

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**MISCELLANEOUS CAUSE NO.56 OF 2018**

**PETNUM PHARMACY LIMITED----- APPLICANT**

**VERSUS**

**NATIONAL DRUG AUTHORITY----- RESPONDENT**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed an application under Article 21, 28 and 42 and Section 36 of the Judicature Act as amended, Rules 3, 4, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following prerogative orders reliefs;

1. Certiorari doth issue to quash the decision of the Respondent Authority not to issue a licensee the Applicant with a certificate of suitability of the premises in respect of her pharmacy business located at Mulago- Kafeero Zone based on the purported illegal Professional Guidelines 2018- Renewal of Licence for Pharmacies.
2. Prohibition doth issue to prohibit the respondent from implementing the decision meted to the applicant in Circular No. 177/ID/NDA/02/2018 dated 20<sup>th</sup> February 2018 stopping issuance of a certificate of Suitability of premises to the applicant to operate a pharmacy business at Mulago-Kafeero zone.
3. An Order of Mandamus doth issue compelling the respondent to issue a licence to operate a pharmacy business on the premises located at Mulago-Kafeero zone.
4. An Order of permanent injunction restraining the Respondent, its workmen, agents and /or successors in title from closing the Applicant's Pharmacy located at Mulago-Kafeero Zone or in any way interfering with the operation of the applicant's Pharmacy business.
5. A declaration that the decision of the respondent not to grant the Applicant a Certificate of Suitability of premises in respect of her Pharmacy located at Mulago-

Kafeero-Zone is irrational, unreasonable, based on bad faith, malafide and bias without due regard to law.

6. A declaration that the whole of paragraph 4.0 of the impugned guidelines and specifically the requirement that pharmacies in Kampala District may relocate within the same district but the new location must be atleast 500 meters from the nearest pharmacy as contained in the impugned guidelines is illegal, irregular and ultra vires and has no legal basis.
7. General damages for the inconveniences suffered by the applicant, business loss and/or loss of earnings as a result of the respondent's decision to not issue a certificate of suitability of premises to enable the applicant operate her pharmacy business at Mulago-Kafeero zone.
8. Costs of this Application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the application by **Ms Innocent Amubwine** but generally and briefly state that;

- 1) The decision of the respondent not to issue a Certificate of Suitability of premises to the applicant's Pharmacy located at Mulago-Kafeero Zone is irrational and irresponsible in as far as it is based on an alleged inspection finding that the premises were 33 meters from the nearest Pharmacy (Shalom Life Care Pharmacy) contrary to the respondent's impugned guidelines.
- 2) The decision of the respondent not to issue a Certificate of suitability of premises for the applicant's Pharmacy is illegal and unconstitutional in as far as it is based on the impugned guidelines which requires pharmacies within Kampala District to only relocate to premises which are 500 meters from an existing pharmacy, which guidelines have no legal basis and are ultra vires the National Drug Policy and Authority Act Chapter 206 of the laws of Uganda and national Drug Policy and Authority (Certificate of Suitability of Premises) Regulations S.I 36 of 2014.
- 3) The decision of the respondent to issue a Certificate of Suitability of premises for the Applicant's pharmacy business located at Mulago-Kafeero zone is manifestly biased, discriminatory and incoherent and the same should be purged for contravention of Articles 21, 28 and 42 of the Constitution and rules of natural justice.
- 4) The respondent's decision not to issue a Certificate of Suitability of Premises for the Applicant's pharmacy business located at Mulago-Kafeero zone is tainted with procedural

impropriety and/or irregularity in as far as the Applicant was not given an opportunity to be heard on her application for issuance of a certificate of Suitability of Premises.

The applicant further set out the facts in support of her case in the affidavit which are as follows;

