RAILWAY ARTISANS UNION
and
RAILWAY ASSOCIATION OF YARD OPERATING STAFF
and
ZIMBABWE AMALGAMATED RAILWAY WORKERS UNION
versus
RAILMED
and
NATIONAL RAILWAYS OF ZIMBABWE
and
RAILWAYS EMPLOYMENT COUNCIL

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 29 January 2008

Opposed Court Application

T Biti, for the applicants
P Machaya, for the respondents

GOWORA J: This matter was initially placed before me under a certificate of urgency. As the final and interim relief sought on the provisional order were the same, I wrote an endorsement on the face of the application querying the manner in which the relief had been framed. The letter of explanation was not placed before me and it was not until after some months that the matter was then brought to my attention. In the event, it was set down before me in chambers to be argued as an urgent application. The respondents indicated a desire to file affidavits in opposition and it was agreed between the parties that the best way was for the matter to be dealt with as an opposed application. The parties thereafter filed their documents including heads of argument and the matter was then argued in court.

On the date of hearing, Mr *Biti* for the applicants, made reference to a number of authorities to which I had no access. He promised to avail them to me shortly thereafter but it was not until the 31 May 2007 that this request was complied with. It was as a consequence, virtually impossible to render a judgment soon after the hearing as I then was heavily committed in other duties. I turn now to the application before me.

The applicants are unions representing members in the employ of the second respondent. The first respondent is a medical aid society set up for the benefit of the employees of the second respondent and would appear to have been set up by virtue of a collective bargaining agreement between the second respondent and its employees. It is common cause that the first respondent was collecting subscriptions from the employees and the second respondent. Benefits which the employees received were not related to the level of payment by the beneficiary and it was, consequently, a fact that the second respondent was operating as a welfarist society with its members being afforded the same benefits. In August 2006 the second respondent (who I shall henceforth refer to as the "respondent") put into effect a three tier system where benefits were structured according to the level of contributions paid by respective members. Following representations made to the respondent, the changes were not put into effect immediately as the parties attempted to find a common position. However at the end of August 2006, the respondent gave notice of its intention to put the changes into effect at the beginning of October 2006. The changes were put into effect and the system is now operational. In view of the reasons I alluded to earlier an attempt to have a temporary interdict stopping the implementation was still-born. It therefore only leaves the final relief for determination. The terms of the final relief are in the following terms:

1 That the implementation and execution of the tiered system by the first respondent effected on 1 October 2006 be and is hereby set aside.

2 That the first respondent be and is hereby ordered to cease/stop and be inducted from implementing the tiered system introduced on 1 October 2006.

3. That the first respondent pays the costs of suit.

Extensive heads of argument were filed on behalf of the parties. In addition, both counsel addressed the court orally. Mr *Biti*, for the applicants argued that there were three issues for determination. The first issue was whether or not the first respondent had powers in terms of its constitution to alter the medical aid scheme in existence since its inception. Counsel invited me to look at the narrow positivist meaning of clause 11 (2) as well as the context of the agreement. The second issue was whether or not the Board of the third respondent had issued a directive to the first respondent following upon a meeting held on 20 October 2006 and the last issue was whether or not the applicants had a legitimate interest to be heard before a decision was made to link benefits to subscriptions.

Mr *Machaya* argued almost on the same premise as Mr *Biti viz* whether the respondent had the power to introduce the benefit structure that it did. His argument was that the applicants had considered the structure of the third respondent in isolation of the statute. He submitted that the first respondent had the power to alter the benefits accorded to its members. In so far as the third respondent was concerned it was his contention that it had not issued a directive to the first respondent to stop implementing the alteration in the benefit structure. Lastly it was argued on behalf of the first respondent that the provision of medical services by the first respondent to members of the applicants was not a condition of service and that therefore there was no need for the applicants' members to be consulted prior to the implementation of the changes.

