

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY**

2022/HP/0983

HOLDEN AT LUSAKA

(Civil jurisdiction)



BETWEEN:

THE PEOPLE

AND

**THE ROAD TRANSPORT AND
SAFETY AGENCY**

Before the Hon. Mr. Justice M.D. Bowa on 31st of January 2024

For the Applicant: Mr. W. Kayopa with Mr. C. Dimiyo of Simeza Sangwa and Associates

For the Respondent: Mr. D. Kalima in house Counsel RTSA

JUDGMENT

References

1. *Reading BC vs Ali (2019) EWHC 200*
2. *R vs Hull University ex parte Page (1993) AC 662,*
3. *R vs Northumberland Compensation Appeal Tribunal ex parte Show (1952) KB 338;*
4. *Reilling vs Mackerman (1983) 2 AC 237.*
5. *Royal College of Nursing of the United Kingdom vs Department of Health and Security (1981) AC 80v;*
6. *Regina vs Secretary of State for Health Ex Parte Quintavelle (1959) 2 ALL ER 1226*

7. *Fitzpatrick vs Sterling Housing Association* (2003) UKHL 13
8. *Derrick Chitala vs Attorney General* (1995/97) ZR page 91SL
9. *North-Western Energy Company ltd v. The Energy Regulation Board* (2011) ZMHC 78
10. *R vs Trade Secretary exparte Parestello* (1981) QB19
11. *Chief Constable of North Wales Police vs. Evans* [1982] 3 All ER, 141, HL.
12. *Bank of Zambia vs. Access Leasing Limited and Another* (2008) ZR. 159 Vol 1 (SC).
13. *Council of Civil Service Unions vs. the Minister for the Civil Service* [1984] 3 All ER. 935.
14. *Frederick Jacob Titus Chiluba vs. Attorney General* (2003) ZR. 153.
15. *Attorney General vs. Roy Clarke* (2008) ZR. Vol. 1 38.
16. <http://www.lusakatimes.com/2022/06/2>
17. [https://www.moneyfmzambia.com/2022/06/22government-directsrtsa to engage stakeholders over online taxi services](https://www.moneyfmzambia.com/2022/06/22government-directsrtsa-to-engage-stakeholders-over-online-taxi-services)
18. <https://www.mwebantu.com>.

Legislation referred to:

1. *The Road Traffic Act 2002 s 102.*
2. *The Road Traffic Amendment Act 2022*
3. *RSC of England 1999 edition*

Other Works referred to:

1. *Halsbury's Laws of England 4th Edition Reissue volume 1 page 170*
2. *Judicial Review handbook Micheal Fordham (2004) Judicial Review Handbook 4th Edition*
3. *De Smith's Judicial Review of Administrative Actions (1980), 4th Edition, Stephens & Sons Limited.*

1. Background

1.1 The Appellant commenced this action dated 20th June, 2022 by notice of motion seeking leave to commence Judicial review proceeding pursuant to Order 53 Rule 3 of the Rules of Supreme Court of England.

1.2 The action is brought to challenge the decision of the Road Transport and Safety Agency (RTSA) to start impounding ride hailing vehicles operating on online platforms from 28th June, 2022.

1.3 The specific reliefs being sought were couched in the following terms:

1. *A declaration that RTSA's decision to start impounding ride hailing vehicles operating online platforms is illegal.*
2. *An order of certiorari to remove into the High Court for the purpose of quashing the said decision.*
3. *An order of prohibition prohibiting RTSA from implementing or enforcing the said decision.*
4. *If leave to apply is granted, a direction that such grant should operate as a stay of the decision or further proceedings to which this application relates with the determination of the application or until the court orders otherwise pursuant to order 53 rules 3 (10) (a) of the Rules of the Supreme Court of the England 1985.*

5. *The Applicant requests for an oral application pursuant to rule 3(3) of order 53 of the Rules of the Supreme Court of England 1985.*
6. *If leave to apply is granted, a decision that the hearing of the application for judicial review be expedited.*
7. *An order for costs.*
8. *And that all necessary and consequential directions be given.*

1.4 I considered and granted the application for leave to apply for judicial review *ex parte* on the 30th of June, 2022. I also directed that the leave granted would operate as a stay against the impugned decision pending the determination of the matter or until such further order of the court.

1.5 On the 22nd of August, 2022, Sydney Mbewe the National Secretary of Public Passenger Transport Divers Association of Zambia filed into court a summons for an order to be joined to the proceedings as an interested party. I dismissed that application for want of prosecution on the 4th November, 2022.

1.6 I further struck off the substantive matter from the active cause list due to none attendance with liberty to restore.

The matter was restored upon application on the 14th of November, 2022 and set down for hearing on the 30th of January, 2023.

2.0 The parties positions

2.1 The Applicant's case

2.2 Haggar Mandefu ,the founder and Chief Executive officer of the Applicant company deposed to the affidavit verifying facts dated 28th June, 2022. He deposed that the Notice of Application and facts and matters stated therein as prepared by his advocates were true to the best of his knowledge and belief as were the grounds in the notice of the application.