- a) The applicant was licensed to operate a retail pharmacy business at Luzira for years 2017 and 2018. In June 2017 the owner of the premises sold the building and they had to negotiate with a new landlord for a new tenancy.
- b) That the new landlord informed the applicant that he was not willing to continue with their tenancy and they were expected to vacate the premises to pave way for renovations.
- c) The applicant identified premises at New Ntinda Business centre along Kalinabiri road, Ntinda Trading centre Nakawa division and wrote to the respondent requesting them to inspect and approve the premises. On 19<sup>th</sup> July, 2017 the respondent replied to his letter informing the applicant that his application for relocation to New Ntinda Business Centre had been rejected under the NDA Professional (Licensing Guidelines) 2017 which only allowed relocation of Pharmacies within Kampala if the new location is 200 meters from an Existing Pharmacy.
- d) The applicant in October 2017 identified new premises in Kasanga along Ggaba road in Makindye division, Kampala and he wrote a letter to the respondent requesting for the inspection and approval of premises. On 13<sup>th</sup> November 2017, the respondent informed the applicant that application for relocation had been rejected because the new premises were 90 meters from an already existing pharmacy (Buffalo Pharmacy) contrary to the Professional Licensing Guidelines 2017.
- e) The applicant was evicted from the current location at Luzira by the landlord on 3<sup>rd</sup> January 2018 and they identified new premises at Mulago Kafeero Zone where she relocated her pharmacy and applied on 2<sup>nd</sup> February 2018 to the respondent for inspection and approval for issuance of licence in respect of the new premises.
- f) That the application was rejected by the respondent in a letter dated 20<sup>th</sup> February 2018 on the ground that the new premises were only 33 meters away from the existing pharmacy (Shalom life Care Pharmacy) contrary to 2018 Guidelines, which restricted the approval of any new premises to be at least 500 meters from the nearest pharmacy.
- g) The applicant sought advice from the Regional Inspector of Drugs- Central Region who advised that since the stock of the drugs faced the risk of expiry, the applicant should

relocate the pharmacy to the new proposed premises Mulago- Kafeero zone as she pursued the certificate of Suitability of Premises.

- h) The respondent being aware of the applicant's eviction from Luzira, went ahead and issued a certificate of suitability of premises, well knowing the applicant was not able to operate from there which according to the applicant was done maliciously.

The respondent opposed this application and filed an affidavit in reply through the Secretary to the Authority Donna Kusemererwa.

The 1<sup>st</sup> respondent contended they are charged with the statutory mandate of regulating pharmacies and drugs in the country in order to ensure that the population of Uganda accesses safe, efficacious and good quality drugs. It is in line with that authority issues policy from time to time, which policy is hinged on the powers and duties vested in the authority law.

That before grant of a licence for the operation of a pharmacy, an applicant is required to comply with the laid down legal and regulatory requirements as prescribed.

The respondent contended that it is not duty bound to consult the applicant in the process of the applicant in the process of assessing applications for the issuance of a licence. The applicant has always been notified when the application is rejected.

The restrictions on distance between pharmacies in the area is *inter alia* informed by the statistics of the population in that area as well as the number of pharmacies and drug shops licenced in that area. The Authority is guided by such considerations in its policy making decisions with regard to the restrictions.

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

Three issues were framed by the parties in their Joint Scheduling Memorandum for court's determination;

1. *Whether the National Drug Authority Licensing Guidelines, 2017 and National Drug Authority Guidelines, 2018 are illegal and/or ultra vires.*
2. *Whether the decisions of the respondent regarding distance guidelines of location of pharmacies as communicated to the applicant vide letters dated 19<sup>th</sup> July 2017, 13<sup>th</sup> November 2017 and 20<sup>th</sup> February 2018 are illegal and/ or ultra vires?*
3. *What remedies are available to the applicant?*

I shall resolve this application in the order of the issues so raised but the respondent's counsel has raised a preliminary objection which will have to be addressed first. The applicant was represented by *Mr Robert Bautu , Mr Nyegenye Henry and Mr.Kalikumutima Deo* whereas the 1<sup>st</sup> respondent was represented by *Mr Mwehitsye Dennis*.

### **Preliminary Objections**

The respondent's counsel raised a preliminary objection to this suit about the applicant's lack of *locus standi* to apply for judicial review basing on the fact that the applicant is operating illegally.

The applicant applied to the respondent for a certificate of suitability of premises, which the respondent declined to issue. However that the applicant went ahead to open a pharmacy in Mulago Kafeero zone, which according to him is a written admission and confession by the applicant to operating a pharmacy inspite of their application for certificate of suitability of premises being rejected.

According to him the act of the applicant relocating their pharmacy without a certificate of suitability of premises and a licence from the respondent is therefore illegal and disentitles the applicant from benefitting from the discretionary intervention of judicial review.

He cited the maxims of equity which are to the effect that Equity follows the law, and that one who comes to Equity must come with clean hands.

The applicant's counsel submitted that the objection raised by the Respondent cannot be sustained as a preliminary point of law to warrant dismissal of the Application.

***A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop”***

***Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701***

The applicant contended that the Respondent's preliminary objection does not raise issues of law but of fact. The Court cannot pronounce its self on the matter without satisfying itself whether in fact the Applicant is operating a retail pharmacy illegally. Such needs sufficient evidence and proof from the Respondent which has not been done. The preliminary objection by the Respondent is therefore improperly raised. The Court in the above-mentioned case directed that improper raising of preliminary objections must stop. It is sad that to date, the practice continues. On this basis alone, counsel prayed that the preliminary objection is overruled with costs.

