



REPUBLIC OF KENYA

TRANSPORT LICENSING APPEALS BOARD AT NAIROBI APPEAL

CASE NO. 17 OF 2018

CHELSEA TRANSPORTERS SACCO LTD.....APPELLANT

VERSUS

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant is a CO-OPERATIVE SOCIETY that is registered under the Co-operative Societies Act (Cap 490) and that was seeking to be licensed by the Respondent to operate public service vehicles.
2. The Respondent, National Transport and Safety Authority, is established under section 3 of the National Transport and Safety Authority Act, No. 33 of 2012 and has the responsibility to: advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety, implement policies relating road transport and safety; plan, manage and regulate the road transport system; ensure the provision of safe, reliable, and efficient road transport services and to administer the Traffic Act.

The Appellant's Case

3. The Appellant filed an application at the Transport Licensing Appeals Board (TLAB) on the 7th of December 2018 with the complaint that the Respondent had failed to register their society due to the change in government policy even after the Appellant had complied with all the requirements that were prescribed to them by the Respondent. This was in response to the letter sent to the Appellant by the Respondent that declined the Appellant's application.
4. The Appellant was seeking to be licensed as a public service transport operator plying Ngara (Fig Tree) on Thika Road, Githurai 44, Kahawa West route and back as per the National Transport and Safety Authority Act Number 33 of 2012.
5. In relation to the Appellant, they had complied with all the instructions from the Respondent, including obtaining clearance from the Nairobi City Council to operate on the requested route and they had also presented to the Respondent, letters of no objection from various transport operators who ply the same route and some of the letters were presented to the Tribunal.
6. The Respondent, after receiving the requested documents, wrote back and cleared the Appellant for pre-registration inspection at the Vehicle Inspection Centre on Likoni Road, Nairobi. The Appellant complied with this condition and presented their thirty one (31) vehicles for inspection on the 8th of

August 2018.

7. It was the Appellant's case that they had complied with all the requirements that were prescribed to them by the Respondent. They were therefore surprised to receive a letter from the Respondent dated the 7th of December 2018 declining their application due to a shift in government policy for the reason that they had public service vehicles whose capacity was less than 25 passengers. The Respondent relied on section 4 (3) of the Legal Notice Number 179 of 31st December 2014 as a ground for rejecting the Appellant's application.

8. Section 4 (3) of the Legal Notice Number 179 of 2014 provides that the Authority shall not, with effect from the 1st January 2016, renew the license of any Public Service Vehicle whose seating carrying capacity is less than twenty-five passengers. The appellant contended that this section does not apply to them, as they were not seeking to renew their license, but they were applying for a new license.

9. It was the Appellant's assertion that there existed a legitimate expectation that they will be licensed as they had implicitly been given a clean bill of health by the Respondent when they requested that the Appellant proceed to the inspection stage with the Respondent knowing very well that they will not license vehicles with a seating capacity of fourteen (14) passengers.

10. The Appellant further contended that being rejected when applying for a license does not surmise as a 'reasonable and sufficient' notice on the 'alleged' existence of the contentious regulation to the Appellant.

11. It was the Appellant's claim that the Respondent, NTSA, had unfairly failed to register them after they had complied with all their requirements.

12. Evidence was adduced to show that the Respondent had indeed registered other fourteen seater operators well after the 1st January 2016 deadline. As such, failing to register the Appellant was deemed to be discriminatory.

The Respondent's Case

13. It was the Respondent's case that the Appellant had complied with all the requirements save for the shift in government policy on the law governing the transport sector.

14. The Respondent averred that it is mandated to rely on NTSA regulations, specifically Legal Notice Number 179 of 31st December 2014, whose section 4(3) restrains the Authority from licensing any Public Service Vehicle whose seating capacity is less than twenty-five (25) passengers. The Respondent averred that Legal Notice Number 179 of 2014 implements the directive as a manner of decongesting the Central Business District (CBD) in Nairobi.

15. The Respondent contended on the issue raised by the Appellant on the issuance of a 'sufficient notice' that the regulation, Legal Notice Number 179 of 2014, served as a notice and there was no need for the Respondent to bring it to the attention of the Appellant.

16. The Respondent further submitted that in the particular issue, the Tribunal had no jurisdiction to decide the matter. This is as the issue required a determination on the contested 'legality' of the contentious provisions (Sections 4 (2) and 4 (3)) of the Legal Notice Number 179 of 2014.

Determination

17. Following the arguments adduced in trial, the Transport Licensing Appeals Board has isolated the following issues to be the ones requiring determination:

- a. Whether the Tribunal has jurisdiction to determine the matter?

b. Whether the Appellant had complied with the PSV Regulations for the purpose of registration and licensing as a Public Service Operator; and

c. Whether the Respondent had erred by failing to register the Appellant?

Whether the Tribunal has jurisdiction to determine the matter?