2.3 The facts referred as set out in the notice of application for leave to apply for Judicial review dated 20th June, 2022 were that the Respondent is responsible for implementing policy on road transport traffic management and road safety and also responsible for issuing licences and permits under the Road Traffic Act No. 11 of 2002. Further that the Applicant is a private Company duly registered under the

Companies Act whose business is providing a hailing platform via an App called Ulendo.

2.4 It was averred that ride hailing services are the trading mode of transportation solution in major cities in the world and since their advent in Zambia have offered innovative transport service to people in the country. That this is done through ride hailing platforms that include Uber, Bolt and Ulendo in the present case. Further that the ride hailing platforms have designed Apps and any person owning a vehicle can download the App on their phone and register to offer ride hailing services.

2.5 The vehicles are not branded and do not have taxi signs. Further that the vehicles do not have specific designated parking stations. It was averred further that the transaction from start to finish is done on the smart phone App.

2.6 The Applicant provided detail on how the App operates and went on to state that it is currently having over 150 permanent employees and has provided alternative employment to over 10,000 driver partners serving in excess

of 500,000 clients and over 100 Corporate entities in Lusaka, Ndola and Kitwe.

2.7 It was the Applicant's position that from inception, it engaged the Respondent over the lack of a regulatory model for ride hailing companies since there is currently no law that caters for online ride hailing services. That various meetings were held between the Respondent and the Applicant, during which it was explained to the Respondent that the modus operandi of ride hailing companies is not covered by any legislation in Zambia including the Road Transport Act No. 11 of 2002.

2.8 The first set of meetings were with the previous management chaired by Mr. Rodgers Nkandu the then Deputy Director and more recently under Gladwell Banda RTSA's Chief executive officer . During those meetings, the Applicant's business model was explained and comparisons were made with companies such as Uber and the fact that in countries and cities where it operates have specific legislation or amendments in place to cater for ride hailing platforms.

2.9 It was agreed with that there was need to regulate the ride hailing industry. The Respondent promised that it would engage the Ministry of Transport to come up with a statutory instrument dedicated to regulating the industry. That the Respondent also advised the Applicant to continue working with its current model while it awaited for the regulation via statutory instrument that the Agency undertook was to be done before the end of March, 2022.

2.10 Around April 2022, the Respondent called for another meeting to discuss the ride hailing industry. All ride hailing companies were invited. At that meeting, the need for regulation and the inadequacies in the current legislation were discussed. The Respondent reiterated its desire to enact a statutory instrument and advised companies to continue with business as usual in the meantime.

2.11 However, on the 16th of June, 2022, the Applicant was surprised that the Respondent made a decision to start impounding ride hailing vehicles on grounds that they were not properly licenced in accordance with section 102 of the

Road Traffic Act. That decision came as a surprise in the light of the fact that the Applicant had been engaged in discussions with the Respondent for over 6 months during which it promised to issue a statutory instrument and advised the Applicant to continue with its business as usual. Further, that the Applicant was not given an opportunity to be heard on the matter before this decision was made.

2.12 It was the Applicant's belief that the decision by the Respondent may have been orchestrated by an organization representing traditional taxis being the Public Passenger Transport Divers Association of Zambia. That the Respondent's decision coincided with the said Association's demand for the Applicant to stop operating. It was averred that the Association are the Applicant's competition in the business and had been engaged in a dispute from its inception.

2.13 In addition, that the Association views the Applicant and other online hailing platforms as competition taking business away from them since Ulendo fares are much lower

than the traditional taxis . Therefore that the decision to start impounding ride hailing vehicles operating on the hailing platforms will have a negative impact on the business of the Applicant because its effect would be to shut down the company.

2.14 Exhibited in the affidavit verifying facts were copies of the notifications of meetings with the Respondent. Also exhibited and marked “**HM2**” is a copy of a Memorandum issued by the Respondent warning the Applicant and its driver partners that the Agency would start impounding vehicles using online ride hailing Apps effective 30th June, 2022.

2.15 Further exhibited “**HM5**” was a copy of a demand letter sent to the Association in reaction to various defamatory remarks and threats of violence they made against the Applicant and its driver partners.

2.16 Applicant’s arguments in support

2.17 In skeleton arguments advanced in support of the application, the Applicant contends that the grounds for the application for judicial review was firstly illegality. That the decision of

the Respondent to impound vehicles operating on the online ride hailing platform offered by the Applicant is illegal. It was argued that the Respondent had misinterpreted section 102 of the Road Traffic Act upon which its decision was founded.

2.18 The section provides that:

“No person shall use or cause to be used any vehicle for the purpose of standing or plying for hire or as a public service vehicle”

2.19 It was argued that the section was meant to cover vehicles that stand at taxi ranks and ply for hire. That it was also meant to cover specific public service vehicles such as buses operating locally or internationally. However that ride hailing vehicles neither stand as taxis nor do they ply for hire.