The above notwithstanding, counsel submit that there is no evidence on the record of Court that the Applicant is operating a pharmacy contrary to the provisions of the law. The Respondent

seeks to rely on ANNEXTURE “D” of the affidavit in reply to prove its assertion. The applicant’s counsel disagrees with this assertion.

The Applicant merely shifted its pharmacy to Mulago to find a safe haven for its drugs in the wake of an imminent eviction by the land lord. Per paragraph 13 of the affidavit in support of the Application, the relocation was done on the advice of the Regional Inspector of Drugs -Central Division of the Respondent. This fact was not disputed by the Respondent.

No evidence was led to prove that the Applicant opens and operates the pharmacy business at the premises. Accordingly, we invite the Court to a conclusion that apart from the bare statements in the affidavit, no evidence has been led by the Respondent to prove that the Applicant is operating a pharmacy illegally at Mulago.

More so, the rules of interpretation mandate the Court to interpret legislation to avoid absurdity. It would be a sad day of justice in our nation if the Applicant is penalized for transferring its pharmacy to Mulago, yet it was on several occasions denied approval by the Respondent well knowing that it was imminently being evicted from its current place of business. The Applicant was not expected to leave drugs in a building whose demolition was imminent. \_

***“..... when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.” Cullimore v Lyme Regis Corporation [1961] 3 All ER 1008***

The Applicant was faced with a challenge where it needed the immediate intervention of the Respondent. The Respondent who is the licensor neglected to perform its functions as prescribed under law by failing to give the Applicant a remedy, yet only frustrating all its attempts to relocate.

The Applicant had no control over the actions the Respondent’s officers failing to perform their duties and such cannot be penalized for the same. Counsel invited the Court to determine that in the circumstances, the legislation would be interpreted as being directory. Counsel accordingly invited the Court to overrule the preliminary objection with costs.

The respondent’s counsel raised the said preliminary objection from the blue and indeed on an assumption of certain facts which are not admitted. He indeed asserts that his preliminary objection is based on the fact that the applicant relocated without any approval or issuance of a certificate of suitability.

The court agrees with the submission of counsel for the applicant and the case cited of ***Mukisa Biscuit Company – vs- Westend Distributors Limited (1969) EA 696 at page 701***. The respondent’s objection is premised on assumed facts that are not admitted and it is not in any way made on the basis of any law. The respondent should have raised the same as an issue for

determination and set out the facts to support his submissions rather than making an assumption of facts belatedly during his submissions.

The respondent's counsel submitted that the applicant lacked *locus standi* to bring this action because according to him the applicant was operating a pharmacy without any Certificate of Suitability of Premises.

*Locus standi* means the right to sue and it is not known to this court that the party's right to institute a matter for judicial review is premised on the arguments advanced by the respondent's counsel premised on assumed facts. *Locus standi* or legal standing is the status, which the law requires of a person to enable him or her invoke the jurisdiction of the courts in order to be granted a desired remedy. See **Public Law in East Africa by Ssekaana Musa** pg 71.

The submission of counsel on the right to sue/*locus standi* is being confused with the presumption that the prerogative orders being sought in this application are equitable remedies.

The remedies for judicial review are derived from the Judicature Act and are not equitable remedies as argued by the respondent's counsel. The respondent's counsel has cited the case of **Hon Anifa Kawooya vs AG & NCHE Constitutional Court Miscellaneous Application No. 46/2010**. This case was cited out of context and has no application to the nature of the preliminary objection raised. Similarly, the case of **Makula International Limited vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11** cited as well is totally inapplicable to the respondent's preliminary objection.

The said preliminary objection is baseless and totally devoid of any merit and is accordingly dismissed with costs.

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 may 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 is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

### ***ISSUE ONE***

*Whether the National Drug Authority Licensing Guidelines, 2017 and National Drug Authority Guidelines, 2018 are illegal and/or ultra vires.*

The applicant's counsel submitted that the decisions of making the National Drug Authority Licensing Guidelines 2017 and the National Drug Authority Guidelines, 2018 are substantively and procedurally invalid.

### **The authority to make subsidiary legislation under the National Drug and Policy Act**

The primary legislation regarding regulation and Licensing of Pharmacies is the National Drug Policy and Authority Act. Section 64 solely empowers the Minister in consultation with the Drug Authority to make regulations for the better carrying into effect the provisions of the Act. The said are to be made by Statutory Instrument.

