REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Ibrahim, Ojwang, Wanjala , Njoki Ndungu & Lenaola, SC.JJ.)

PETITION NO. 2 OF 2019

BETWEEN

SGS KENYA LIMITED.....PETITIONER

AND

1. ENERGY REGULATORY COMMISSION.....RESPONDENTS

2. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENTS

3. INTERTREK TESTING SERVICES (EA) LTD.....RESPONDENTS

(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi

(*Nambuye, Ouko & Kiage JJ.A*) dated 11 May 2018, in Nairobi

Civil Appeal No. 341 of 2017)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is an appeal from a Judgment of the Court of Appeal, dated 11 May 2018, in Civil Appeal No. 341 of 2017, which set aside the Judgement and decree of the High Court at Nairobi by *(Mativo, J.),* dated 22 September 2017. The High Court (in J.R Misc. Application No. 496 of 2017) had quashed the decision of the Public Procurement Administrative Review Board (PPARB), which upheld the decision of the Energy Regulatory Commission to terminate the award of Tender Number ERC/PROC/4/2/16-17/119, won by the petitioner herein. The Judgment of the Court of Appeal had the effect of sustaining the termination of the tender-award, on the ground that the applicable term of reference did not include the possibility of emergent technical conditions.

B. BACKGROUND

[2] The 1st respondent, Energy Regulatory Commission, is a public body established under the Energy Act, 2006. Its mandate includes the regulation of electrical energy, petroleum and related products, renewable energy, and other forms of energy. On or about 12 May 2017, the 1st respondent floated tender number ERC/PROC/4/3/16-17/119, for the marking and monitoring of petroleum products, a service meant to curb adulteration of fuel. The tender attracted 3 bids. These were opened on 31 May 2017, with the responding firms being SILPA SA, Intertek Testing Services (EA) Ltd, and SGS Kenya Ltd (SGS).

[3] The 1st respondent appointed an evaluation committee which duly evaluated the bids, on the basis of technical and financial criteria. The evaluation committee recommended, on 30 June 2017, that the contract for the provision of petroleum-marking and monitoring services be awarded to SGS (the petitioner), at an annual cost of US$ 2,760,844.72. This was on the basis that SGS had attained the highest score, and had been the lowest bidder. The Commission, in the course of its recommendation upon the bids received, thus remarked in its evaluation report:

"General Observation

(a) The increasing need of detection of adulteration by use of Jet 1 ought to have been captured in the terms of reference for this tender. This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of jet A1 as an adulterant for diesel. Further, the Commission is now aware of an existing technology that can easily detect Jet A1 in motor fuel.

(b) *The team also noted the need for a detailed explanation of how the test-results from the monitoring teams are to be transmitted to the client. To this end . . . the advantage of use of a real-time and tamper-proof mechanism that would provide more authentic results".*

[4] Taking into account the existence of the technology referred to in the general observations, the 1st respondent's Acting Director for Petroleum, gave an opinion on 7 July 2017, recommending to the Acting Director-General, that the procurement process be terminated, and then re-commenced, with the requirement that the said technological elements be incorporated in the tender, and with reference to the monitoring of the petroleum service. The Acting Director-General considered this opinion, as well as that of the Head of Procurement, and on that basis, approved the recommendation for termination, by virtue of Section 63 (1) (a) of the Act. The decision to terminate the tender was communicated to all bidders, as required by Section 63(4) of the Act.

[5] SGS was aggrieved by the decision to terminate the tender, and filed a request for review, before the Public Procurement Administrative Review Board (2nd respondent), seeking Orders that the said tender-termination be annulled. SGS asked that it be awarded the tender; and in the alternative, SGS sought that the 1st respondent be directed to proceed with the tender and complete the process. The Board, by its decision of 1 August 2017, disallowed the request for review. It also gave the liberty to re-advertise the tender, for the provision of the petroleum marking services.

