



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW NO. 10 OF 2017**  
**IN THE MATTER OF AN APPLICATION FOR ORDER OF MANDAMUS**  
**AND**  
**IN THE MATTER OF SECTION 8 OF THE LAW REFORM ACT**  
**BETWEEN**  
**SAFE RIDER VEHICLE TECHNOLOGIES (PTY) LIMITED....1<sup>ST</sup> APPLICANT**  
**LEON DU PLESSIS.....2<sup>ND</sup> APPLICANT**  
**THEO TECHNOLOGIES LIMITED.....3<sup>RD</sup> APPLICANT**  
**VERSUS**  
**THE NATIONAL POLICE SERVICE COMMISSION (NTSA)....RESPONDENT**

**JUDGMENT**

1. By a notice of motion dated 23<sup>rd</sup> January 2017 filed on 24<sup>th</sup> January 2017, pursuant to leave granted on 18<sup>th</sup> January 2017, the exparte applicants **Safe Rider Vehicle Technologies (PTY) Limited; Leon Du Plessis and Theo Technologies** seek from this court judicial review orders that:

- a) An order of **mandamus** be and is hereby issued to compel the respondent **National Transport and Safety Authority (NTSA)** to register the 3<sup>rd</sup> applicant as a speed governor supplier and agent of the 1<sup>st</sup> and 2<sup>nd</sup> applicants in Kenya and by virtue of such registration, the respondent be compelled to accept vehicle speed governor certificates issued by the 3<sup>rd</sup> applicant.
- b) The costs of the application be awarded to the exparte applicants.

2. The application is predicated on the grounds stated in the statutory statement and supported by a verifying affidavit filed together with the exparte chamber summons on 17<sup>th</sup> January 2017 sworn by John Makau Mutisya, the 3<sup>rd</sup> applicant's Managing Director and the affidavit sworn by Leon Du Plessis, the Managing Director of the 1<sup>st</sup> applicant, who is also the 2<sup>nd</sup> applicant in these proceedings.

3. The *ex parte* applicants' case is that the 1<sup>st</sup> applicant Safe Rider Vehicle Technologies (PTY) Limited is a South African Company Manufacturing Motor Vehicle Speed Governors and whose brand copyrighted name is "**Safe Rider**" and has done business of servicing and selling its speed governors in Kenya for over 15 years.

4. As a manufacturer, the 1<sup>st</sup> applicant appoints distributors to develop business and distribute its products and for a long time, it had its agent distributor in Kenya known as **Safe Rider Management Systems Limited** which latter is a Kenyan Company.

5. In July 2016, the 1<sup>st</sup> applicant terminated the business relationship with Safe Rider Management Systems Limited on discovery that the latter company was distributing counterfeit speed governors originated by the 1<sup>st</sup> applicant's competitor in South Africa.

6. In the same month of July 2016, the 1<sup>st</sup> applicant appointed Theo Technologies Limited ( the 3<sup>rd</sup> applicant ) as its distributor in Kenya and notified Kenya Bureau of Standards (KEBS) and National Transport Safety Authority (the respondent herein) which are the statutory bodies responsible for inspection and licensing the use of commercial motor vehicle speed governors and recorders in Kenya.

7. It is alleged that the respondent has refused to permit the 3<sup>rd</sup> applicants to sell, distribute, service, install certify and or otherwise sell the 1<sup>st</sup> applicant's speed governors in Kenya for no good reason, which is a denial of opportunity to earn a living unduly despite several requests.

8. Further, that the respondent has frustrated the 1<sup>st</sup> and 2<sup>nd</sup> applicants' efforts to sell their speed governors and recorders in Kenya, which has also made it impossible for the 3<sup>rd</sup> applicant to sell the 1<sup>st</sup> and 2<sup>nd</sup> applicant's products which refusal is illegal and abuse of office by the respondent.

9. It is also alleged that by the refusal to register the 3<sup>rd</sup> applicant as a distributor of motor vehicle speed governors and recorders on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> applicants the respondent has acted *ultra vires* its powers.

10. In the affidavit sworn by Leon Du Plessis, it was basically reiterating what Mr Mutisya had deposed while maintaining that the respondent's refusal to register the 1<sup>st</sup> and 2<sup>nd</sup> applicants' new distribution agent had resulted in the applicants' inability to sell their products in Kenya without any reason given that they had operated in Kenya for more than 15 years of Kenya.

