sworn in on 18th July, 2016, would have expired on or about 18th January, 2019, yet it was curtailed on 30th July, 2018, six months before its expiry.

[45] The contention in paragraph seven of the affidavit in reply that "....this was to ensure that committee is (sic) constituted of fresh members and also to accord

other persons with (sic) the opportunity to serve within their political term," is not a valid reason for such curtailment. The need to expose as many councillors as possible to positions of leadership within their electoral term is not a legitimate justification for curtailing the period established by convention, since discretion must be exercised within the limits of the law and in a manner that the gives of effect to legislative intent.

[46] Counsel for the respondents argued in the alternative that the Council enjoys wide discretion in taking its decisions and that under Rule 22 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), the Council does not have to give reasons for its decisions, especially since they are based on majority votes. It is trite that in the absence of special circumstances, it is inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters as being somehow implicitly limited or fettered (see *R (Rudewicz) v. Secretary of State for Justice [2013] QB 410*).

[47] However, since there is no such thing as an unfettered discretion, public bodies or officials have a duty, when exercising their discretion, to act rationally and in accordance with the general law. Public decision-makers must use discretionary powers in good faith and for a proper, intended and authorised purpose. Legislation generally provides the lawful authority for action to be taken and for decisions to be made. Where the legislation does not specify the matters to be taken into account, it is important to consider the underlying purpose of the decision-making power and what factors might be relevant to achieving that purpose. Public decision-makers must not act outside of their powers as conferred by legislation.

[48] In the instant case, both parties adopted a convention limiting the term of office of Chairpersons of standing committees to two and a half years. The Council was bound by that convention and save for grounds justifying removal specified by

section 14 (1) and (2) of *The Local Governments Act,* and Rule 102 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), it could not curtail that term the way it did. The power to act or to make the decision dissolving the committees would only crystallise on or about 18th January, 2019 upon the expiry of the two and a half year term. Therefore, when the Council decided to dissolve the committees on 30th June, 2018, it acted *ultra vires* its powers. For that reason the first issue is answered in the affirmative. The respondent's decision to dissolve the respondent's standing committees constituted on 18th June, 2016 and to replace them with new ones, is bad for illegality.

Second issue; Whether there was any fatal procedural impropriety in the process leading up to the decision to dissolve the respondent's standing committees and replace them with new ones.

[49] A public body may act *ultra vires* not only when it does the wrong thing but also if it does the right thing in the wrong way. Procedural impropriety may arise from one of three possible sources; either from (i) failure to adhere to procedural rules laid out by statute, or (ii) failure to observe the principles of natural justice; or (ii) failure to act fairly. It is contended by the applicants in this case that the process leading up to the decision was flawed in that;- as Chairpersons of standing committees, each of the applicants was a member of the Business and Welfare Committee responsible for drawing the Order Paper yet none of them was involved in its preparation for the meeting of 29th and 30th June, 2018; on 19th June, 2018 the Speaker unlawfully constituted himself into the Business and Welfare Committee and came up with the order paper for the meeting of 29th and 30th June, 2018; there was only one item on the order paper for the meeting of 29th and 30th June, 2018 and it did not relate to dissolution of the respondent's standing committees constituted on 18th June, 2018; the Speaker dissolved the committees unilaterally in his closing remarks at the meeting of 29th June, 2018 which decision was ratified by Council at the adjourned meeting of 30th June,

2018; and that the process of election of new office bearers was marred by confusion and breaches of the established procedures of nominations, secondment, voting either by secret ballot or by show of hands, and tallying of votes.

[50] In the affidavit in reply, none of those averments of fact was specifically traversed by the respondent. Although not strictly a pleading but rather a submission of evidence in rebuttal, in paragraphs four to seven of the affidavit in reply, the respondent makes general statements as to the resolution of Council to dissolve the committees and replace them with new membership. There are no specific responses to the particulars of the specified instances of failure to adhere to procedural rules laid out by *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), or specific evidence in rebuttal. Authority has been cited before in this ruling to support the proposition of law that requires each material allegation of fact to be dealt with specifically in one's subsequent pleading, which *ipso facto* ought to apply with equal force to evidence submitted by way of affidavit in reply.