[6] SGS thereafter moved to the High Court, seeking leave to file a ***judicial review*** application. In its motion filed on 16 August 2017, SGS sought Orders of:

(a) *Certiorari,* to remove in to the High Court and quash the Board's decision;

(b) *Prohibition*, to countermand the decision of the 1st respondent to proceed with a new tender process;

(c) *Prohibition*, to prohibit the 1st respondent from entering into or signing any contract with any third party on the basis of a new tender; and

(d) *Mandamus,* directing 1st respondent to proceed with the old tender, including award of the contract to SGS.

[7] *Mativo J.* heard the judicial review proceedings, culminating in a Judgment dated 25 September 2017, bearing the following Orders:

(a) an Order of Certiorari to remove into the High Court to quash the decision and Ruling delivered by the Public Procurement Administrative Review Board on 1 August 2017, in Application No. 64 of 2017 ***(SGS Kenya Limited v. Energy Regulatory Commission)****;*

(b) an Order of *Prohibition* to remove into the High Court and quash the decision of the Energy Regulatory Commission, to proceed with the tender process in Tender Number ERC/PROC/4/3/17-18/016 for the provision of Marking and Monitoring Petroleum Products;

(c) an Order of *Prohibition* directed to the Energy Regulatory Commission, prohibiting it, directly and /or through its servant and/or agents, from entering and /or signing any contract with any third party, concerning tender number ERC/PROC/4/3/17-18/016, for the provision of Marking and Monitoring of Petroleum Products;

(d) an Order *Mandamus* directing the Energy Regulatory Commission to proceed with the tender process in tender number ERC/PROC/4/3/16-17/119, for the provision of Marking and Monitoring of Petroleum Products in conformity with the recommendation of its evaluation committee, for the award of the tender/contract to SGS Kenya Limited;

(e) each party to bear its own costs.

[8] Aggrieved by the Judgment of the High Court, 1st respondent lodged an appeal in the Court of Appeal. The Appellate Court, in a Judgment dated 11 May 2018, allowed the appeal, setting aside the Orders of the High Court, and substituting them with an Order dismissing the substantive motion with costs.

[9] The Court of Appeal faulted the High Court Judge for determining a *judicial review* matter as if it was an *appeal,* and for *going into the merits* of a decision already taken. The Appellate Court held it to be improper for the High Court to *make value judgment regarding the evidence*; to weigh the same, and to minutely examine it, to determine whether it reached a certain standard of acceptance.The Court found that the High Court had occasioned room for abuse of its power, by *usurping the competences of the Public Procurement Administrative Review Board.*

[10] The Appellate Court held that, in a judicial review matter, the Court's mandate is *limited to procedural improprieties*, and extends not to the merits of a decision. It held that the Board had been duly mindful of its own earlier decision in ***Avante International INC v. IEBC*** (Review No. 19 of 2017): it took into consideration the nature and weight of the *opinion on technological change*, which the 1st respondent had acted upon; and the Board's reasoning exhibited a fidelity to practicality and to good sense. Consequently, the Appellate Court held, the Judge ought to have shown greater deference to the Board's decision, and should have been more circumspect in its view of such a decision, bearing in mind the specializations of the Board. The Appellate Court held that the 1st respondent did not bear a statutory duty to award the tender to SGS, or to any other entity, so as to attract the compulsive force of *Mandamus.*

[11] Aggrieved by the Judgment of the Court of Appeal, the petitioner sought to have the matter certified as one of general public importance under Article 163(4) (b) of the Constitution an application which was allowed by the Appellate Court on 19 December 2019, upon a single issue: whether tribunals are bound by the doctrine of *stare decisis*. The petitioner filed a petition of appeal in this Court, thereafter, on 22 January 2019.

C. TRIBUNAL MANDATE, JUDICIAL REVIEW, AND THE SCOPE FOR APPEAL: CASE BEFORE THE SUPREME COURT

[12] The petition is stated to fall under Rule 33 of the Supreme Court Rules, 2012 and it raises the following issues for determination:

(a) whether Tribunals, such as the Public Procurement Administrative Review Board, are bound by their prior decisions, in accordance with the doctrine of precedent *(stare decisis);*

(b) whether the failure by quasi-judicial bodies (such as the PPARB) to abide by, or distinguish their prior decision, without giving

reasons, is an irrational, or improper exercise of their mandate;

(c) whether it was unfair, inequitable, untransparent, or not cost-effective, for the procuring agency to terminate the tender process, with a view to starting the same all over again, when the petitioner had offered to avail the relevant petroleum-technology information at no extra cost.