2.20 Reference was made to the case of **Reading BC vs Ali**¹ that considered the meaning of *“plying for hire”* and concluded that it involves exhibition of the vehicle and expressly inviting customers to hire the vehicle. That the court in that case held that the use of an Uber App is not plying for hire because there

is no exhibition and neither is there solicitation. Invariably that the use of an App is not an exhibition of the vehicle and does not amount to soliciting for hire.

2.20. It was argued that in the same vein, the use of the Ulendo App is neither plying for hire as the Ulendo vehicles are not exhibited nor do its drivers solicit for customers. That customers use the App to book a driver whom they have not seen. The Applicant concluded that ride hailing vehicles do not, as such, ply for hire.

2.21 It was argued that the Respondent has failed to appreciate that ride hailing vehicles are not public service vehicles standing at taxi ranks or bus stations and that they do not park at taxi ranks or designated stations.

2.22 It was submitted that the Road Traffic Act does not cover ride hailing services which explains why the Respondent had undertaken to make provision by way of a Statutory Instrument. It was argued as indisputable that the Road Traffic Act was passed in 2002 whilst ride hailing services were only introduced on the Zambian market in 2015.

2.23 It was therefore argued that the Respondent erred in law by extending the application of section 102 of the Act to ride hailing online platforms. That the section does not apply as the intention of Parliament was to cover traditional taxis standing on taxi ranks and public service vehicles operating from bus stations.

2.24 That ride hailing online platforms involve private vehicles who use a smart phone application. It was argued that this is new technology that was not in existence at the time the Act was enacted. Section 102 of the Act does not therefore apply to the case at hand.

2.25 It was suggested that what the Respondent should be doing is to move with technology and either amend or enact new legislation to cover the service in issue. That what they cannot do is to apply a provision to stifle new innovation and technology which was not in the contemplation of the legislation at the time of enactment. It was submitted that Respondent had therefore misinterpreted the provision relied

upon and consequently committed an error in law rendering the decision illegal.

2.26 Reference was made to the learned authors of **Halsbury's Laws of England 4th Edition Reissue volume 1** who at page 170 write:

“A public body will err in law if it acts in breach of fundamental human rights, misinterprets a statute, or any other legal document, or a rule of common law, makes a decision on the basis of secondary legislation or any other act or order, which is itself ultra vires takes legally irrelevant consideration into account or fails to take relevant consideration into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, fails to follow the procedure required by law”.

2.27 Other authorities relied upon by the Applicant to advance the argument on illegality include **R vs Hull University exparte Page**;² **R vs Northumberland Compensation Appeal Tribunal exparte Show**³; and **Reilling vs Mackerman**⁴

2.28 It was argued based on these authorities as clear, that any error or law made by an administrative Tribunal or public body in reaching its decision is illegal and can be quashed on grounds that the public body made an error of law.

2.29 It was argued further that when interpreting statutes, it is proper and necessary to have regard to the existing state of affairs at the time the law was enacted. That this helps determine the extent of the application of the particular law in question. The cases of **Royal College of Nursing of the United Kingdom vs Department of Health and Security**⁵ ; **Regina vs Secretary of State for Health Ex Parte Quintavelle**⁶ and **Fitzpatrick vs Sterling Housing Association**⁷ were relied on in aid of this proposition.

2.30 It was contended that the Respondent in this matter did not take into account the state of affairs when the legislation was enacted. It was argued that the Legislature did not have in contemplation online hailing platforms at the time.

2.31 the Respondent therefore misinterpreted section 102 of the Act and consequently committed on error of law in the face of the record. It was argued further that the decision by the Respondent is illegal because it contravened Article 10 of the Republican Constitution which provides that:

“(i) The Government shall create an economic environment which encourages individual initiative and self-reliance among the people, so as to promote investment employment and Wealth”

2.32 It was argued as indisputable that ride hailing taxis are an individual initiative and encourages self-reliance among the people of Zambia. Further that Ulendo Taxis is a progressive initiative that promotes self-reliance and creates employment and wealth. That it has over 150 permanent employees and has provided alternative employment to over 10,000 driver partners. It therefore fits in with the intent and purpose of article 10 of the Constitution. It was argued that the Respondent’s decision contravenes article 10 because its purpose and effect is to stifle individual initiative and self-reliance and therefore illegal.

2.33 In its second ground the Applicant pleads unreasonableness/irrationality as the basis of relief. Reliance was placed on the learned author of **Judicial Review handbook Micheal Fordham (2004) Judicial Review Handbook 4th Edition**, in which he writes that:

“It is a basic principle of administrative law that a public body should take into account all relevant considerations and no irrelevant ones. A material failure to do is common ground for judicial review”

2.34 Another authority relied on in setting out what amounts to irrationality for purposes of judicial review applications was the case of **Derrick Chitala vs Attorney General**⁸ It was argued that the Respondent’s decision was unreasonable because it failed to take into account relevant considerations notably that ride hailing is a new innovation, which should also be encouraged in terms of article 10 of the Constitution.