[51] Just as allegations of fact not specifically traversed will be taken to be admitted, whether this was intended or not, a party who fails to adduce evidence in rebuttal will be taken to have admitted the un-rebutted evidence, subject to it being assailed as inherently incredible or possibly untrue. The party who adduced the un-rebutted evidence then is entitled to have the fact to which it relates treated as proved. On account of the respondent's failure to specifically traverse these averments or adduce evidence in rebuttal, yet they cannot be assailed as inherently incredible or possibly untrue, I find that the applicants have proved that the respondent engaged in conduct that was inconsistent with the procedural requirements laid out by *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition).

[52] Under rule15 thereof, the order of business of Council is determined by the Business Committee. Rule15 (5) of those rules constitutes the Chairpersons of standing committees to form part of the business and welfare committee of Council. The Chairpersons of the Standing Committee sit and formulate the agenda for the next Council meeting. The applicants who are members of that committee were not invited, yet the Speaker came up with an order paper for the meeting. Rule 15 (7) of those rules prohibits Council from transacting any business that is not adopted on the order paper. The notice by which the applicants were invited to the meeting of 29th June, 2018 (annexure "C" to the affidavit in support of the notice of motion) did not include the dissolution and replacement of the respondent's standing committees as an item on the agenda. Although rule 15 (5) of the rules allows for alteration of the order paper by motion, there is no indication as to how this item found its way onto the order paper, if it did at all. The move by Council to re-constitute committees is an administrative act that could be discussed by Council only if the Council followed all the steps required for the laying it as a motion.

[53] It is trite that failure to comply with mandatory procedural requirements renders a decision invalid on grounds of procedural *ultra vires*. On the other hand, failure to comply with directory procedural requirements does not. If it is a mandatory requirement, the court would then look at whether there was substantial compliance. For example in *Coney v. Choyce and others; Ludden v. Choyce and others, [1975]1All ER 979*, the case of two schools was that *The County and Voluntary Schools (Notices) Regulations, 1968* were not fully complied with in t hat no notice was posted at or near the main entrance to either of those schools. The respondent had instead put forward the proposals to reorganise the Roman Catholic schools in a number of neighbouring towns on a single "three-tier" basis by way of public meetings, newsletters and in churches over a period of three years.

[54] It was held in that case that considering the general object of the procedural requirements of *The County and Voluntary Schools (Notices) Regulations, 1968*, i.e. that notice should be given to a representative number of people of what their rights were, those requirements were to be treated as directory rather than mandatory. Since there had been no substantial prejudice suffered by those for whose benefit the requirements had been introduced, the breach was to be treated as a mere irregularity which has not had the effect of rendering the Minister's approval of the proposals invalid. In the alternative the Minister was entitled, on complaint being made to take the view that there had been substantial compliance with the regulations and therefore that no declaration of default should be made. It followed that, on either ground, the action should be dismissed.

[55] In the instant case, the irregularities complained of arose within the context of convening and conducting a meeting of Council. The claim that the process of election of new office bearers was marred by confusion and breaches of the established procedures of nominations, secondment, voting either by secret ballot or by show of hands, and tallying of votes was not substantiated though.

[56] Once there are procedural lapses while convening or conducting a meeting, then depending on the circumstances, the meeting may be illegal and then it cannot be said that the business transacted in an illegal meeting is legal. However, when it is very clear that the officers who convened or conducted the meeting were well intentioned, the meeting cannot be said as illegal due to simple procedural lapses. Mistakes will happen in public administration and it is not in the public interest that the validity of decisions be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties.

[67] Thus, the court need not only determine whether the rules flouted are mandatory or directory, or in case of the former, whether there was substantive compliance, but also seek to establish the intention of the officers who convened or

conducted the meeting before making a decision as to whether a procedural lapse should result in declaration of the meeting as “illegal” or not. Innocent errors should not undermine the validity of decisions made where no substantial injustice to third parties has occurred. A court should look at such matters pragmatically, principally and by reference to substance over form. A procedural error or an honest mistake should not undermine subsequent decisions which rely on or assume that previous conduct has been properly performed.

[68] Bad faith within the context of procedural irregularities denotes an intentional or malicious refusal to comply with the requirements of the rules. One can make an honest mistake about rules of procedure but when the rules are intentionally or maliciously flouted, such conduct demonstrates bad faith. It requires proof of more than a mere violation of the rules. It requires evidence of unfair or unreasonable conduct, not just mistaken judgment. In the evidence before this court, there is nothing tom indicate that the officers of the respondent who convened and conducted the impugned meeting were not well intentioned.