[13] The petition is premised on the following grounds:

(a) failure by quasi-judicial tribunals to adhere to the doctrine of *stare decisis* would subject the course of administration of justice, and of the rule of law, to caprice, irrationality and unpredictability on the part of such bodies, causing extreme uncertainty in the processes of justice;

(b) PPARB failed to adhere to the terms of Article 227(1) of the Constitution, the Public Procurement and Assets Disposal Act, 2015 and the Public Procurement and Disposal Regulations, for ensuring that the procurement system is fair, equitable, transparent, competitive and cost-effective;

(c) the failure by the PPARB to abide by its precedent in ***Avante International Technology Inc. v. IEBC PPARB,*** Review No.19 of 2017, or give reasons for digressing from it, is an untransparent, inequitable and irrational exercise of its decision-making power in the public procurement process;

(d) the appellant suffered loss and damage, by the tender process being terminated, on the basis of criteria not recognized by the law.

[14] The petitioner prays for the following reliefs:

(a) a declaration that the 2nd respondent and all other quasi-judicial bodies under Kenyan law, are bound by their previous decisions, in accordance with the doctrine of precedent;

(b) a declaration that the Court of Appeal erred in holding that the 2nd respondent did not act in ignorance, nor disregard its own decision in the earlier case;

(c) a declaration that the Court of Appeal erred in finding that the High Court had improperly and impermissibly delved into an evaluation of the evidence, and in substituting its opinion in place of the 2nd respondent's opinion;

(d) a declaration that the failure to adhere to the doctrine of precedent, or even to provide reasons for departing from its earlier decision, resulted in an unfair and untransparent decision-making process, contrary to Article 227(1) of the Constitution, and the Public Procurement and Asset Disposal Regulations;

(e) an Order setting aside the Judgment, Order and decree of the Court of Appeal in Civil Appeal No.341 of 2017;

(f) an Order affirming the Judgment, Order and decree of the High Court in Judicial Review Miscellaneous Application No.496 of 2017

(g) costs of the appeal.

D. SUBMISSIONS OF COUNSEL

[15] Learned counsel for the petitioner and the 1st respondent filed their written submissions, which were highlighted on 24 September 2019: Mr. Muite and Mr. Musyoka for the petitioner; Mr. Otachi for the 1st respondent; and Ms. Mwasao (holding brief for Mr. Bita) for the Attorney-General. Ms. Mwasao, however, stated her obligation as being limited to observing the proceedings, without making submissions.The 3rd respondent was not represented, even though its advocates had been duly served with the

hearing notice.

[16] Learned Senior Counsel, Mr. Muite, submitted that the 1st respondent had violated the provisions of Article 227 (1) of the Constitution, by failing to follow a system that is fair, equitable, transparent, competitive and cost-effective, in the procurement of public goods and services. He called in aid, in that regard, the terms of Article 10(1) of the Constitution, on "national values", which he alleged, were violated by the 1st respondent, especially as regards good governance, integrity, transparency and accountability. He submitted that the procurement process lacked openness and accountability, contrary to the terms of Chapter 12 of the Constitution, which relates to public finance. He urged that public money, in the present circumstances, would not be used in a prudent and responsible manner. He submitted that the petitioner, having scored 84.7% in the bid-assessment, was the highest scorer, on combined technical and financial criteria, and so, should have been awarded the tender, and failure in this regard would amount to imprudent use of tax-payers' money.

[17] Mr. Muite submitted that the Court of Appeal was wrong in failing to appreciate that judicial review proceedings are no longer a set of proceedings *sui generis*, but are now anchored under Article 47 of the Constitution, which requires fair administrative action. He submitted that judicial review now falls within the express prescriptions of the Constitution, and on this account, the Appellate Court was in error, in hold that the High Court had improperly interfered with the jurisdiction of a body that was subject to Articles 10, 47, 201 and 227. He invited this Court to find that these Articles of the Constitution had been violated; and he urged that a general message on the importance of prudent financial management, should issue forth to all public entities.