Section 5(i) of the National Drug and Policy Act empowers the Drug Authority to make Professional Guidelines.

From the evidence on record, the impugned Guidelines were made by the Secretariat of the Drug Authority. A perusal of the Licensing Guidelines for 2017 at page 2 clearly shows that the same were approved by Ms. Dona Kusemererwa in her capacity as a purported Secretary to the Authority. A perusal of the National Drug Authority Professional Guidelines 2018- Licensing Renewal of License for Pharmacies at page 1 clearly shows that the same were approved by Ms. Dona Kusemererwa in her capacity as purported Secretary to the Authority. During cross examination, Ms. Donna Kusemererwa admitted that the guidelines are developed by Inspectorate Department and approved by the Secretary to the Drug Authority.

Section 54 of the National Drug and Policy Act establishes the Secretariat and vests in it the authority to manage the day to day functions of the Authority. Under the said Act, Parliament does not delegate any Authority to the Secretariat to make any regulations or guidelines for licensing. Instead the said power is vested with the Minister acting in consultation with the Drug Authority. Further the authority to make professional guidelines is in the Authority and not the Secretariat.

The Courts are always empowered to inquire into whether subsidiary legislation is intra vires the enabling statute.

***In Hotel and Catering Industry Training Board -v- Auto Mobile Proprietary Limited 1969]2 ALLER 589***, the House of Lords held that the extension of levy to private Members Clubs that carried on similar activities to targeted industry and Commerce to provide employers with trained personnel and finance in training was ultra vires.



In the case of *Kasule v Attorney General, [1971] 29 EA*, Court held that the purported orders were ultra vires the Premium Development Bond Act. The conditions were therefore invalid, and plaintiff entitled to the prize.

By developing the National Drug Authority Licensing Guidelines 2017 and the National Drug Authority Guidelines, 2018, the Secretariat acted outside the scope of its mandate and usurped the powers of vested in the Minister to make regulations in consultation with the Drug Authority. Accordingly, the guidelines in so far as they are made without any authority and legislative mandate are illegal and ultra vires.

Even if the secretariat was empowered to make rules under the primary Act (which is not the case), the applicant's counsel contended that the National Drug Authority Licensing Guidelines 2017 and the National Drug Authority Guidelines, 2018 to the extent that they were formulated and approved by Mrs. Donna Kusemererwa in her capacity as Secretary to the Drug Authority are illegal and of no consequence.

In her affidavit in reply to the Application, Ms. Donna Kusemererwa states that she is the Secretary to the Drug Authority. During cross examination, Ms. Donna admitted that she was appointed as Executive Director of the Drug Authority a position which was declared non-existent by Justice Musota as he then was. In the terms of the said Judgment and decree admitted in Court as PExh 3, the Court held that the appointment of Ms. Dona as executive Director was null and void and to that extent the Court enjoined her from ever holding out to be Executive Director of the Respondent. Whereas the authority Appealed against the decision of the Court, the Witness testified that the Respondent went ahead to amend her contract redefining her position as Secretary.

In the first place we submit that the actions the Respondent in the Contract of Employment of Ms. Dona Kusemererwa were calculated to circumvent and render the order of Court nugatory.

***In the case of Horizon Coaches Limited -v- Mbarara Municipal Council & Anor Misc. Application No. 7 of 2014***, the Constitutional Court held that *the action of the Applicant attempting to circumvent the decisions of the Supreme Court illegal and untenable.*

Accordingly, counsel for the applicant invited this Court a conclusion that the amendment of the Contract of employment of Ms. Donna Kusemererwa by the Respondent from the position of Executive Director to Secretary was calculated to circumvent the orders of Court and to that extent it is illegal.

Secondly, the Respondent was never appointed to the position of Secretary to the Drug Authority. Her appointment was that of Executive Director. Having found that the Respondent was appointed to a non-existent position, the remedy did not lie in amending the already illegal agreement. The Respondent rather should have formally advertised the position of Executive Director and appointed an individual to fill the same. The Respondent did not appoint Ms. Dona Kusemererwa as Secretary, but rather amended here contract.