18. In considering whether the Tribunal has jurisdiction to determine the matter, it is important to note that jurisdiction is everything and without it, a court or a tribunal acts in vain. The courts in *Owners of the Motor Vessel “Lilian S” –vs- Caltex Oil(Kenya) Ltd* (1989) KLR 1 espoused on the issue of jurisdiction by stating that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. Jurisdiction can be termed as a creature of legal and constitutional instruments. The Transport Licensing Appeals Board is therefore a creature of statute namely, the National Transport and Safety Authority Act, 2012. Under Section 39(5) of the Act, the Board is vested with the jurisdiction to, on appeal, to affirm or reverse the decision of the National Transport and Safety Authority, or make such other order as the Board considers necessary and fit.

20. Consequently, a tribunal has no inherent jurisdiction. It only acts in accordance with the vested jurisdiction/power. In this matter, the issue to be determined is whether the Respondent failed to lawfully register the Appellant and this then becomes an appeal issue that is under the purview of the Board. We therefore find that the Board has jurisdiction to determine the matter.

Whether the Appellant had complied with the PSV Regulations for the purpose of registration and licensing as a Public Service Operator?

21. The law in Section 5 of the PSV Regulations gives the conditions that one must need to comply with in order for the Authority to license them that is:

5. Conditions to be met by applicants

“(1) A person desirous of operating public service vehicles shall be a member of a body corporate which shall—

(a) be licensed to operate if the body corporate owns a minimum of thirty serviceable vehicles registered as public service vehicles or in respect to which an application for a license has been or is to be lodged with the Authority;

(b) have in its employment a staff complement which must include at a minimum —

i. a driver in respect to each public service vehicle;

ii. an inspector for each route on which the public service vehicle is intended to operate;

iii. an office manager;

iv. an accounts clerk; and

v. a qualified mechanic or a contract under which the services of a mechanic are outsourced;

(c) have in place a code of conduct approved by the Authority governing its employees, agents and

sub-contractors;

(d) have in place a documented management system, safety management system based on ISO 39001:2012 “Road Traffic Safety Management Systems” or equivalent and customer complaints handling system;

(e) comply with labour laws and regulations including in respect to statutory deductions, health and safety of the workplace, Work Injuries Benefits Act (Cap. 236) insurance, statutory leave days and written contracts of employment for staff; and

(f) where it operated public service vehicles licensed under these Regulations in the immediately preceding calendar year fully complied with the requirements of these regulations in the immediately preceding year.”

22. Following the evidence adduced in the trial and the foregoing provision, the Appellant has been able to prove that they had complied with conditions under section 5 of the PSV regulations, as they had a threshold of thirty (30) vehicles. They produced details of the required thirty vehicles which underwent inspection at the Vehicle Inspection Centre and the various letters of no objections from transport operators who ply the same route as was to be used by the Appellant.

23. As a result, the Appellant had successfully complied with the requisite PSV Regulations and the various conditions that had been placed by the Respondent upon them for the purpose of registration and licensing as a Public Service Operator with the exception of the Legal Notice Number 179 of 2014.

Whether the Respondent had erred by failing to register the Appellant?

24. The Tribunal had previously adopted a purposive approach to the interpretation of Section 4(2) and 4(3) of the Legal Notice Number 179 of 2014 in its previous case of *Salty Supporters Investment Limited v The National Transport and Safety Authority* where it espoused that the Legal Notice through its section 4 (2) stated that no new PSV vehicles would be registered as Commuter Service Vehicle whose capacity is less than twenty-five passengers. This means that the existing fourteen seaters would continue operating until 1st January 2016, when all the fourteen seaters would cease to be licensed by virtue of section 4 (3). As such, there exists no conflict on the intended purpose of the two sections.

25. In this matter, however, the Appellant was seeking to be licensed as a new operator and therefore Section 4(3) would not be applicable to their situation as Section 4(3) of the Regulation seeks to decline the renewal of the licenses of existing operators who have vehicles with fourteen seaters. The Respondent cannot purport to interpret the law in a manner that oppresses the public.

26. The Tribunal notes that the Authority gave the Appellant the legitimate expectation that they would be licensed despite having fourteen seaters. This is because they were taken through all the approval processes and also spent money to have their vehicles inspected and issued with inspection certificates. It was not until the last stage when they were required to comply with section 4 (3) of the 2014 Regulations. Besides, the Appellant was able to prove that other fourteen seaters had been licensed after 1st January 2016. This, therefore, amounts to a discriminatory administrative action that is also contrary to section 7 (m) of the Fair Administrative Action Act 2015 for breaching the legitimate expectations of the Appellant.

27. The Tribunal is of the considered opinion that the enforcement of the regulations can only meet the standards set under the Fair Administrative Action Act 2015 if they are applied uniformly and without any bias.

28. Having considered the facts and the law applicable to this matter, the Transport Licensing Appeals Board hereby finds:

1. THAT the Respondent, NTSA, erred in failing to register the Appellant, Chelsea Transporters

SACCO Limited, after they had complied with all the prescribed requirements.

2. THAT the Respondent, NTSA, completes, within fourteen (14) days the registration of the Appellant as a licensed transport operator.

Delivered, dated, and signed in Nairobi by the Transport Licensing Appeals Board on this 15th day of March 2019.

Dick Waweru	Chairman
Aden Noor Ali	Member
Professor Kiarie Mwaura	Member
Moses Parantai	Member
Betty Chepng'etich Bii	Member