2.35 Further that, a decision made by a public body can be quashed if it is so irrational to the extent that no person sitting in the same position with the same set of facts would make such a decision especially where as in this case, the decision maker fails to take into account relevant matters .

2.36 The third ground advanced by the Applicant for review is bad faith and improper motive. It was argued that by invoking section 102 of the Act, the Respondent acted in

bad faith and for improper motives. Reliance was placed on the case of **North Western Energy Company Limited**⁹, in defining what amounts to bad faith and improper motives.

2.37 Further that in **R vs Trade Secretary ex parte Parestello**¹⁰ the court held:

“first of all , persons who wield power must not use their discretion for some ulterior purpose. If the person is so prejudiced against someone that he is using the section, not for purposes for which the power was given but for example to punish someone, then that is using it for an ulterior purposes which would be outside the statute.”

2.38 It was contended that the Respondent’s decision was meant to support the Public Service Passenger Transport Drivers Association of Zambia’s agenda to stop online ride hailing companies from operating in Zambia.

2.39 It was suggested that the public service drivers had waged a war against the Applicant from the time it began operations. That they had threatened violence against its drivers and issued demand letters to have Ulendo stop

operating in Zambia on account of the competition and alleged loss of business to online ride hailing companies.

2.40 It was argued that the decision by the Respondent to impound the hailing vehicles was issued on 10th June, 2022. That this was a day before a suit by the Public service drivers commenced against the Respondent and the Applicant intended to stop its operations in Zambia was due to come up.

2.41 It thus became clear as far as the Applicant was concerned, that the Respondent's decision was calculated to give efficacy to the action filed by the Public Service Driver' Association and to aid the agenda to stop the operations of online ride hailing companies.

2.42 That several statements were issued by the Public Service Drivers and the General Secretary of the Association against the Applicant inciting violence against it.

2.43 It was therefore contended that the Respondent's decision was laced with malice and made for improper purposes, notably to entrust the Public service drivers who desire to

stop Ulendo from operating in Zambia. RTSA in that sense acted in bad faith and used the power under section 102 for ulterior or improper purposes.

2.44 The Respondent's case

2.45 The Respondent opposed the application by affidavit in opposition dated 23rd August 2022 sworn by Anthony Chewe the Acting Deputy Director Transport at the Respondent agency.

2.46 It was deposed that the Applicant and other online car hailing operators were advised during the meetings held, that it was a requirement that any person plying for hire or persons using a motor vehicle needed to have a valid road service licence.

2.47 It was averred further, that the majority of vehicles used on the Applicant's platform have been operating without valid road licences. In addition, that the decision to prosecute persons who use vehicles for hire or reward without road service licences was made in line with the provisions of the Road Traffic Act No. 11 of 2002.

2.48 He added that the Applicant cannot be allowed to shield itself in a technological App to commit offences under the Road Traffic Act No. 11 of 2022. Further, that all vehicles registered on the Applicant's platform should have road service licences.

2.49 It was averred further that the decision to impound motor vehicles and prosecute the owners of vehicles that operate as public service vehicles without the road service licences using the Applicant's platform is part of the functions of the Respondent under the law. Further that the said decision was lawfully, reasonably, and fairly arrived at following various engagements with the Applicant and other similar operators to comply with the requirements of the law. That this is therefore not a matter for juridical review as the Agency's actions were not ultra vires the law.

2.50 Respondent's arguments in opposition

2.51 In its skeleton arguments in opposition to the application dated 23rd of August 2022, the Respondent suggested that

the questions for determination in this application may be summed up by addressing the following questions:

- ✓ Was it legally competent to issue a public notice to ensure that all motor vehicles operating using other platform should have road service licences (within statutory mandate but within what contemplated)?
- ✓ Was the Respondent acting unreasonably or irrationally when it issued the public notice that all motor vehicles operating as public service vehicles should have road licences ?
- ✓ Did the Respondent act in bad faith and with improper motive when making the decision?
- ✓ Is the Applicant entitled to judicial review?

2.52 The Respondent proceeded to make submissions under each of these heads in turn.

2.53 Under the first head proposed on whether it was generally competent for the Respondent to issue the public notice, it was argued that the Applicant in making their submission on the import of section 102 of the Act conveniently singled

out “plying for hire” from the wording. It was argued that Section 102 of the Act provides as follows:

“subject to the provisions of part X, no person shall use or cause or permit to be used any vehicle for the purpose of standing or plying for hire as a public service vehicle for the carrying of persons unless there is in force in relation to the vehicle a road license authorizing such use”.

2.54 It was argued that the elements include the aspect of standing; plying for hire; as a public service vehicle for carriage of persons without a license.

2.55 That a public service vehicle is defined under section 3 of the Road Traffic Act as ***“a motor vehicle or trailer, other than a contract car hired for conveying passengers or goods or both or otherwise used for conveying passengers or goods or both for reward”.***

2.56 It was submitted that based on the above and the Applicant’s admission that it has registered over 6187 motor vehicles that are operating as public service vehicles for conveying passengers for reward, it is misconceived for the Applicant to argue that the motor vehicles registered

with them on their platform do not require road service licenses.

2.57 Further, that the decision to require that the Applicant complies with section 102 of the Act does not mean that the Applicant's initiative would be curtailed. Instead that the Applicant should ensure that its operations comply with the existing law. The court was accordingly implored to dismiss the application as the decision was not illegal.

2.58 Under the second head, the Respondent referred the court to the case of Derrick Chitala vs Attorney General (supra) wherein Ngulube CJ as he was in addressing the question of "irrationality" at page 97 to 98 stated that

"In law a decision can be so irrational and so unreasonable as to be unlawful on "Wednesbury " grounds - see Associated Provincial Picture Houses vs Wednesbury Corporation- The principle can be summarized as being that the decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on

the relevant law and acting reasonably could have reached that decision”.

2.59 Premised on the above, the Respondent argues that all the factors under section 102 of the Road Traffic Act were taken into account. Further that it was a misconception for the Applicant to argue that the mere fact that it had allegedly created 1500 employment opportunities and were innovative should be reason for them to be exempted from the law. The Respondent added that it was not in any event the Applicant that were required to obtain road service licenses but the owners of the vehicles who register their vehicles with them. It was submitted further that the cited Article 10 of the Constitution relied on by the Applicant does not exempt individuals from complying with necessary applicable laws.

2.60 In the third head responding to the Applicant's assertion of the decision in question having been actuated by malice and bad faith, the Respondent relied on the case of *R vs exparte Parestello* (*supra*) in which the court held that:

“First of all, persons who wield power must not use their discretion for some ulterior purpose. If the person is so prejudiced against someone that he is using the section not for the purpose for which the power was given, but for example to punish someone, then that is using it for an ulterior purpose for which would be outside the statute”.

2.61 It was argued that it would be difficult to connect how the Respondent’s action was colored by malice when all the Respondent had done was to ensure compliance with the law.

2.62 It was submitted further that it was on record that the Applicant was invited for a meeting over this matter way before the Applicant was sued by the drivers Association, in which the Respondent is in fact 2nd Defendant.

2.63 It was submitted that the Applicant has failed to prove or demonstrate how the decision by the Respondent to ensure that the owners of the vehicles on the Applicant’s platform complies with section 102 of the Road Traffic Act was made in bad faith or maliciously.

2.64 In the 4th head the Respondent presents arguments making a case on why leave of the court to proceed to a substantive hearing for Judicial review should be denied. I will not repeat the arguments here as it is common cause that leave was granted and I am now only considering substantive arguments for and against the grant of the reliefs sought.

3.0 The hearing.

3.1 At the hearing on the 30th January, 2023, learned counsel for the Applicant Mr. Kayope relied on the affidavit verifying facts and filled arguments in support. He added that although there had now been an amendment of the Road Traffic Act by Act number 8 of 2022, the concerns raised by the Applicant had not been dealt with. He therefore reiterated the prayer for the grant of the reliefs sought.

3.2 Mr. Kalima learned counsel on behalf of the Respondent relied on the affidavit in opposition and skeleton arguments filed into court on the 23rd of August, 2022. He argued that the Respondent's position was that its decision was premised on the provisions of the Road Traffic Act No. 11 of 2002 as

read together with the Amendment Act No. 8 of 2022 which he asked the court to take judicial notice of.

3.3 He argued that the Act provides that no person shall apply for hire or reward a motor vehicle or permit another to use a vehicle for such purpose without a road service license in force. That the contention by the Respondent therefore, is that the enforcing of the provisions of the Road Traffic Act are not in any way illegal as the Applicant has been permitting motor vehicles on their platform for reward as public service vehicles without valid road service license. He argued that these vehicles have been carrying passengers who are members of the public.

3.4 It was counsel's submission that this conduct had deprived the Government of much needed revenue. Counsel added that the Amendment Act has made provision for regulating online ride hailing providers or operators. It was submitted further that there is need to make a distinction between the providers and owners of the vehicles. That the providers of the

online platform such as the Applicant do not need to get a road service licence.

3.5 However, that the provider is compelled by law to ensure that the vehicles that are registered on their platforms should have valid road service licences issued by the Respondent. He added that the failure to ensure this is done entails that they are permitting the owners of these vehicles to commit an offence under the Road Traffic Act.

3.6 He maintained that the Principal Act provided under section 102 to 105 for the operation of the operators. He therefore submitted that the Applicant was in essence fighting the cause of the owners of the vehicles. It was further learned counsel's position that the present application has been overtaken by events as the law now requires that online ride hailing providers should be regulated by the Respondent. He prayed that the Application be dismissed with costs accordingly.

3.7 In reply Mr. Kayope submitted that the Amendment Act has not provided any regulation for online ride hailing services

as submitted by opposing counsel. That the law remains exactly the same except for the inclusion of a provision that the Minister may by statutory instrument or regulation or amendment of the Act regulate online ride hailing services. He referred the court to section 233(b) (b) (b). in that regard.

3.8 Learned counsel argued that there are in fact no regulations promulgated so the status quo remains as it was before, notably that there are currently no laws in Zambia that deal with online hailing services. He argued further that the intention of Parliament when these laws were enacted did not have in contemplation this new technology. He reiterated his prayer for the grant of the relief sought by the Applicant.

4.0 Court's consideration.

4.1 I have anxiously considered the application before me and the parties' respective submissions. The law and purpose of judicial review is aptly summed up by the learned authors of the Rules of the Supreme Court Practice, 1999 edition, under Order 53/14/19 wherein they state:

“The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. ‘It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is not part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.’... Thus, a decision of an inferior court or a public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense... The court will not, however, on a judicial review application act as a ‘court of appeal’ from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the

court would, under the guise of preventing the abuse of power, be guilty itself of usurping power..."

4.2 In the case of **Chief Constable of North-Wales Police vs. Evans**¹¹ Lord Hailsham L.C. formulated the functions of Judicial review in the following terms:

"It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that an individual is given a fair treatment by the authority to which he has been subjected and that it is not part of the purpose to substitute the opinion of the Judicial officer or individual judges for that of the authority constituted by the law to decide the matters in question".

4.3 In **Bank of Zambia vs. Access Leasing Limited and Another**¹² the Supreme Court approved and adopted the formulation by Lord Diplock, in the case of **Council of Civil Service Union vs. The Minister of Civil Service**¹³ on the question of when a Court will subject decisions of inferior tribunals to judicial review wherein he stated:

"One can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that

further development on a case by case may not in due course of time add further grounds.”

4.4 In **Chiluba vs. Attorney General**¹⁴, the Supreme Court had this to say;

“Thus a decision of an inferior court or public authority may be quashed (by an order of certiorari made on an application for judicial review) where that court or authority acted without jurisdiction or exceeded its jurisdiction or failed to comply with the rules of natural justice in a case where all those rules are applicable or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense.”

4.5 In the case of **Attorney General vs. Roy Clarke**¹⁵ the Supreme court further re stated the unquestionable proposition that:

“There is nothing like unfettered discretion immune from judicial review...that in a government under law like ours, there can be no such thing as unreviewable discretion”

4.6 On illegality in particular as a ground for judicial review, the Supreme Court in the case of Fredrick Jacob Chiluba vs. Attorney General (supra) observed that:

“We begin with illegality. To succeed under this ground the appellant has to prove that the decision of the National Assembly contravened or exceeded the terms of the law which authorised the making of the decision or that the decision pursues an objective other than that for which the power to make the decision was conferred. By looking at the wording of the power and the context in which the power is to be exercised, the courts ultimate function is to ensure that the exercise of power is within or intra vires the statute”

4.7 The law has been restated in a number of cases over the years. Therefore no debate is presented regarding precisely what the purpose of judicial review is and importantly when the courts will come in to interfere with decisions made by public authorities.

4.8 The Applicant alleges illegality in the decision by the Respondent to impound vehicles operating on online ride hailing platforms. That the decision was illegal as the Respondent had misinterpreted section 102 of the Road Traffic Act of 2002 upon which the decision was anchored. To be specific, that the section was meant to cover vehicles that stand at taxi ranks and ply for hire.

4.9 Further that the law was also meant to cover specific public service vehicles operating locally or internationally. It was contended that there was no plying for hire in this case as there was no exhibition or solicitation by the Applicant's drivers. The law having been passed in 2002 when ride hailing was not in existence invariably meant the ride hailing was not in contemplation at the time the law was promulgated.

4.10 That the Respondent cannot stifle innovation and what ought to have been done was to pass new legislation. The error in interpretation of the law thus rendered the decision illegal. A passage from Halsbury's Laws and *R vs Hall*(supra) among other authorities was cited for the proposition that an error of law made by an administrative Tribunal or public body is illegal and hence can be quashed on grounds of illegality. It was further argued that the decision was illegal as it goes against article 10 of the Republican Constitution that obliges the Government to create an economic environment that encourages individual initiative and self-reliance among people.

4.11 The Respondent on the other hand insist that it was competent for it to issue the notice in issue. They argue that properly read, the section relied upon does cover online ride hailing service. That on its own admission the Applicant reveals that it had registered over 6187 Motor vehicles and it was inconceivable for the Applicant to argue that the vehicles registered with them did not require road service licences. Further that the call to comply with section 102 of the Road Traffic Act should not be construed to mean the Applicant's initiative would be curtailed. Rather that the Applicant was obliged to ensure that its operations comply with the existing law. The Respondent thus sees nothing illegal about its decision.

4.12 There is no question that the desire of the Respondent was to regulate the online ride hailing business that has been introduced in Zambia. It would appear wholesomely inconceivable that the business would be running at a profit without any form of licence and provision for the much needed tax for the National Treasury. The Respondent thus saw it fit to issue the notice threatening to impound the unregistered

vehicles by the 30th of June 2022 and sought to justify this action on the basis of section 102 of the Road Traffic Act.

4.13 I have no doubt that the decision was not backed by the law as it stood at the time. The Road Traffic Act and section 102 in particular when enacted in 2002 did not have in contemplation online ride hailing services introduced in Zambia sometime in 2015. I am persuaded to agree with the submissions of the Applicant in this regard. I agree that the intention of Parliament was to cover traditional taxis on taxi ranks and public service vehicles operating from bus stations.

4.14 It is common cause as deposed in the affidavits that the ride hailing online platforms involve private vehicles owned by individuals who use a smart phone application and new technology that was not in existence at the time section 102 was enacted. The relied on case of *Reading BC v Ali* (supra) ably guides the meaning of “*Plying for hire*” in similar worded legislation as denoting the exhibition of the vehicle and express invitation to customers to hire the vehicle.

4.15 I agree that there is no such exhibition or solicitation done as both customer and driver use an App on a smart phone operated by the Applicant. No amount of aligning or dissecting of the section relied on by the Respondent would see the law in that form being extended to online ride hailing services. It quite simply was not in contemplation. A decision not backed by the law or made in err of interpretation of an existing law would I agree, be illegal.

4.16 The Respondent's decision was in that sense illegal. The proper course of action was to amend the law or issue regulations pursuant to the enabling law to cater for the online ride hailing service. The citing of the Constitutional provision and arguments advanced was an invitation to the court to delve into the interpretation of Constitutional provision outside part III. The High Court has no jurisdiction to make such determination that remains the domain of the Constitutional Court.

4.17 In the second ground of the prayer for judicial review, the Applicant pleads unreasonableness/irrationality. It was argued that the Respondent's decision was unreasonable because it failed to take into account relevant considerations, notably that

online ride hailing is a new innovation. That the decision is one that is so irrational that no reasonable person sitting in the same position would have arrived at.

4.18 The third ground which really flows from the second, was an allegation that the decision was premised on bad faith. The Applicant contends that The Respondent acted for improper motives as the decision was meant to support the Public Service Passenger Transport Drivers Association of Zambia to stop the online ride hailing companies perceived to be a threat to their operations.

4.19 The Applicant points to the fact that the decision by the Respondent to impound the hailing vehicles was issued on 10th June 2022 a day before the suit by the Public Service drivers Association commenced against the Respondent and the Applicant was due to come up. The Applicant concludes that it thus became clear to them that the Respondent's decision was calculated to give efficacy to the action commenced by the public service drivers and enhance the agenda to stop the operations of online ride hailing companies.

4.20 The Respondent naturally disputes these assertions. They contend that there were no irrational considerations in applying the law and that the mere fact that the Applicant had created employment opportunities did not render them exempt from the law. In addition that it in any event it was not the Applicant required to obtain the licence.

4.21 The Respondent further contends that the Applicant had failed to demonstrate how its decision which was primarily premised on its desire to have the law complied with was driven by bad faith or ulterior considerations.

4.22 The consequences of ulterior considerations are beyond dispute. The question is, is there evidence of such ulterior motive on the facts presented before me?. I see none. The Respondent as observed earlier appeared keen to capture the registration of vehicles operating on the online ride hailing platform for licensing purposes. There is no evidence to support the argument that the decision was premised on the Respondent's desire to kill off the innovation and to favour the Public Transport Drivers Association that had in any event

commenced an action against the Respondent and the Applicant in a different matter.

4.23 For the same reason, I find I am not persuaded to accept that the decision was necessarily unreasonable. The Respondent did take into consideration there was a new innovation and in its several meetings with the Applicant made known its desire to have the vehicles using the online platform to be licensed. The only issue for me would thus be that the decision made was not backed by any law hence making it illegal.

4.25 That said, at the time of the hearing of this application, 2 things had happened. Firstly, the Minister of Transport was widely reported in the media to have pronounced Government's stand to halt the Respondent's decision. No vehicles operating on the online hailing platform were to be impounded. I take judicial notice of the wide press coverage to this effect. Secondly, the Road Traffic (Amendment) Act 2022 was passed into law.

4.26 At the hearing, it was the Respondent's position advanced through counsel that this application had in any event now been overtaken by events on account of the passing of the

amendment Act in particular which now requires the licencing of ride hailing vehicles operating on online platforms.

4.27 The Applicant's advocate disputed this position. As far as he was concerned nothing had changed. The only change was an enabling provision for the Minister to promulgate regulations for the online ride hailing service. That as at date of the hearing, there were no regulations. Therefore, that the law is exactly the same, notably no provision for ride online hailing services exist.