In ***MAKULA INTERNATIONAL VERSUS HIS EMINENCE CARDINAL NSUBUGA WAMALA AND ANOTHER*** in [1982] HCB page11, the Court of Appeal in that case held that,

*a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all pleadings, including any admissions made thereon”.*

From the evidence on record, Ms. Donna Kasemererwe is holding the office of Secretary to the Drug Authority pursuant to the amendment of her Contract of employment as Executive Director. This Contract was declared illegal by the High Court of Uganda. The same has not been set aside. As such any amendment that flows from an illegal contract is equally illegal. To this end Ms. Dona is holding the office of the Secretary on the basis on an amendment to an illegal contract and her term of office is consequently illegal.

More so, **Article 92 of the Constitution** prohibits parliament from making law with the effect of amending or rendering nugatory a Judgment of Court. We submit that the said principle applies to situations of litigant whose actions are aimed at rendering nugatory and circumventing orders of Court. The Respondent decided to amend the Contract of Ms. Dona Kusemererwa following the order of the Learned Justice Musota declaring the same illegal. The said actions are merely aimed at rendering negative, the order of Court. In the case of **Hughes versus Kingston Upon’ Hull CC [1999] QB 1193** it was held that a contract is illegal if the mere making of it is a legal wrong. In the case of **Edith Nantumbwe Kizito -v- Miriam Kutesa:- Court of Appeal Civil Application 294 of 2013**, the court held that a contract with the effect of varying a judgment of Court is illegal. Counsel submitted that the amendment of an illegal contract is illegal. Accordingly, the amendment of the Employment Contract between the Respondent and Ms. Dona Kusemererwa following a declaration of Court that the same is illegal is illegal and did not give rise to any legal obligations. It follows that the change of description from Executive Director to Secretary is illegal.

Having found that the Secretary is holding office illegally, we submit that the consequences of her actions in her capacity as the Secretary to the Drug Authority are illegal. Indeed, the National Drug Authority Licensing Guidelines, 2017 and the National Drug Authority Guidelines, 2018 are illegal since they are approved by Ms. Donna Kusemererwe, a person illegally holding the office of Secretary to the Authority.

We also submit that the affidavit of Dona Kusemererwa in reply to the Application sworn on behalf of the Authority is defective as the deponent is illegally occupying the said office. She did not have the authority to depone the affidavit. On this basis, counsel prayed that the affidavit be rejected by this Honourable Court. **MA 966 of 2011 Mugoya Construction vs. Central Electrical**

The respondent’s counsel in response to the above submission contended that the Secretary to the authority testified before this court that her contract was amended. It is therefore wrong for the applicant’s counsel to conclude that the amendment was done to circumvent the High Court ruling, since it is not on record that the amendment in question was done after the said ruling.

The above submission was premised on a ruling of High Court Miscellaneous Application No. 186 of 2017 Nakachwa Florence Obiocha vs National Drug Authority & Donna Asimwe Kusemererwa and Court of Appeal Miscellaneous Application No. 366 of 2017. This court was availed both rulings in this matter and it is clear that the court found as follows;

*“...So the purported rectification of the issue by assigning the title of Executive Director/Secretary was also illegal. The error of law committed in the award of contract to the*

*second respondent is incurable. The process must be done afresh in strict compliance with the law. The Authority, in regard to the office, only has power to grant more duties but not to completely change the job.”*

It is also true that the 2<sup>nd</sup> respondent appealed against the decision of this court and applied for an interim stay of Execution of the orders in the above ruling. This therefore implies that the Donna Asiiimwe Kusemererwa still holds the position of Secretary which was erroneously changed from Executive Director until the determination of the appeal. This is an absurd situation and it may border on edges of an abuse of court process to perpetuate an illegality involving execution of public duties by a person whom court has found to be illegally holding office.

### **The substance of the Guidelines**

We submit that the National Drug Authority Licensing Guidelines, 2017 and the National Drug Authority Guidelines, 2018 as developed by the Secretariat are ultra vires the National Drug and Policy Act as well as the National Drug & Policy (Certificate of Suitability of premises) Regulations 2014.

Section 17 of the National Drug and Policy Act mandates the Authority approve suitability of premises for inter alia location of pharmacies. Regulations 31, 32, 33, 34, 8,9,10, 15 and 16 of the National Drug & Policy (Certificate of Suitability of premises) Regulations 2014 prescribe the considerations for the approval of location premises and the grant of a certificate for the suitability of premises. Distance between Pharmacies is not one of the considerations set out therein.

On the other hand, the National Drug Authority Licensing Guidelines, 2017 guidelines prescribe a mandatory location of 200 metres of one Pharmacy from another. The National Drug Authority Guidelines, 2018 on the other hand prescribe 500 metres as the mandatory distance of location of one Pharmacy from another.

**Section 18 (1) of the Interpretation Act cap 3 states that any reference to a statutory instrument to “the Act” shall be construed as reference to the Act under which the instrument was made.**

**More so section 18 (5) of the same Act states that an Act done under or by or in pursuance of a statutory instrument shall be deemed to be done under or in pursuance of the Act conferring the power to make the instrument.**

Evidently, the guidelines make additions to the considerations set out in National Drug and Policy Act as well as the National Drug & Policy (Certificate of Suitability of premises) Regulations 2014 in so far as they prescribe distance between Pharmacies.

**In the Indian case of Agarwal Ayengar & Co. v. State A. I. R. 1951 Bom.' 397. The question considered is whether under the doctrine of implied powers the delegate can assume more powers than those conferred expressly. **Court noted that it is a well-known doctrine in England that the delegate is entitled to do not only that which is expressly authorised but also that which is reasonably incidental to or consequential upon that which is in terms authorized.****

To this end the Guidelines which prescribe distance conditions for location of pharmacies which conditions are not set out in the Parent Act and regulations are ultra vires. Further the guidelines are also ultra vires to the extent that they are made without any authority delegated or otherwise.

Where a regulation or guideline is made ultra vires the relevant enabling power, the same is liable it is treated as never having had any legal effect. **Case of Boddington -v- British Transport Police 1998] WLR 639**

To this extent the applicant's counsel prayed that the Court declares such regulations *ultra vires*, invalid and be treated as never having had any legal effect.

The respondent's counsel submitted that the National Drug Policy and Authority Act, Cap 206 provides under **S.2(1) (a)** provides that the National Drug Policy shall be to ensure that essential, safe, efficacious and cost effective drugs are made available to the entire population of Uganda, to provide satisfactory health care, among others.

**Section 5 (a) (i) and (k)** of the NDPA Act further provides that the Authority is charged with implementing the national drug policy, and in particular;

- (a) To deal with the development and regulation of pharmacies and drugs in the country.
- (i) To establish and revise professional guidelines and disseminate information to health professionals and the public.
- (k) To perform any other function that is connected with the above or that may be accorded to it by law.

It is worth noting that **S.5 (a) (i)** provides for the establishment and revision of **Professional Guidelines** and not Operational Guidelines. The Professional Guidelines referred to in S.5 (a) (i) are professional in nature e.g Practical Guideline for Dispensing at Higher Level Health Centers, Uganda Clinical Guidelines etc. It is therefore the Respondents submission that the guidelines at issue are operational in nature and derive from the provisions under **S.54 (1) (2) and (3)** as opposed to **S.5 (a) (i)**.

**S.54 (1)** of the National Drug Policy and Authority Act provides that the Authority shall have a Secretariat which shall be responsible for the day-to-day operations of the Authority. **S.54 (2)** further states that the Secretariat shall be headed by the secretary to the Authority, whereas **S.54 (3)** is to the effect that the Authority may confer upon the secretary any other functions in addition to those conferred upon him/her in the Act.

The drafting and approval of Guidelines being part of the day-to-day activities of the Drug Authority, in as much as inspection, enforcement and the general mandate of the secretariat is concerned, it is the Respondents submission that that the Secretary neither acted ultra-vires nor illegally when she signed the Guidelines.

The Applicant also contended that the decisions in the letters were made by the Director of Inspectorate and Enforcement and not the Authority and that they are therefore null and void cannot hold in light of the above statutory provisions.

**S.54 (1)** as earlier noted provides that the Authority shall have a Secretariat which shall be responsible for the day-to-day operations of the Authority. Properly construed, this provision entails some rule-making authority/discretion for the Secretariat, headed by the Secretary, at least as far as the management of day-to-day operations such as inspection and enforcement activities, call for the formulation of guidelines/policy to ensure uniformity/certainty/consistency and accountability to the public by the Secretariat and employees, including the secretary.

**S.23** of the Interpretation Act, Cap 3 provides for implied power and states that where any Act confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing. This in effect means that the power given to the Secretariat by statute (**S.54 (1) NDPA Act**) to carry out day-to-day operations of the Authority, goes hand in hand with implied power to formulate the necessary policy to implement this mandate.

Moreover, our Constitution in **Paragraph I (i)** of the National Objectives and Directive Principles of State Policy provides that,

“The following objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.”

This Constitutional provision compels the Secretariat, its Secretary and this honorable court in applying or interpreting the principal Act to heed to the over-arching public interest in **Paragraph XII** of the National Objectives and Directive Principles of State Policy, which provides for balanced and equitable development and states as follows:

- (i) The State shall adopt an integrated and coordinated planning approach.
- (ii) The State shall take necessary measures to bring about balanced development of the different areas of Uganda and between the rural and urban areas.
- (iii) The State shall take special measures in favour of the development of the least developed areas.