I think the logical place to start in this matter is the examination of the relationship between the applicants and the first respondent. The first respondent was established by the National Industrial Council for the Railway Industry in 1970. One of its objects was to afford members the facility of obtaining medical and surgical treatment for themselves and their dependants including the provision of drugs and medicines. According to the Constitution in terms of which the first respondent was set up its members comprised of the following; employees of Railways, employees of National Railways of Zimbabwe, Railmed, National Railways of Zimbabwe Pension Fund, RAE, RAU., RAYOS., REC., RMS, and Z.A.R.W.U. who are entitled to membership in terms of their conditions of employment. Also included in the list of people entitled to be members are pensioners of the various institutions described above and the widows or widowers of those persons who had been in employment in the same and were members of the first respondent.

The applicants, being unions, are representing the persons employed by the various bodies I have referred to. Except for those employed by the first respondent, none of the members of the applicants can say that they are employees of the same. The greater number of the applicants' members therefore are employed by the other bodies. Going by the objects of the Constitution of the first respondent, the applicants' members have a relationship with the first respondent whereby the latter has undertaken to afford the members facility for the provision of medical and surgical treatment as well as drugs and medication. Nowhere in their papers have the applicants' alluded to any other contract with the first respondent except for the provision of the services I have described above. Yet, in addressing the question of the first respondent's actions in altering the benefit structure being offered to their members, the

applicants contend that the actions of the first respondent are in fact an alteration of their conditions of service. In order to dispose of the issue of the relationship between the applicants and the first respondent it then becomes necessary to arrive at a decision as to the meaning to be ascribed to the phrase "conditions of service". When one is in service one is in employment and therefore conditions of service are the same as conditions of employment. In the case of *OK Bazaars* (1929) *Ltd* v *Madeley NO & Anor*[1], conditions of employment were described as:

> "Conditions of employment in the present context means simply the terms, either express or implied, contained in a contract of employment".

The terms and conditions of the employment contracts of the applicants' members are not in the purview of the first respondent. In my view conditions of service can only exist where services of a personal nature are rendered, the one being the employer the other the employee. We do not have services of a personal nature being rendered by the applicants' members to and on behalf of the first respondent. I presume that the contracts of employment provide for contributions by the employer for subscriptions to a medical aid society. Beyond that I refuse to go as the contracts are not before me and any further comments on my part would be mere speculation.

The point is made by Mr *Biti* that the effect of the alteration put in place by the first respondent was to fundamentally alter the structure of the Medical Fund from one based upon the principle of equal contributions from the employer and employee and equal unlimited benefits to a new principle of a scheme based on full recovery. I accept that the entitlement to the medical aid benefit, on the basis of the equal contribution with the employer and attendant benefits is a condition of service. I do not accept as contended by Mr *Biti* that receiving equal benefits with other members where the one pays less than another member is a condition of service. However, the linking of the benefits to the level of subscriptions paid by the first respondent's members does not affect the terms on which the members of the applicant are afforded employment by their respective employers. The level and extent of benefits afforded to members is within the discretion of the first respondent and the employer has no input in such assessment. There is no suggestion that under the new scheme the employer will contribute less than it has been contributing, because if that were the case then the applicants' members would have been on very firm ground in arguing that their conditions of service had been altered. All the scheme does is to ensure that a contributor obtains services according to

[1] 1943 T.P.D. 392

the level to which they can contribute in terms of subscriptions. The employer's obligation is not lessened in any manner as he is still obliged to contribute in equal measure to the contributions made by the member. The condition of service is the entitlement to membership in terms of the contract of employment coupled with the employer's obligation to contribute an equal measure as the employee. Since the employer does not determine the level of benefits afforded by the first respondent, the fact the benefits are reduced does not alter the conditions of service which remain unchanged. I am unable to find therefore, that the scheme has the effect of altering the conditions of service of the first respondent's members.