[69] A public authority could be acting *ultra vires* if it commits a serious procedural error, i.e. failure to achieve substantive compliance with a mandatory procedural requirement or failure to comply with a directory procedural requirement, resulting in substantial injustice to third parties. In assessing the degree of seriousness, at the least serious end of the spectrum of improper conduct is that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range is conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end is conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct.

[70] A better test for determining the issue of validity has been suggested as asking whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statute (see *Project Blue Sky Inc. v. Australian Broadcasting Authority (1998) 194 CLR 355* applied in *Sitenda Sebalu v. Sam K. Njuba and another, S.C. Election Petition Appeal No. 26 of 2007*).

[71] The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. In that context, the question is whether, as a matter of statutory construction, the existence of a fact is a precondition to the valid exercise of a power. There is no doubt that the requirement of an order paper is an essential preliminary or precondition to the orderly business of Council. On the other hand, members of the public should be able to order their affairs on the basis of apparently valid decisions of Council.

[72] Meetings of Council are conducted in accordance with *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition). Form the general tone of the scheme of the rules, the Minister could not have intended the rigid application of rule 15, thereby excluding any court discretion over the provision. The fact that a provision is expressed in mandatory language is relevant, but not conclusive because of other factors such as public inconvenience that would follow from holding decisions to be invalid. It is a fundamental question whether the statutory requirement regulates the exercise of functions already conferred, or is an essential preliminary to the exercise of a function. The fact that rule 15 regulates the exercise of functions already conferred by *The Local Government Act* rather than imposes essential preliminaries to the exercise of its function strongly indicates that it was not a purpose of the rules that a breach of rule 15 was intended to invalidate any act done in breach thereof.

[73] It has been held in several cases that non-compliance with a statutory requirement does not inevitably lead to invalidity, despite apparently mandatory language, because of other factors such as public inconvenience that would follow from holding decisions to be invalid (see for example *Lansen and others v. Minister for Environment and Heritage and Another (2008) 174 FCR 14*; *Montreal Street Railway Company v. Normandin [1958] S.C.R. 533; [1917] A.C. 170* and *R v. Urbanowski [1976]1WLR 455*). When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only. This is not an inflexible rule and must yield to a contrary conclusion if it is clear that the purpose of the rules would not be supported by such a construction.

[74] However in this case, it is clear, as I have said, that the purpose of the provision is to regulate the proceedings of Council, non-compliance was never intended to deprive resultant decisions of legal effect. The violated provisions of rules relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the rules.

[75] It has been the practice to hold such provisions to be directory only the breach of which does not nullify the resultant decision, and I so find in this case. To hold that decisions of Council could be ineffective as a result of non-compliance with rule 15 of *The Standard Rules of Procedure for Local Government Councils in Uganda* (July, 2014 Edition), would lead to inconvenience and loss of public confidence in the decisions of Council. I therefore find that the procedural improprieties that manifested themselves in the process leading up to the

decision to dissolve the respondent's standing committees and replace them with new ones, were not fatal.

Third issue; Whether the respondent's decision to dissolve the respondent's standing committees and replace them with new ones was irrational.

[76] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. The court will intervene when the reasons for decision are non-existent, opaque or otherwise indiscernible. The decision should be so unreasonable that no reasonable authority could ever have come to it. Failure to take into account a relevant consideration is a badge of unreasonableness.

[77] When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc. the concept of "deference as respect" requires of the court's respectful attention to the reasons offered or which could be offered in support of a decision and not submission. The fact that there may be an alternative decision to that reached by

the tribunal does not inevitably lead to the conclusion that the tribunal's decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[78] To justify interference by court without delving in the merits, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Judicial review of determinations regarding academic standards is limited to the questions of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to a Constitutional provision or a statute (see, *Matter of Susan M. v. New York Law School, 76 N.Y.2d 241, 247, 557 N.Y.S.2d 297, 556 N.E.2d*).

