

NATIONAL AIRWAYS WORKERS' UNION
and
AIR TRANSPORT UNION
versus
THE MINISTER OF TRANSPORT, COMMUNICATION
AND INFRASTRUCTURE DEVELOPMENT N.O
and
SECRETARY FOR TRANSPORT, COMMUNICATION
AND INFRASTRUCTURE DEVELOPMENT N.O
and
THE GROUP CHIEF EXECUTIVE OFFICER AIR
ZIMBABWE HOLDINGS (PVT) LTD N.O
and
AIR ZIMBABWE HOLDINGS (PVT) LTD
and
NATIONAL HANDLING SERVICES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE 5 April 2012

URGENT CHAMBER APPLICATION

C. Mucheche for the applicants
R. Hove for the 1st and 2nd respondents
C. Zinyengera for the 3rd and 4th respondents
No appearance for the 5th respondent

MUTEMA J: The applicants have had a long running legal battle with the 4th respondent (Air Zimbabwe Holdings) and Air Zimbabwe (Pvt) Ltd, a subsidiary company of Air Zimbabwe Holdings. The legal dispute between the parties has its genesis steeped in matters of employment. It is claimed that Air Zimbabwe Holdings and Air Zimbabwe (Pvt) Ltd owe the applicants and their members (who are employees of the former) approximately US\$35 415 731,80 representing union dues and salary arrears for the period January, 2009 to December 2011. The applicants believe that the financial woes bedevilling Air Zimbabwe Holdings and Air Zimbabwe (Pvt) Ltd are a result of mismanagement. This is the reason why the applicants filed case number HC 661/12 on 23 January, 2012 by way of a court application to have Air Zimbabwe Holdings and Air Zimbabwe (Pvt) Ltd placed under

provisional judicial management instead of gunning for outright liquidation. That application is still pending and it is being opposed.

On 2 April, 2012, the applicants stumbled upon an official letter dated 26 March, 2012 from second respondent to third respondent wherein it was directed that 4th respondent should transfer its share holding in fifth respondent to a nominee company wholly owned by the government of Zimbabwe and that the fifth respondent would cease to be a subsidiary of Air Zimbabwe Holdings and the fifth respondent's current board of directors was dissolved. The letter in question is attached to this application as annexure "B". The respondents' action postulated above created an apprehension in applicants' mind that the action amounted to stripping Air Zimbabwe Holdings of its assets thereby reducing it to a shell thus rendering nugatory the application in case number HC 661/12. This prompted the applicants to file the present interlocutory interdict barring the respondents from giving effect to the transfer of Air Zimbabwe Holdings shares in fifth respondent as directed by the second respondent in annexure "B" *supra* and from interfering with the assets of Air Zimbabwe Holdings in any manner that will have the effect of stripping the company of its assets pending finalisation of the matter in HC 661/12.

The terse oral submissions made on behalf of the first and second respondents is that urgency is absent because the first two respondents' actions are deemed lawful and it is difficult for them to reverse their actions.

The third and fourth respondents orally associated themselves with the first two respondents' submissions *supra*. They added that the sole purpose of the first two respondents' actions is to restore profitability and that even if the shares are transferred there will not be any prejudice occasioned to the applicants because of s 16 of the Labour Act, [Cap 28:01] which provides that on transfer of an undertaking, the rights of employees and obligations of the transferor are transferred to the transferee.

That the matter is not urgent on the basis that the first two respondents' actions are deemed lawful and it is difficult to reverse the actions is an idle argument. It also misses the rationale underlying the legal concept of urgency as contemplated in the rules of this court. A matter is urgent when the need to act arises it cannot wait and the application is timeously made. *In casu* annexure "B" *supra* came to the applicants' attention on 2 April, 2012 and on 4 April, 2012 this urgent application was filed. There was therefore no delay in seeking redress/relief by the applicants. When it comes to urgency, the issue is not whether a

respondent's actions are deemed lawful or it is difficult to reverse the actions. The lawfulness or otherwise of the first two respondents' actions is for the court to decide on the return day and so is the issue pertaining to the alleged difficulty in reversing those actions. In fact, the respondents are not being called upon to reverse their actions but to put them on hold pending the finalisation of the matter in case number HC 661/12. In the event, I find that the matter *in casu* does meet the requirements of urgency as contemplated in the rules.

Regarding the merits, the local case of *Enhanced Communications Network (Pvt) Ltd v Minister of Information, Posts and telecommunications* 1997 (1) ZLR 342 clearly sets out the requisites for a temporary or interim interdict.

They are these:

- (1) That the right sought to be protected is clear; or
- (2) (a) if not clear, it is *prima facie* established, even though open to doubt; and
(b) there is a well-ground apprehension of irreparable harm if the relief is not granted and the applicants ultimately succeeds in establishing his rights;
- (3) The balance of convenience favours the grant of the relief; and
- (4) There be no other satisfactory remedy.

There is a rider to the above requisites that even where the requisites are established, the court still has a discretion whether to grant or refuse the remedy.

That the right *sought* to be protected is clear or if not clear, it is *prima facie* established even though open to doubt seems to me to be as clear as day follows night. Applicants seek to protect the *re litigiosa*, viz the assets of Air Zimbabwe Holdings rendered as such by HC 661/12. The applicants, by so doing want to protect what Air Zimbabwe (Pvt) Ltd owes them in terms of union dues and salary arrears stated above which has not been disputed and which the court can take judicial notice of due to its notoriety. The right sought to be protected is clear.

That there exists a well-grounded apprehension of irreparable harm if the relief sought is not granted and the applicants ultimately succeed in establishing their right in HC 661/12 is beyond caevil. It is not disputed that fifth respondent is currently the only subsidiary of Air Zimbabwe Holdings which is profitable. Judicial notice can also be taken of the fact that Air Zimbabwe (Pvt) Ltd's planes are all grounded and as such no revenue is being generated by it. If the respondents were to be allowed to alienate assets belonging to Air Zimbabwe

Holdings and applicants ultimately succeed in HC 661/12 in having the two entities cited therein placed under provisional judicial management, irreparable harm would have been occasioned to the applicants since there would be no assets to provisionally judicially manage.

That outcome would simply amount to a *brutum fulmen*. The argument that the applicants will not be prejudiced by the transfer of the shares on the basis of the provisions of s 16 of the Labour Act is fallacious. That section does not apply *in casu* because annexure “B” *supra* is defeaningly silent about the fate of the workers or the obligations to the workers by the transferee of the shares in question. In fact that letter only states that the fifth respondent would cease to be a subsidiary of Air Zimbabwe Holdings without stating what the fate of the fifth respondent would be let alone that of its employees.

The balance of convenience clearly favours the granting of the relief sought. No prejudice would be wrought upon the respondents by granting the relief because if the outcome in HC 661/12 is in their favour, they can always implement their actions. In any event, it has not been disputed that applicants filed their heads of argument in HC 661/12 on 23 March, 2012 and only the set down date for the opposed application is awaited. On the other hand, if the relief is not granted the applicants’ pursuit in HC 661/12 will be rendered academic.

Clearly there is no other satisfactory remedy that can accrue to the applicants in the circumstances in view of the foregoing findings.

In the event, I will invoke the discretion reposed in me in view of the above findings and grant the relief sought in terms of the provisional order.

Matsikidze and Mucheche, applicants’ legal practitioners
Civil Division of the Attorney General’s Office, 1st and 2nd respondents’ legal practitioners.
Mutumbwa, Mugabe and partners, 3rd and fourth respondents’ legal practitioners.