I move on. The next issue I have to determine is whether the first respondent has the power under the Constitution to alter the benefit scheme in the manner that it did. The powers of the first respondent must of necessity be examined in the conjunction with the provisions of the Medical Services Act [*Cap 15*:*13*] ("the Act") which regulates the manner in which medical aid societies conduct their business as well as the manner in which they are managed. Although the first respondent as an entity was set up in 1970, which was prior to the promulgation of the Act, its registration was deemed in terms of s 17 of the Act. I start with the definition section which not only describes what a medical aid society but also specifies its purposes. The definition in s 2 of the Act is as follows:

> "… any association or organization which accepts subscriptions from members or other persons wholly or mainly for the purposes of -
>
> a) paying any expenses incurred by such members or persons and additionally, or alternatively, their dependants or employees, in respect of medical or dental treatment; and
>
> b) meeting the whole or part of any expenses incurred by such members or persons and additionally, or alternatively, their employees, in respect of medical or dental treatment".

The registration of a medical aid society is provided for in s 9. Section 9 (5) provides that the Secretary shall be satisfied in relation to the following before he can register a medical aid society:

> a) the minimum cover for medical services to be provided by the medical aid society is adequate for the purpose of meeting the costs of medical services at such level as may be prescribed; and

b) adequate financial provisions have been made for the proper maintenance of the medical aid society.

In terms of s 10 of the Act, the Secretary is empowered to cancel the registration of any medical aid society which fails to comply with the provisions of s 9 (5). My view is that the powers granted to the first respondent in terms of the constitution have of necessity to be considered in conjunction with the provisions of ss 9 and 10 of the Act. The constitution provides for the creation of a board to administer the affairs of the first respondent. Ten members are required to sit on the board, five of whom shall be appointed by National Railways of Zimbabwe and the last five from the other entities mentioned earlier on in the judgment, from those institutions whose employees or members are entitled to membership of the first respondent. Clause 11 from which the board derives its powers is phrased thus:

Powers and Functions of the Board of Management

(1) Subject to the provisions of the Medical Services Act, the regulations made in terms thereof and any other law, it shall be the duty of the board to administer the affairs of Railmed in a judicious manner at all times and always to act in the best interest of both Railmed and its individual members and to implement the directives of the Secretary responsible for the Health Ministry and REC as may be given from time to time.

(2) It shall have the power to:

(a) formulate and issue Rules of Railmed to include the schedule of rates payable by different categories of members;

(b) modify, amend, repeal, substitute or suspend any or all of such Rules where general or specific circumstances require such action;

(c) Determine the range and scope of benefits to be afforded by Railmed; and

(d) Refuse, terminate or restrict benefits in respect of any beneficiary who contravenes any Rule of Railmed.

Although they have been placed before me, I have not been referred to the Rules of Railmed specifically and I cannot comment further on them other than to say that the first respondent does have the power in formulating such rules to regulate the rates payable by the different categories of members which of necessity, taking into account the different levels of employees in the undertakings must go with a medical aid society. In real terms, the first

respondent would have to set the level and range that each category of membership would have to pay as subscription for the services to be availed to such member. It follows therefore that the rates of contributions set by the first respondent would then have a bearing on the range of benefits that can be accorded for the categories of rates of contributions set in the Rules. It is only fitting therefore that consistent with the power to regulate the schedule of rates of contributions to be paid by the various categories of the members, the first respondent also be endowed with the power to regulate the range and scope of the benefits to be afforded by Railmed. I cannot see the practical effect of a medical aid society having the power to set the schedule of rates of contributions to be paid by the different categories of members but not having the power to set the range and scope of the benefits to be afforded to the membership. It would in my view be only logical that the range and scope of benefits be set and then the contributions be calculated. The one cannot exist independently of the other. I venture to suggest that in arriving at the benefits and contributions that are attendant thereon the board of the first respondent has to bear in mind the provisions of the Act, in particular that it act in the best interests of the members and the society itself. I am fortified in this view by the intent of the first respondent as spelt out in its objects-that, primarily of providing members the facility of obtaining medical and surgical treatment for themselves and their dependants, including the provision of drugs and medicines. The objects of the first respondent would not be met if the first respondent were curtailed in its power as to what benefits it can offer to its members. If that were a matter for the decision of the REC then the latter would have been specifically accorded those powers. It has not. It merely has the power to make decisions of a strategic nature. This brings me to the next rung. Is the decision regarding the extent of benefits to be afforded to the members of the first respondent one that can be termed strategic in nature.

According to Mr *Biti*, even though the first respondent had the power under its constitution to determine the range and scope of the benefits to be afforded to its members it did not have the power to change the society from a welfarist one to one run on market principles with the aim of full cost recovery. I find it hard to comprehend why the restriction on the power afforded to the first respondent under the constitution was framed in such a vague manner. If it was the intention that the REC gives directives of a long-term plan to the first respondent it was simpler in my view to have phrased it as such. Mr *Biti* went further and argued that the three tier system that was adopted by the first respondent was not a mere scheduling of the rates and contributions or the mere determination of the range of scope of benefits, but was

rather the essence and product of the first respondent's strategic recovery plan which was prepared in 2004 and commissioned in 2005. He premises his view on the argument that the entitlement to medical benefits is a condition of service. I have already found that the medical benefit is not a condition of service, but that what was a condition of service was the entitlement to membership and the concomitant contribution by the employer on behalf of the employee. It is pertinent to note that the contracts of employment where the conditions are spelt out were not displayed to the court as much of the argument is based on the alteration of the same.

The constitution does not define what it means by strategic. From the argument pursued by Mr *Biti*, it is clear that the meaning he ascribes to strategic is to do with an alleged alteration of conditions of service. I have above already discussed on whether the introduction of the three tier system of benefits by the first respondent constituted a change in the members conditions of service and my conclusion was that it did not constitute such.

I turn next to the question whether or not the REC issued a directive to the first respondent. The REC wrote two letters to the first respondent subsequent to the adoption by it of the three tier system of benefits. The first letter to the first respondent was phrased as follows:

> "RE: INTRODUCTION OF THE THREE-TIER SYSTEM EFFECTIVE 1 OCTOBER 2006
>
> 1. On 20 October 2006, the Railway Employment Council met and decided as follows:-
>
> 1.1. The introduction of the proposed Three-Tier Scheme is to be suspended with immediate effect, *viz* from the 20th instant and it shall remain so suspended until you are advised to the contrary in due course.
>
> 1.2. The suspension is intended to enable the Railway Employment Council to have the matter resolved and you are advised accordingly.
>
> 2. In the meantime the deductions for the remission to you shall be as hitherto was the case before the purported introduction of the Three-Tier System by yourselves".

The letter was written by the chairman of the REC and on receipt of this letter the chairman of Railmed sought clarification, as in his view it appeared that the four trade unions and NRZ had not resolved to direct the board of Railmed to suspend the Three-Tier System. A letter was dispatched from the office of the chairman of the REC in the following terms:

> "I merely advised you that the feeling in Council was that the introduction of the proposed three tier system be suspended with effect from the 20th instant. This was necessary in order to enable the members of the Council to reach an agreement.
>
> However, you may choose to ignore my advice but you do not have any reason to misunderstand what I said.
>
> I never pretended to say that the trade unions and NRZ resolved to direct the Railmed Board to suspend the three tier system. I have no power to direct any member or constituent member of the REC to do anything".

What emerges from the last quoted letter is that the Board of the REC had not passed a resolution which would have issued a directive to the first respondent to suspend the introduction of the three tier system. It also emerges clearly from the chairman's letter that he was talking about a feeling in Council. There had been no agreement that the three tier system be suspended. The letter from the chairman is very clear and it seems to me that if the applicants wish to contradict him and put forward a version that differs from his statement in the letter then they should have produced minutes of the meeting where the directive was given. In the meeting of the REC Board held on 20 October 2006 the chairman had noted that "the Council had no jurisdiction to instruct Railmed to cease the implementation of the scheme". In fact, the meeting could not agree on what action to take and the chairman indicated that he would write to Railmed and state that Council's position was that the status *quo*, as it was before the introduction of the three-tier system (for whatever merit), should prevail until Council wrote to Railmed on the position. This then led to the crafting of the letter initially sent to the first respondent, which letter was subsequently clarified. When the two letters are read in conjunction with the minutes it becomes clear that REC did not take a position on the implementation because of the divergence of views expressed by the board members present. Further, I did not understand, from my reading of the minutes that REC had resolved to give a directive to the first respondent to stop implementing the new system. In the absence of that I have to find that the REC did not issue a directive to the applicants to suspend the introduction of the three tier system of benefits.

It remains for me to deal with the question raised by counsel for the applicants as to whether or not before the system of benefits was introduced the applicants should have been consulted. In other words Mr *Biti* contends that the applicants had a legitimate expectation to be heard before the implementation of the three tier system. In this regard the first argument advanced by Mr *Biti* was to the effect that when the board members of the first respondent sit

in the Board they owe a duty of care to the Board of the first respondent only as that is the primary responsibility of any board member. I think this submission is made in total disregard of the provisions of the first respondent's constitution, in particular clause 11 which enjoins the board in the administration of the first respondent, to act in the best interests of both Railmed and its individual members. It is of course understandable that Mr *Biti* would seek to convince me that in making the decisions that it made, and not consulting the members, the first respondent was motivated by a duty to protect its interests to the exclusion of that of the membership. This argument flies in the face of the face of the specific duty imposed by the constitution on the board to take into account the interests of the medical aid society and those of its individual members.

In support of the contention that the applicants had a legitimate expectation to be heard counsel has referred me to various authorities. He has made mention of s 18 (1) and s 18 (9) of the Constitution. He has argued further that principles of natural justice as codified in the quoted sections would have required that the applicants be heard. An examination of the quoted subsections reveals the following:

> "18 (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.
>
> 18 (9) Subject to the provisions of this Constitution, every person is entitled to a fair hearing within a reasonable time by an independent and impartial court other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations".

The manner in which the argument is developed is that counsel contends that the first respondent is a public body and as such it has the obligation before making any decisions which would adversely affect the rights of the members of medical aid society, to give them a right to be heard. It cannot be disputed that the members of the applicants would have rights in so far as their relationship with the first respondent is concerned. I note with interest that the majority of decisions cited by him are concerned with the relationship between an employer and an employee. The reality is that the relationship between the applicants' members and the first respondent is regulated by contract and it is that light that the question as to the claimed right to be heard should be examined. In my view the remarks that are appropriate in this case

are to be found in the case of *Administrator, Transvaal* v *Traub*[2] in which CORBETT CJ had this to say at 748G-H:

> "When a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty, or property or existing rights the latter has a right to be heard before the decision is taken (or in some instances thereafter: see Chikare's case (*supra*) at 379) unless the statute expressly or by implication indicates the contrary".

The principle has been applied in appropriate circumstances to decisions made in the exercise of contractual rights. Whether or not the *audi* rule is applicable to a particular decision will depend on the circumstances of the case, particularly whether the express or implied terms of the statute or contract under which the decision is taken requires its observance.

There is a presumption in favour of the application of the *audi* rule when the decision is made in the exercise of a statutory power unless the rule is expressly excluded. There is no such presumption when a decision is taken in the exercise of a contractual right because the question in area of contract is whether or not the failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract.

In the case of *Chirasasa* & *Ors* v *Nhamo N O* & *Anor*[3] the full bench of the Supreme Court of Zimbabwe in a judgment rendered by MALABA JA, with the concurrence of the entire bench states as follows:

> "The next question to determine is whether the right given to the employer to terminate the contract of employment on giving the appellants one month's notice for non-disciplinary reasons could be exercised without regards to the principle of natural justice expressed in the maxim *audi alteram partem* (the *audi* rule).
>
> The *audi* rule is a common law principle which has been applied by courts in review proceedings as part of administrative law, to grant relief to persons whose rights, liberty, property, or legitimate expectation have been adversely affected by decisions made by public authorities or bodies in the exercise of statutory (public) powers without having been afforded the opportunity to be heard".

The first thought that one has is that the first respondent in making the decision that it did was not exercising functions granted in terms of a statutory provision. The powers that the

[2] 1989 (4) SA 731 (A)
[3] SC 133/02

first respondent was exercising are derived from the constitution of the first respondent and it then begs the question how the obligation imposed on the first respondent to hear the applicants' members before implementing the changes it did allegedly arose. This brings me a discussion on the reliance by the applicants on the provisions of s 18 of the Constitution. I cannot find that the reference to s 18 (9) of the Constitution is appropriate *in casu*. The first respondent is not an adjudicating authority nor is it a court or tribunal. It has not been stated precisely how the provisions of s 18 (1) and (9) would apply in this case.

I must commend Mr *Biti* for advancing what clearly is an ingenious argument, that the first respondent is a public body and that as such the *audi* rule applies to it. He has not seen it fit to define for the benefit of the court what a public body constitutes and whether or not the first respondent fits into the mould of such a body. I will therefore confine myself to the status of the first respondent as it is stated in the Constitution and also its stated objectives. The first respondent was established in 1970 by the National Industrial Council for the Railway Industry which has now been named the Railway Employment Council. Its legal status is that of a body corporate which is capable of suing and being sued in its own name. I think that the question of whether or not it is a public body emerges from the entitlement to membership set out in clause 8 of its constitution. According to the clause eligibility to membership is confined to the following persons or organizations:

a) employees of the Railways as required by the rules and as defined in the rules of Railmed;
b) employees of National Railways of Zimbabwe, Railmed, National Railways of Zimbabwe Pension Fund, RAE., RAU, REC, RMS, and ZARWU, who are entitled to membership in terms of their conditions of service;
c) a widow/widower of an employee deceased during employment with the bodies stated in a) above; and
d) all persons who were as at the 30th day of April 1970, were members of the Fund as constituted up to and including that date.

What emerges from the list of persons or organizations entitled to membership is that only those associated with the railway industry can claim eligibility for membership in the first respondent. Membership in the first respondent is therefore restricted. I am therefore not certain that the applicants appreciate that the size of the first respondent is not what determines whether or not it is a public or private enterprise. Neither is the number of organizations within

the railway industry whose employees or former employees who are entitled to claim such membership a factor. The most pertinent feature is that the first respondent's constitution excludes every other person who is not employed or connected with the railway industry from becoming or claiming a right to membership. As such it is a restricted medical aid society on the basis of employment or association therewith and it cannot on that be termed to be a public body.

We are therefore not here concerned with issues of public law as argued on behalf of the applicants. In *casu,* this court is concerned with the rights and obligations which flow from a contract and the law in this country is no different from that of South Africa when it comes to the application of the *audi* principle. In our law the principle as to whether the *audi* principle applies outside the realm of public law was concretized in *Chirasasa & Anor* v *Nhamo N O & Anor* (*supra*) where at p 18 of the cyclostled judgment MALABA JA opined:

> "The decision to terminate the appellants' contracts of employment on notice was made in the exercise of a contractual right. Mr *Hwacha* argued that this was a case of a mere contract between private individuals. It was not an express term of the contract of employment containing the right to terminate that the appellants should be heard before the decision to give them notice was taken. There is no basis on which such an obligation can be implied into the contract. That is particularly the case when termination for misconduct is expressly provided for in the Code of Conduct".

Given that the applicants wish to enforce rights arising out of a contract between their members and the first respondent, such rights have to be given effect to in accordance with the terms of the contract the parties concluded. The court is not permitted to go outside the terms of the contract which however has not been exhibited to the court. The error on the part of the applicants was to elevate the benefits afforded to their members by the first respondent to a condition of service and not appreciate that the condition of service was the actual membership in the first respondent and not the benefits themselves. Had the applicants appreciated the distinction they might have then accepted that what was at stake in this matter was the relationship between different contracting parties and the rights and obligations flowing from such a relationship. The contract has not been invoked in these proceedings and I am unable to give effect to a right which has not been established. The basis on which the applicants claim a right to be heard is not well premised and in my view the right to be heard before the decision to alter the benefit structure has not been established. I therefore find for the respondents in this matter.

In the premises the application is dismissed and the applicants are ordered, jointly and severally, the one paying the others being absolved, to pay the respondents' costs.

Honey & Blanckenberg, legal practitioners for the applicants
Mbidzo, Muchadehama & Makoni, legal practitioners for the respondents