[79] It was argued by council for the respondent that Council had the discretion to terminate the committees' term of office. However, discretion may not be exercised in an arbitrary, capricious or irrational manner. For the determination of whether or not the reasons advanced for justifying the decision are legitimate, those reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible acceptable outcomes. The reasons given need not be comprehensive, but they must be comprehensible. The reasons given in the instant case relate to the need to terminate that term.

[80] Term limits for elected officials are designed to achieve a number of goals;- they ensure that after a period of time, the playing field will once again be levelled and a seat will be open without an incumbent; working in an elected position is not

intended as a profession, ensuring that public office holders maintain fresh ideas and perspectives and that that no one individual can focus more on keeping the office as a job and a certain level of power, than representing the public; reduce the likelihood of corruption since there is less time that the politicians can be influenced by the power of the office that they hold; creates the opportunity for tapping into the potential for leadership in communities especially providing younger people a chance to get elected to public office, etc.

[81] It is trite that the discretionary element of the decision may be challenged only to the extent permitted by the established grounds for judicial review. This is because where the decision-maker has discretion, there is room for disagreement as to what the "correct" decision is, the court may be no better placed than the initial decision-maker to decide whether a decision is a good or bad, whether for reasons of relative competence or legitimacy, or for other reasons. The decision must be so absurd, "...so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223*).

[82] Where an administrative decision is a matter of discretion it will not be disturbed on judicial review except on a clear showing of abuse of discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Some of the general principles relevant to the exercise of discretion are: acting in good faith and for a proper purpose, complying with legislative procedures, considering only relevant considerations and ignoring irrelevant ones, acting reasonably and on reasonable grounds, making decisions based on supporting evidence, giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance, giving proper consideration to the merits of the case, providing the person affected by the decision with procedural fairness, and exercising the discretion independently and not under the dictation of a third person or body. What fairness requires will vary from case

to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires.

[83] In light of the general objectives for setting term limits for elected officials, a decision intended to ensure that committees are constituted with fresh members in order to accord other members the opportunity to serve within their political term, is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Although the timing of the decision is questionable, the decision itself is not so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. It was therefore not an irrational decision.

Fourth issue; Whether the circumstances of this case otherwise justify exercise of the court's discretion to grant the prerogative orders sought.

[84] The grant of remedies under judicial review is at the discretion of the court. Although the granting of relief under judicial review is discretionary, it is not arbitrary. For a number of reasons, the remedies available under judicial review may be inappropriate, even where the court has subject matter jurisdiction. The court must take into account a number of considerations in weighing whether or not it should exercise its discretion to grant relief. The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy (see *Credit Suisse v. Allerdale Borough Council [1997] QB 306 at 355D*).

[85] Judicial review must not be allowed to discredit itself by making unreasonable requirements and imposing undue burdens. Hardship or impossibility of performance may militate against the grant of remedies under judicial review. The court should conduct a balancing exercise. On the one hand the court will

weigh up the inconvenience or detriment that will be suffered by the applicants if they were left without an equitable remedy and determine whether this outweighs the hardship that may be suffered by the respondent.

[86] In the instant case, although the filing was timely but hardship is likely to result. All factors remaining equal, the applicants' term of office would have expired by now yet new Committees have already been constituted. To reverse that process will not serve any useful practical and substantive purpose regarding the quality of governance, but is only likely to engage the respondent in unnecessary expenditure of public funds just for purpose of making a legal statement.

[87] Regulation 8 of *The Civil Procedure (Judicial Review) Rules, 2009 (S.I. No.11 of 2009)* creates the right to compensate individuals who have sustained a loss because of the unlawful administrative actions of a public body, provided the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages. The basis of the applicants' claim for damages is that they were prematurely deprived of their respective offices, they suffered a political set-back by losing positions of political clout and influence, and incurred a drop in the amounts payable to them as allowances.

[88] I find that none of the reasons advanced to support a claim for general damages would constitute a cause of action if the claim had been made in an action begun by the applicants at the time of making their application. Consequently none of them could have been awarded damages on that account and their claim for damages herein is dismissed.

Order :

[87] In the final result, the applicants have succeeded in challenging the legality of the decision to curtail their term of office by a period of six months but have not established a basis for this court to grant them any of the discretionary

substantive remedies sought. The application is accordingly dismissed but with costs to the applicants.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the applicants : Mr. Tony Kitara.

For the respondent : Mr. Oyet Moses.