**The Sixth Schedule of the 1995 Constitution** also states the functions and services for which government is responsible under **Paragraphs 12, 20, 27 and 29**, and they include regulation of trade and commerce, health policy, national standards and any matter incidental or connected with the functions and services mentioned in this schedule.

Mindful of the imperative to interpret and apply the principal Act in conformity with the objectives of the Constitution, and the evidential basis for passing of the Guidelines as articulated, we respectfully submit that the decision of the Secretariat/Secretary to approve the

Guidelines at issue was premised in the public interest and it is therefore a decision which is not ultra vires. It was an administrative act within the reservoir of the Secretary's power as the administrator of day-to-day operations of a government agency entrusted with the responsibility to ensure that the National Drug Policy as provided under **S.2** of the Act which states the National Drug Policy, is adhered to.

The Secretary as the head/over-seer of Secretariat would have been remiss/negligent in her responsibility as described by **S.54 (1)** and **National Objective (I) (i) and XII of the Constitution** if she had left day-to-day operations of the Authority to be carried out without any Guidelines.

The Guidelines themselves are not prima facie unreasonable or, "beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution." See **Article 43(2) (c)** of the Constitution on permissible administrative decisions taken in public interest.

In closing, we respectfully submit that the Applicant has erroneously invited court to apply the wrong approach to Statutory Interpretation, an approach that eschews the broader and purposive context in Statutory Interpretation.

Words and expressions used in a statute must not only be interpreted according to their ordinary meaning, but must also be interpreted in light of their context as enriched by the Objectives of the Constitution from which the statute itself derives validity. This is the right approach to statutory interpretation in a Constitutional democracy.

The allegation that the Guidelines were signed by an Executive Director and not a Secretary to the Authority is therefore neither here nor there for the time being.

The Applicant goes on to contend that the Authority is not fully constituted and therefore its decisions are not binding. This argument cannot hold in light of **S. 30 (1), (2) (c) and (3) (a)** of the Interpretation Act, Cap 3 which provides that powers of certain bodies shall not be affected by vacancy. It states as follows;

"Anybody to which this section applies may act notwithstanding any vacancy in its membership; and its proceedings shall not be invalidated by-"

**Section 30 (2) (c)** further states that;

"The bodies to which this section applies are—

Any board, commission or similar body (whether corporate or un-incorporate) established by any Act."

**Whereas Section 30 (3) (a)** is to the effect that;

"This section shall be deemed always to have been in force in respect of the bodies to which it applies."

In view of the foregoing, the allegation that the Authority was not fully constituted and therefore the Guidelines at issue are ultra vires and illegal is also neither here nor there.

### **Decision**

The applicants are challenging the guidelines for being substantively ultra-vires since they are made by a person not authorised by the law. The National Drug Policy and Authority Act establishes an Authority as a body corporate with perpetual succession and a common seal under section 3.

The drug authority shall consist of the chairperson and the following persons;

3(2) ***The drug authority shall consist of the chairperson and the following other persons-***

- (a) The director medical services;***
- (b) The commissioner for veterinary services;***
- (c) The commissioner for trade;***
- (d) The director, criminal investigation department;***
- (e) The chief of medical services, Ministry of Defence;***
- (f) The chief of pharmaceuticals and health supplies;***
- (g) The head of the Natural Chemotherapeutics Laboratory;***
- (h) The director, Mulago Hospital;***
- (i) A representative of each of the following-***
  - (i) The National Medical Stores;***
  - (ii) The Uganda Medical Association;***
  - (iii) The Pharmaceutical Society of Uganda;***
  - (iv) The Uganda Veterinary Association;***
  - (v) The head of the School of Pharmacy, Makerere University;***
  - (vi) The Uganda herbalists;***
  - (vii) The Uganda Dental Association;***
  - (viii) The Joint Medical Stores;***
- (j) The director general of the Uganda AIDS Commission;***
- (k) Two other persons appointed from the public.***

The functions of the Authority are set out in section 5 and inter alia provides;

- (i) Establish and revise professional guidelines and disseminate information to health professionals and the public.***

**Section 64(1) of the National Drug Policy and Authority Act** provides for making of regulations;

The Minister may, on advice of the drug authority, by statutory instrument, make regulations generally for the better carrying into effect the provisions of this Act-

- c) Prescribing conditions to be inserted in licences or permits granted under this Act, and otherwise prescribing things to be done in relation to such licences or permits;***

The guidelines as made by the secretary or secretariat are a preserve of the Authority and the secretary is not a member of the authority except that she takes the minutes of their meetings.

The core function of the authority to make professional guidelines could not be delegated to the secretariat or the secretary under the principle of *delegatus non potest delegare*. It is not clear whether the Secretary was delegated this core function by the authority since no evidence of delegation was ever presented to court or it was merely usurped by the Secretary or Secretariat.

The evidence presented to court through the respondent witness during cross examination is that the secretariat made the guidelines without any involvement of the Authority.

The guidelines of 2017 and 2018 were ultra vires since they were made by a person without authority. The secretary usurped the powers of the Authority and this is totally contrary to the National Drug Policy and Authority Act. In the case **of Boddington -v- British Transport Police 1998] WLR 639/[1998]2 All ER 203...** it was noted; “Thus Lord Diplock confirmed that once it was established that a statutory instrument was ultra-vires, it would be treated as never having had any legal effect. That consequences follows from application of the ultra vires principle, as a control on abuse of power; or, equally acceptably in my judgment, it may be held that maintenance of rule of law compels this conclusion.”

The respondent as a public authority is required to act within their given powers. This means that they are not supposed to exercise powers which have been otherwise conferred on someone else specifically.

The authority conferred with power is not allowed to delegate the exercise power to someone else, because that would be contrary to the intention of Parliament as expressed in the words of the Act. If Parliament had wanted that other person to exercise the power, it would have conferred power on them.

In the present case the Secretary/Secretariat could have been delegated power to undertake work preparatory to making delegated legislation, the final product of the delegated legislation/guidelines should have been made by the authority so charged with the power under the National Drug Policy and Drug Act and later the Minister responsible Health under section 64. See **Jeff vs NZ Dairies Board [1967] I AC 551; R vs Race Relations Board ex parte Salvarajan [1975] WLR 1686**

Once a delegate acts without authority, such illegal act cannot be ratified and it is *void ab initio*. See **The Municipal board of Mombasa vs Mohanlal Kala and other (1956) EACA 319**

The Guidelines of 2017 and 2018 are ultra vires and illegal since they were made by a person not authorised to make them and to that extent they are of no consequence.

This issue is resolved in the positive.

*Whether the decisions of the respondent regarding distance guidelines of location of pharmacies as communicated to the applicant vide letters dated 19<sup>th</sup> July 2017, 13<sup>th</sup> November 2017 and 20<sup>th</sup> February 2018 are illegal and/ or ultra vires?*



In light of the resolution of the first issue, it would automatically mean that the decisions made in reliance or based on illegal guidelines would equally mean that they are illegal.

The said decisions are devoid of any merit and are accordingly quashed.

*What remedies are available to the applicant?*

1. The Professional Guidelines of 2017 and 2018 are hereby quashed for illegality.
2. An order of **Mandamus** doth issue compelling the respondent to issue a licence to the applicant to operate a Pharmacy business on the premises located at Mulago-Kafeero Zone.

### 3. Damages

The applicant sought general damages of 1,000,000,000/= and also special damages as shown in the loss assessment report to the tune of 169,327,292/= as a result of the Respondent's conduct.

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 recognisable 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 categorised as special or general 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 suffered some damage when the applicant refused to consider the application for issuance of a licence relying on ultra-vires guidelines. This is a restitutionary claim against the respondent and the principles governing restitution will apply, the actual application of these principles will frequently need to take account of the fact that different considerations.

This court has established that there was misfeasance in a public office which arose by the acts of the respondent and indeed injured the applicant since it involved a deliberate and dishonest abuse of power and the respondent ought to have known that the applicant would suffer loss. See **Three Rivers District Council v Governors of Bank of England (1998) 11 Admin. L. Rep 281.**

The respondent is vicariously liable for acts of its employees for their unauthorised actions of enacting guidelines without authority or their involvement and they abdicated their responsibility of supervising their staff. They purported to exercise statutory power to the detriment of the general public and the applicant suffered loss as a result.

In principle, any exercise of power amenable to judicial review should also be remediable in damages if the necessary elements of malice or knowledge, together with foreseeability and causation can be established.

The applicant would in the circumstances of this case be awarded damages of 45,000,000/= with interest of 15% from the date of this ruling.

The applicant is awarded costs of this application.

I so Order.

**SSEKAANA MUSA**

**JUDGE**

**31<sup>st</sup>/10/2018**