4.28 The question naturally arising granted these arguments is what does the law now provide?

4.29 The Road Traffic Amendment Act 2022 does a number of things that affects the present case.

- ✓ *It under section 2 the Act, defines what a public service vehicle is.*
- ✓ *Provides a definition for "plying for hire or reward."*
- ✓ *Defines a public service vehicle road service licence.*
- ✓ *Repeals section 102 and extends application of the law under the new section 100 and 101 (1)*

✓ Amends section 233 (k) and introduces 233(1)(2) (b)(b)(b),a provision to enable the Minister to pass regulations regulating online ride hailing services.

4.30 For ease of reference section 2 of the amendment Act provides that

“Public service vehicle”

Means a motor vehicle including a trailer which

(a) Is licensed under part VII of this Act for conveying passengers with or without goods, or

(b) Plies for hire or reward or is let out for hire or reward for conveyance of passengers.”

“Plying for hire or reward.” Includes-

(a) Parking at a designated taxi rank,

(b) Offering for hire by notice, advertisement, announcement or any other means; or

(c) Parking or travelling while exhibiting a “for hire” notice of any kind.

“Public service vehicle road service” is defined to mean “a road service licence authorizing the use of a public service vehicle.”

4.31 Under part VIII of the Amendment Act, section 102 of the 2002 Act among other sections is repealed and substituted. Section 100 (1) in particular provides

“Subject to part x, a person shall not or cause or permit to be used a motor vehicle for the purpose of standing or plying for hire or as a public service vehicle unless there is a valid road service licence authorizing the use of the motor vehicle for the purpose of standing or plying for hire as a public service vehicle.”

4.32 Under section 101 (3) the law provides that:

“It shall be presumed unless the contrary is proved, that a motor vehicle was used for the purpose of standing or plying for hire, or as a public service vehicle, where

(a) A person is charged with using a motor vehicle in contravention of subsection (1) or

(b) Police officer or road traffic inspector reasonably suspects that a motor vehicle was being used for purposes of standing or plying for hire or as a public service, or for the purpose of carriage of persons.”

4.33 Finally section 233 (2) of the Principal Act as amended by the Amendment Act now reads.

“233(1) the Minister may on the advice of the Agency, by statutory instrument, make regulations in relation to any matter

contemplated, required or permitted to be prescribed in terms of this Act, and the power to make regulations conferred by this Act shall be published in the Gazette at least thirty days before the date upon which they shall come into effect.

(2) In particular and without derogating from the generality of the forgoing, the regulations referred to in subsection (1) may be made...

(bbb) regulating online ride hailing services.” (emphasis added)

4.34 From the above provisions it can be concluded that no argument can be presented of the online ride hailing services not being in contemplation. The definition of plying for hire and expansive provisions under section 101 are so widely couched and do now in my considered view capture the application of the law to the Applicant and vehicles operating using its online platform.

4.35 The restrictive sense in which plying for hire was considered in the *Reading BC vs Ati* case (supra) becomes inapplicable in light of the all-encompassing definition that includes in the bracket “*offering for hire by notice, advertisement, announcement or any other means*” (emphasis added). The desire to have all vehicles plying for hire to be licenced is clear

in the provisions of section 100 and the definition of public service vehicle licence in section 2 of the Amendment Act.

4.36 The specific reference to regulation for ride hailing services puts beyond question that the Amendment Act did have in contemplation the regulation of this new innovation. My search on the Parliamentary website did not reveal the promulgation of any regulations pursuant to section 233(1) (2) (b)(b)(b) of the Act. Be that as it may, I am satisfied that the law as it now stands could be applied to regulate the new sector.

4.37 I further note that in halting the Respondent's intended action of impounding vehicles communicated to the public through its notice, the Minister of Transport specifically communicated the Government's resolve not to stifle the online ride hailing service and expressed Government's desire to ensure a well-defined regulatory framework backed by the law.¹⁶

4.38 Mention was also made that all necessary consultation with all relevant stakeholders was in the process to ensure tailor made regulations are in place to accommodate online car operators and at the same time ensure appropriate taxes are in place.¹⁷

4.39 Such pronouncement was also made by the Respondent's Deputy Director Mr. Alinani Msisya in his statement to the media on 1st September 2022 in which he specifically stated the law was among other things meant to include provisions to regulate online car hailing.¹⁸

4.40 I would therefore conclude that whereas the initial pronouncement made by the Respondent to start impounding vehicles on the online hailing platforms was illegal, I find that judicial review becomes inappropriate as it has been overtaken by the stand taken by Government to halt the decision and direct stakeholder engagement with a view of coming up with appropriate regulations; and secondly that the passing of the Amendment Act no 8 of 2022 technically does make online ride hailing fall under the umbrella of the law.

4.41 It is hoped that with the delivery of this judgment, the relevant Ministry can wrap up the regulations in order not to inhibit what has fast become a vital innovation and alternative option of transportation to a considerable portion of the Zambian Public.

4.42 In light of the novelty of this case and obvious public interest it has generated, I order that each party will bear its own costs.

Dated at Lusaka this 31st day of January 2024.



HON. JUSTICE M.D BOWA