[18] The petitioner's written submissions focus upon four principal questions, for determination:

(i) whether the Review Board failed to follow its decision in a past decision (the ***Avante*** case);

(ii) whether the doctrine of *stare decisis* applies to quasi-judicial tribunals, like the Review Board;

(iii) whether the petition has exceeded the terms of the leave and certification granted by the Court of Appeal on 19 December 2019;

(iv) should the answer to (ii) above be in the negative, would the petitioner be entitled to Orders of judicial review"

[19] On the first issue, the petitioner submits that, despite the ***Avante*** decision being cited to the Review Board, and the Board expressly making reference to it, the Board, nonetheless, overlooked the principle of that decision.

[20] On the second issue, learned counsel, Mr. Musyoka urged that the doctrine of *stare decisis* is a fundamental jurisprudential yardstick, and that prior decisions must be followed, save for good cause justifying a departure. Counsel urged that the doctrine is helpful in achieving uniformity/consistency, predictability and certainty, in law. He submitted that the need for consistency in administrative decisions demands that, even though an administrative tribunal is not bound by its previous decisions, and is free to adopt any reasonable interpretation of the pertinent legislation in a matter before it, previous interpretations will have some bearing on the reasonableness of the tribunal's interpretation, in a current matter.

[21] The petitioner, in extolling the object of precedent, invoked works of record: Glanville Williams, ***Learning the Law*** (9th ed. 1973); ***Sweney v. The Department of Highways*** (Canada, 1933) (Ontario Court of Appeal, *Middleton, J.A.).* It was the petitioner's position that, a disregard of past cases bearing similarity to the present one, has the negative consequence of occasioning uncertainty in the law.

[22] On the third and fourth issues, the petitioner submits that it is common ground, that the certification by the Appellate Court for this appeal, was on the question of whether quasi-judicial tribunals are bound by the doctrine of *stare decisis.* But it is also submitted that, tied to that issue, is the question whether the Review Board followed the ***Avante*** precedent, and whether it should have followed it. The petitioner submits that the decision of this Court should bring out the consequences of its determination of the two issues, lest the decision holds its place as no more than an academic statement.

[23] The petitioner invokes Article 47 of the Constitution (on fair administrative action), as well as the High Court's decision in ***Martin Nyaga Wambora v. Speaker of the Senate*** [2014] eKLR, urging that the rules of natural justice, and the duty to act fairly

when making administrative, judicial or quasi-judicial decisions, coalesced into constitutional rights, capable of enforcement by an aggrieved party, in appropriate cases.

[24] The petitioner draws a comparison between the concept of judicial review under the Constitution of Kenya, and under the Constitution of South Africa, and in that context, cites a South African case, ***Pharmaceutical Manufacturers Association of South Africa,*** *ex parte* ***President of the Republic of South Africa & Others,*** 2000(2) SA 674, where the Court thus held:

"[The] common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts"

[25] The petitioner has also placed reliance on the High Court decision *in* ***Republic v. Commissioner of Customs Services*** *ex parte* ***Imperial Bank Limited*** [2015] eKLR where *Odunga J.* recognized that ***"judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision."***

[26] The 1st respondent, in grounds of opposition and replying affidavit filedon dated 23 April 2019 and filed on 24 April 2019, states that the petition, in effect, extends in design beyond the terms of the leave and certification granted by the Court of Appeal on 19 December 2018. The replying affidavit is sworn by Mueni Mutunga, the 1st respondent's Commission Secretary and Director of Legal Services, who depones that, in so far as the petitioner seeks to challenge the merits of the Court of Appeal's Judgment, the true object of the Appellate Court's certification has been missed. This, as maintained by learned counsel, Mr. Otachi, was not for sustaining: for, if the petitioner had perceived true constitutional issues, then a petition of appeal would have been filed under Article 164 (a) of the Constitution, within time.