11. Mr Du Plessis further deposed that their products are recognized by the government of Kenya as ideal for use here. Further, that the Kenya Industrial Property Institute (KIPI) had registered the trade mark "**Safe Rider**" which was also certified by KEBS as being ideal for use in Kenya.

12. It is further deposed that the respondent has not treated the applicants fairly by denying them an opportunity to earn an honest living, denial of economic opportunity and discrimination hence the respondent's administrative action of refusing to register their agent should be reviewed in terms of the law.

13. The respondent National Transport Safety Authority filed a replying affidavit sworn by Engineer Fredrick Oanya, Deputy Director, motor vehicle inspection, setting out the statutory functions of the National Transport Safety Authority as per the National Transport Safety Authority Act No. 33 of 2012 being to advise and make recommendations to the Cabinet Secretary on matters relating to road and transport and safety; implement policies relating to road transport and safety; and conduct motor vehicle inspections and certifications.

14. It was contended that the speed governor supplier approved by the Kenya Bureau of Standards (KEBS), Chief Mechanical and Transport Engineer (CMTE) and the National Transport Safety

Authority to supply and install the “ *Safe rider*” branded speed governors in Kenya is Safe Rider Management Systems who bears the “S” mark approved by (KEBS). It is contended that the applicants had neither submitted their speed governor to the KEBS, Chief Mechanical and Transport Engineer for testing and approval nor to the National Transport Safety Authority for approval to fit their speed governors and therefore are not listed among the approved speed limiter suppliers in Kenya.

15. That the National Transport Safety Authority only recognizes approved speed governor suppliers and does not interfere with obligations between contracting parties.

16. It was contended that the prayers to register the 3<sup>rd</sup> agent applicant as a speed governor supplier for the 1<sup>st</sup> and 2<sup>nd</sup> applicants is premature because they have not submitted their speed governors for testing and approval by the KEBS, Chief Mechanical and Transport Engineer and the National Transport Safety Authority.

17. On 10<sup>th</sup> March 2017 the 2<sup>nd</sup> applicant filed a further affidavit contending that the respondent was misleading the court on the allegation that Safe Rider Management Systems is approved by Kenya Bureau of Standards.

18. That it is his company the 1<sup>st</sup> applicant that manufactured the speed governors that Safe Rider Management Systems distributed in Kenya for over 10 years and that the 1<sup>st</sup> applicant holds the trademark for the products. Further, that the distribution contract was terminated in July 2016 on discovery that Safe Rider Management Systems traded in counterfeit speed governors called Safe Rider. Further, that on 14<sup>th</sup> October 2016 the Safe Rider Management Systems placed an advertisement in the Nationa newspaper stating that its speed governors are manufactured in Kenya, a clear confirmation that it no longer dealt with the 1<sup>st</sup> applicant’s products which are manufactured in South Africa.

19. That Safe Rider Management Systems was illegally taking over the applicant’s brand name yet the names are different in that “SafeRider” is different from “ Safe Rider” products, the latter belonging to the 1<sup>st</sup> applicant hence it is strange for the respondent to refuse to register the applicants.

20. That on 29<sup>th</sup> January 2014 the 1<sup>st</sup> applicant’s product was duly tested by KEBS and the test results showed that the product complied with required standards established by KEBS.

21. Further, it was stated that the Safe Rider Management Systems speed governor is a different brand from the 1<sup>st</sup> applicant’s products and that it was after the successful testing of the 1<sup>st</sup> applicant’s products that Safe Rider Management Systems Limited was approved as distributor for the 1<sup>st</sup> applicant, after the 1<sup>st</sup> applicant was authorized to export the speed governors to Kenya.

22. In addition, it was deposed that when the agency of Safe Rider Management Systems Limited was terminated in August 2016, the 3<sup>rd</sup> applicant and KEBS were notified and a response received from KEBS on 11<sup>th</sup> August 2016.

23. That the respondent does not test speed governors but that the task of testing is with KEBS which testing was duly undertaken and approvals given.

24. That had the 1<sup>st</sup> applicant not changed its distribution agent, it would still be selling its products in Kenya.

25. That the respondent is working with the 1<sup>st</sup> applicant’s former agent Safe Rider Management Systems Limited to frustrate the applicants business hence the refusal to authorize the new agent- 3<sup>rd</sup> applicant, to supply the speed governors in Kenya and to the over 15,000 customers in Kenya who

already installed the speed governors courtesy of Safe Rider Management Services Limited, the former agent.

26. At one point in the course of these proceedings, there was an attempt by Stima Thabiti Manufacturers Limited and Safe Rider Management Systems to be enjoined as interested parties but they never actualized their intentions other than filing notice of appointment of advocates through Kamotho Njomo & Company Advocates and Wathuta and Company Advocates. This was despite the court granting them leave to file their applications for joinder for consideration and even fixing a hearing date of 15<sup>th</sup> May 2017 of the intended applications if any, but by that date, no application for joinder had been filed hence the court set this date for judgment on the substantive motion.

27. Only the ex parte applicant filed written submission on 15<sup>th</sup> May 2017 framing one issue for determination, that of whether the order of mandamus should issue compelling the respondent to discharge its statutory duty of registering the 3<sup>rd</sup> applicant as a speed governor supplier and agent of the 1<sup>st</sup> and 2<sup>nd</sup> applicants and by such registration the respondent be compelled to accept vehicle speed governor certificates issued by the applicant.

28. In answer to the above sole question, the ex parte applicants' counsel reiterated the facts of the case herein as deposed in their affidavits.

29. On the law applicable, it was submitted that the respondent is under a duty to act fairly in its dealings as an administrator to ensure that rules of natural justice have been followed in all its dealings. That refusal to grant the applicants a license to sell their speed governors without giving them an opportunity to be heard, or telling them, why their application for a license has been rejected is unfair.

30. That despite the applicants' writing to the respondent seeking to know why they had not been licensed, the respondent did not reply.

31. That the respondent is subject to supervision by this court and that the Constitution of Kenya 2010 Article 27(1) and (4) protects the applicants' right against discrimination and protects their rights to equal protection under the law.

32. Further reliance was placed on Article 43 (1) (c) of the Constitution which guarantees the applicants rights to economic empowerment, which rights had allegedly been unduly infringed by the respondent hence this application. No case law was referred to.

## **DETERMINATION**

33. I have considered the foregoing and in my humble view, the issue that flow for determination is whether the order of mandamus is in the circumstances of this case, available to the ex parte applicants as prayed.

34. According to **Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 89 page 111**, it is stated:

*“ The order of mandamus is a most extensive nature, and, is, in the form of a command issuing from the High Court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases, where, although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual.....The order must command no more than the party against whom the application is made is legally bound to perform.*

*When a general duty is imposed, a mandamus cannot require it to be done. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands*

***of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”***

35. In **Kenya National Examination Council vs Exparte G. Gathenji Njoroge & Others CA No. Nairobi 266/96** (CA) the Court of Appeal applying the above principles stated inter alia:

***“ In other words, an order of mandamus will issue to compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”***

36. Applying the above legal principles to the facts of this case, the exparte applicants lament that despite KEBS testing and approving the licensing and distribution of the 1<sup>st</sup> applicant’s products “SafeRider” speed governors © in Kenya, the respondent has refused to license or register the first applicants’ agent the 3<sup>rd</sup> applicant to distribute the copyrighted product and is instead hell bent to frustrate the applicants with the help of the 1<sup>st</sup> applicant’s former agent Safe Rider Management Systems Limited with whom they fell out upon discovery that the latter was distributing counterfeit products and passing them off as the 1<sup>st</sup> applicant’s speed governors.

37. The respondent contends that it is Safe Rider Management Systems which is licensed to distribute the speed governors as approved by KEBS under class S and that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have not applied for lab testing of their products by KEBS before consideration for registration and licensing of the intended agent for distribution purposes.

38. As correctly submitted by the exparte applicant’s counsel, the functions and powers of the respondent National Transport Safety Authority are as stipulated under Section 4 of the Act. The functions of the Authority include- ensuring the provision of a safe, reliable and efficient road transport services; implement policies relating to road transport and safety; plan, manage and regulate the road transport system in accordance with the provisions of the Act.

39. Under Section 4(2) of the NTSA Act, in the performance of its functions under Subsection (1), the authority shall, among others;

- a) Register and license motor vehicles.
- c) Conduct motor vehicle inspections and certification;
- c) Regulate public service vehicles
- d) Develop and implement road safety strategies.

40. The applicants complain that the respondent has without giving any reasons refused to register the 3<sup>rd</sup> applicant as a speed governor supplier and agent of the 1<sup>st</sup> and 2<sup>nd</sup> applicants in Kenya and that by virtue of such registration, the respondent be compelled to accept vehicle speed governor certificates issued by the 3<sup>rd</sup> applicant.

41. In other words, the applicants are challenging the decision of the respondent to ‘refuse’ to register the 3<sup>rd</sup> applicant as an agent for the 1<sup>st</sup> and 2<sup>nd</sup> applicants for supply and or distribution of “SafeRider” speed governors in Kenya, which license had earlier on been granted to the Safe Rider Management Systems Limited.

42. However, the applicant has not sought any judicial review orders of certiorari to bring into this court for purposes of quashing the decision of the respondent refusing to register and or licence the 3<sup>rd</sup> applicant as an agent for the supply and distribution of SafeRider Speed Governors for the 1<sup>st</sup>

and 2<sup>nd</sup> applicants.

43. In the absence of remedy of certiorari, this court cannot consider mandamus as there is no specific statutory duty imposed on the respondent to register/licence the 3<sup>rd</sup> applicant as an agent of the 1<sup>st</sup> and 2<sup>nd</sup> applicants for supply of speed governors in Kenya.

44. Furthermore, mandamus cannot issue to quash a decision that is made not to register the 3<sup>rd</sup> applicant as an agent for the 1<sup>st</sup> and 2<sup>nd</sup> applicants. Mandamus is a discretionary Judicial Review remedy and is mandatory in nature. It compels the performance of a public/statutory duty which duty must be identifiable and specific not a general duty. Mandamus only issues if the impugned decision is quashed since there is no specific statutory duty.

45. In **Prabhulal Gulabchand Shah V Attorney General and Evans Gathoni Miano CA 24/1985** the Court of Appeal made it clear that a person seeking mandamus must show that there resides in him a legal right to the performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.

46. Sections 29 and 30 of the NTSA Act provide for discretion and conditions for issuance of licences. The court notes that there is no specific duty imposed by statute on the respondent to register/license the 3<sup>rd</sup> applicant as the agent for the 1<sup>st</sup> and 2<sup>nd</sup> applicants.

47. In addition, any challenge to the decision of the National Transport Safety Authority is appealable to the Transport Licensing Appeals Board established under Section 39 of the National Transport Safety Authority Act. This is the spirit and letter of Sections 38 of the Act which stipulates.

***“38(1) A person who-***

***Being an applicant for the grant or variation of a license, is aggrieved by the decision of the Authority on the application;***

***Having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon, or***

***Being the licensee is aggrieved by the revocation or suspension thereof.***

***May, within the time and in the manner prescribed appeal to the Appeals Board established under Section 39.”***

48. The National Transport Safety Authority also administers the Traffic Act, Cap 403 Laws of Kenya. Under Section 41 A of the Traffic Act Regulations, made pursuant to Section 117 of the Traffic Act, every public service vehicle must be fitted with a speed governor which meets the specifications.

49. In this case the Act does not accord the applicant the option of either filing an appeal or filing for Judicial Review. It is clear that a person aggrieved by the decision of the Authority on an application for the grant or variation of a license may within the time and manner prescribed appeal to the Appeals Board established under Section 39 of the Act.

50. It has not been shown that the Appeal stipulated in the Act is not an efficacious remedy for the exparte applicant. Section 2 of the Fair Administrative Action Act, 2015 defines an administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. It therefore follows that refusal to act, which is an omission, is an administrative action.

51. There are a number of authorities stipulating that the existence of alternative remedy are not in themselves a bar to the issuing of Judicial Review orders, such authorities include **Republic Vs National Environmental Management Authority, [2011]eKLR**. However, the applicant, under the Fair Administrative Action Act, 2017 must show that it has to be exempted from the alternative remedies which may not be efficacious. This is the spirit and letter of Section 9(2) (3) and (4) of the Fair Administrative Action Act, 2015.

52. Section 9(2) of the Fair Administrative Action Act, 2015 stipulates.

***“ (1) The High Court or a subordinate court under Subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”***

53. The internal mechanisms for appeal or review are as stipulated in Sections 38 and 39 of the National Transport Safety Authority Act which stipulates that any aggrieved person by the decision may appeal to the Board established under Section 39.

54. The applicants in this case chose to approach this court by way of Judicial Review without first exhausting the internal appeals mechanisms provided for under Section 38 of the National Transport Safety Authority Act.

55. Long before the enactment of Section 9 of the Fair Administrative Action Act, 2015, the Court of Appeal in **Speaker of the National Assembly vs Njenga Karume Nairobi CA No. 92/1992** stated:

***“ There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”***

56. This court cannot lose sight of the principle espoused in **Republic vs Ministry of Interior and Coordination of National Government and another Exparte ZTE JR 442/2013** that :

***“.....one must not lose sight of the fact that the decision whether or not to grant Judicial Review orders is an exercise of judicial discretion and as was held by Ochieng J in John Fitzgerald Kennedy Omanga vs The Post Master General Postal Corporation of Kenya and 2 Others Nairobi HCMA 997/03 for the court to require the alternative procedure to be exhausted prior to resorting to Judicial Review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate parties ought to follow the procedure provided for under the statute.”***

57. A plethora of decisions both from the High Court and Court of Appeal are clear that where the statute has provided for a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. These cases include **Francis Gitau Parsimei vs The National Alliance Party of Kenya and 4 Others Petitioner 356/2012; Kipkalya Kones v Republic and Another exparte Kimani Wanyoike & 4 Others (2008) (EP) 291**.

58. Under Section 9(3) of the Fair Administrative Action Act, 2015, The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under Subsection (1).

59. Under Section 9(4) of the Fair Administrative Action Act, 2015, notwithstanding Subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

60. In this case, there is no evidence of an attempt to exhaust an internal appeals mechanism as stipulated in Section 38 of the National Transport Safety Authority Act. There is also no application placed before this court or even a reference to exemption of pursuit of alternative remedies or exhaustion of internal appeal mechanism.

61. The applicant has proceeded as if there is no such legal requirement for exhaustion of alternative remedies/internal appeal mechanisms.

62. In **Republic vs National Environment Management Authority, CA No. 84/2010**, the Court of Appeal was categorical that:

*“.. Where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it. The learned judge, in our respectful view, considered these structures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the judge.”*

63. The above decision was made prior to the enactment of the 2015 Fair Administrative Action Act which latter statute specifically obliges exhaustion of alternative remedies or internal appeal or review mechanisms and also goes further to provide for exemption to such exhaustion of alternative remedies in exceptional circumstances and on application by the applicant.

64. No such exceptional circumstances are apparent in this case and neither has any application been placed before the court for exemption from exhaustion of internal appeals mechanism under Section 38 of the National Transport Safety Authority Act.

65. Judicial Review, though now elevated to the constitutional threshold, is a remedy of last resort since it does not substantially look into the merits of the decision but the legality, rationally and or procedural propriety of the decision and decision making process. It therefore ought not to be resorted to where there exist appropriate efficacious remedies to redress the grievances complained of.

66. The exparte applicants in this case had the remedy of lodging the appeal to the Transport Licencing Appeals Board established under Section 39 of National Transport and Safety Authority Act. The Board would then have examined the grounds of appeal and determined the merits of the respondent's refusal to grant to the 1<sup>st</sup> applicants agent the licence to distribute the “SafeRider”© devices (speed governors and or to accept the vehicle speed governor certificate issued by the 3<sup>rd</sup> applicant). This is so because, as earlier stated, there is no specific statutory duty placed on the respondent to do any of the things that the applicants wish this court to compel the respondent to do.

67. An Act of Parliament such as the National Transport Safety Authority Act and others with inbuilt dispute resolution mechanisms are self-embodiments and cannot be wished away at the altar of Judicial Review which is a remedy of last resort. The mechanisms provided for under these enactments for dispute resolution which is espoused in Article 159(2) (c) of the Constitution must be respected.

68. In the end, I find that not only have the applicants failed to demonstrate that they are entitled to the orders of mandamus sought as the decision of refusal to grant the license or to accept the certificates issued by the 3<sup>rd</sup> applicant has not been sought to be quashed by this court and secondly, there was and still is an alternative remedy of exhaustion of internal appeals mechanism to the Transport Licencing Appeals Board established under Section 39 of the National Transport Safety Authority Act. In the absence of any special circumstances and on an application by the applicants for exemption from such exhaustion of internal appeals mechanisms, this court finds and holds that the ex parte applicant is not entitled to the Judicial Review remedies of mandamus sought.

69. Accordingly, the notice of motion dated 23<sup>RD</sup> January, 2017 be and is hereby declined and dismissed with an order that each party do bear their own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 17th day of October, 2017.

**R.E. ABURILI**

**JUDGE.**

**In the Presence of:**

Mr Mwangi Advocate for the ex parte applicants

N/A for Respondent

CA: Marylyn