[27] The 1st respondent, in written submissions dated 26 August 2019, maintains that the appeal before this Court should be restricted to the single issue of whether tribunals are bound by the doctrine of *stare decisis*, as held by the Court of Appeal on 19 December 2018 ¾ and not whether the petitioner was entitled to Orders of judicial review at the High Court or the Court of Appeal. Therefore, it was urged, by dint of Article 163 (4) (b) of the Constitution, the Court's jurisdiction, for purposes of this appeal, is limited to the said issue. To sustain this argument, 1st respondent cited the decision of this Court in ***SGS Kenya Limited v. Energy Regulatory Commission & 2 others*** [2019] eKLR.

[28] The 1st respondent submits that the petition exceeds the jurisdiction of this Court, citing the case of ***Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Ltd (1989)*** KLR 1, in support. Citing the decision of this Court in ***Samuel Kamau Macharia & Anor v. KCB Ltd & 2 Others,*** Application 2 of 2011, this respondent urges that the Court's jurisdiction cannot be expanded through sheer judicial craft, or innovation. The 1st respondent recalls the caution that the Court is not to assume jurisdiction merely on account of a litigant's badgering (***Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others*** [2014] eKLR).

[29] The 1st respondent submits that the instant petition goes against the declared judicial stand, by enlarging the issues for determination, and introducing matters beyond the contemplation of the leave-grant of the Court of Appeal (in Civil Appeal No. 341 of 2017). The 1st respondent urges this Court to decline the invitation by the petitioner to upset the merits of the Appellate Court's Judgment.

[30] The 1st respondent, next, addresses the question whether a tribunal is bound by is prior decisions. It is submitted that the relevant case must, in the first place, address the same legal questions as are presently arising; and secondly, such earlier must have been decided by the same Court, or a superior Court within the judicial-administration hierarchy to which the Court considering the current case belongs. The context of this principle, it was urged, is to be found in Article 163 (7) of the Constitution, which stipulates that: "***All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court***".

[31] Learned counsel submitted that the petitioners' case would entail an inapposite notion of horizontal *stare decisis*, that binds Tribunals or Subordinate Courts to their own previous decisions, on matters so much dependent on variable facts on the ground. Mr. Otachi submitted that Tribunals are not Courts, in a literal sense, and should not be held to be subject to the rule of *stare decisis*.

[32] Learned counsel urged that the Public Procurement Adminstrative Review Board was a specialized agency established under Section 27 of the Public Procurement and Asset Disposal Act, and its main tasks involved reconsideration or review of administrative decisions, on their merits. Such an agency, it was urged, stands in the shoes of the original decision-maker, and makes decisions all over again, uninfluenced by the original decision. Such an agency, it was urged, works to expectations, thanks to variety in its composition, the experience of its members, and the ready access to all such information as may be found relevant; and in that regard, settled legal positions founded upon precedent will not be the requisite consideration, in achieving right outcomes.

[33] The 1st respondent's standpoint sought support in a Canadian case (***Weber v. Ontario Hydro*** [1995] 2 SCR 929), in the dissenting opinion of *Lacabucci, J.* (para 14)

"The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by ***stare decisis.*** *By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate."*

[34] For the 1st respondent herein, it was submitted that administrative decision-makers are permitted to draw rules from the general law, and to modify these to the needs of a particular regulatory setting. In this respect, learned counsel called in aid the decision of *Fish J.* in ***Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professional*** [2011]3 SCR 616 (at para 45):

"[A]rbitrators may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized."

[35] In such a context, the 1st respondent's position was that, applying *stare decisis* to bind an administrative tribunal may preclude it from applying its expertise to reach a differing conclusion such as may be justified, in light of its specific policy goals, and its regulatory structure. It was urged that administrative decision-makers do have significant flexibility in responding to changes, and they may attune their directives to better suit changed circumstances.

[36] Mr. Otachi supported the finding of the Court of Appeal, that the tribunal had not disregarded its own decision in ***Avante,*** as it did take into consideration the nature and the weight of the opinion on technological change. Learned counsel thus urged this Court to dismiss the petition.

E. ANALYSIS AND DETERMINATION

[37] Learned Senior Counsel, Mr. Muite, had urged the Court to consider the instant appeal under the terms of Article 163 (4) (a) as well as (b). Not only, according to him, has this case been certified by Court of Appeal as involving "matter of general public importance", (i.e. Clause (b)), it also involves issues of interpretation and application of the Constitution (in accord with clause (a)). In ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others*** [2015] eKLR, this Court in resolving a similar issue, held as follows (paras. 39 and 41):

(i) "The two avenues of the appellate jurisdiction of this Court are distinct. *Firstly, an appraisal of the nature of an appeal as involving matter of constitutional interpretation and/or application, signals access to the Supreme Court 'as of right'; and no form of authorization or leave from the Court of Appeal, or the Supreme Court is required at the beginning…."*

(ii) *"Suffice it to say that the path that a litigant takes is determined on the basis of the subject-matter, as has been held by the Superior Courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on the character of the issues involved in the subject matter, rather than on such procedural shortfalls as may have afflicted a litigant's progress.* ***It follows that where a party has elected the path to the Supreme Court 'as of right', that matter cannot be 'converted' to one where certification is required, just because time for filing 'an appeal as of right' has lapsed…"***

[38] It is clear to us that the petition of appeal has been brought under Article *163 (4) (b) of the Constitution.* We have also taken note that the written submissions have not incorporated arguments on Article 163 (4) (a). The new line of submissions only came up during the highlighting stage.

[39] Such a scenario comports with our Ruling of 12 February 2019, when the petitioner herein was seeking to stay the Judgment of the Court of Appeal. We held, on that occasion, that the application was properly before us, having been certified by the Appellate Court as *raising a single question of great public importance:* whether tribunals are bound by the doctrine of *stare decisis*. We do not intend to belabour this issue. The petitioner herein elected to proceed under the second limb.

[40] The petitioner approached the High Court by way of the prescribed procedures under *Judicial Review*, which revolve around the *paths followed in decision-making.* Such a course, as the Appellate Court properly held, is *not concerned with the merits of the decision in question.* The law in this regard, which falls under the umbrella of basic "Administrative Law", is clear enough, and it is unnecessary to belabour the point.

[41] So we turn to the single issue before us: are the Tribunals bound by the doctrine of *stare decisis*" The petitioner has contended that the Review Board failed to follow its own decision in ***Avante,*** without any explanation. According to the petitioners, *stare decisis* applies to quasi-judicial tribunals, to the intent that there be uniformity/consistency, predictability, and certainty in law, in general terms. The 1st respondent, quite to the contrary, has argued that tribunals are not bound by their previous decisions such being only persuasive; and that each tribunal-task is to be determined on the basis of the facts before it.

[42] From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with *programming and regulatory tasks of the socio-economic, administrative and operational domains.* Membership in such tribunals generally reflects the *essential skills required for the specific tasks in view.* The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.

[43] Such a variegated range of implementation scenarios, it is apparent to us, calls for *flexibility in the regulatory scheme.* In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.

[44] We would agree with the 1st respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.

[45] The petitioner has asked this Court to consider if it was entitled to Orders of judicial review. It is argued that, failure to do so would render the petition a bare academic exercise. It is the case, however, that the petitioner has engaged this Court in an essentially academic exercise. This prayer has exceeded the leave and certification granted by the Court of Appeal, within the terms of Article 163 (4) (b) of the Constitution. We have, however, observed that the Appellate Court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the Order of *Mandamus*, since the 1st respondent did not owe any delimited statutory duty to the petitioner.

[46] The petition of appeal lacks merit.

F. ORDERS

[47] This Judgment has provided occasion for shedding some light on the dividing line between the remits of specialized administrative tribunals, on the one hand, and the regular judicial process insofar as it accommodates the long-standing practice of

stare decisis on the other hand. Such a clarification enables this Court to resolve the instant dispute by way of the following Orders:

(a) The petition of appeal dated 22 January 2019 is hereby disallowed.

(b) The petitioner shall bear the costs of the 1st respondent in this Court, in the Court of Appeal and the High Court, as well as at the Tribunal.

DATED and **DELIVERED** at **NAIROBI** this ***10th*** day of ***January, 2020.***

.....	**.....**
M. K. IBRAHIM	**J. B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA