<u>REPORTABLE</u> **(50)**

(1) AIR ZIMBABWE (PRIVATE) LIMITED
(2) AIR ZIMBABWE HOLDINGS (PRIVATE) LIMITED
v
(1) STEPHEN NHUTA
(2) DEPUTY SHERIFF HARARE
(3) SHERIFF OF ZIMBABWE

THE SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, NOVEMBER 18, 2013 & SEPTEMBER 15, 2014

Adv L Uriri, for the appellants

Adv *T Mpofu*, for the respondents

ZIYAMBI JA: This is an appeal against a judgment of the High Court dismissing with costs an urgent application brought by the appellants for the release from ‘attachment and execution’ of certain motor vehicles and other assets attached by the second respondent (“the Deputy Sheriff”) on the appellants’ premises on 12 April 2013.

<u>THE BACKGROUND</u>

The first and second appellants are companies duly incorporated according to the laws of Zimbabwe and whose registered office and principal place of business is situate at the Harare airport.

The first respondent is an ex-employee of the second appellant. Sometime in October 2010, an arbitral award for outstanding salary and benefits was made in his favour. No appeal was lodged against the decision of the arbitrator and the award was registered with the High Court on 5 September 2012. On 19 October 2012 he caused to be issued a writ of execution on the strength of which the Deputy Sheriff attached and removed twenty–nine vehicles which were found on the appellants' premises at the Harare airport. The appellants alleged that interpleader notices were filed to 'safeguard the claimants' interests which notices are still pending'. Indeed it appears that interpleader proceedings in the name of the first appellant as claimant and the first respondent as judgment creditor were commenced in the High Court on or about 15 November 2012 and not concluded. (I pause here to observe that in terms of the High Court Rules, interpleader proceedings in respect of property attached in execution are required to be brought by the Deputy Sheriff, as applicant, and the person(s) claiming ownership of the attached property as claimant(s)[1]).

The appellants further alleged that in December 2012, s 8 of the Finance Act (No.2) of 2012 ("the Finance Act") was enacted with the sole purpose of protecting, from attachment or execution, the property of the appellants as the successor companies of the Air Zimbabwe Corporation and that following this enactment, and in February 2013, the first respondent released the attached motor vehicles subject to the appellants paying to the Deputy Sheriff storage fees which had accumulated in the sum of US$10 000. The appellants were therefore

[1] Rule 205A which provides:-"(2) In regard to conflicting claims with respect to property attached in execution, the Sheriff or DeputySheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant"

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surprised when, on 12 April 2013, the Deputy Sheriff returned with the same writ of execution and attached the same motor vehicles which had previously been released from attachment.

They alleged that by virtue of the provisions of s 8 of the Finance Act as read with the State Liabilities Act [*Chapter 8:14*] the attachment of the appellants' property to satisfy debts owed by either the first or the second appellant is in violation of the law and therefore illegal. In the premises, they urged the court to intervene as a matter of urgency to prevent the removal of the assets set for 22 April 2013 for public auctioning and so put an end to the illegality perpetrated by the respondents. Failure by the court to intervene and save the attached motor vehicles would result in paralysis of the business operations of the first appellant in a dispute to which it is not a party.

It is of interest to note here that, notwithstanding the alleged urgency, the application was filed on 22 April 2013, the day scheduled for the removal of the attached property, and served on the first respondent the following day at 4.20 pm.

In opposing the application the first respondent raised two preliminary issues. Firstly, that the matter was not urgent and, secondly, that the application was defective by reason of its non-compliance with Rule 241 (1) of the High Court Rules which requires the applicant to set out the facts of his application in Form 29B. No mention was made of the second issue in the judgment and it is not raised in the notice of appeal.

With regard to the first point raised, *in limine*, it was averred by the first respondent that the appellants had shown no satisfactory reason, whether in the certificate of urgency or their founding affidavits, as to why the matter should be heard as a matter of urgency. In particular, there was no disclosure as to when the alleged urgency arose regard being had to the fact that the writ was issued on 19 October 2012; that when the Finance Act on which the appellants rely was enacted in December 2012, no action was taken by the appellants; and that the appellants had concealed from the court an earlier attempt by the Deputy Sheriff, on the 10 April 2013, to attach their property before the actual attachment took place on the 12 April 2013. In addition, there was no explanation from the appellants as to why they failed to file this application before the 22 April 2013. In the premises, the urgency was self-created.

As to the merits of the matter, the first respondent averred that the property attached belonged to the second appellant ('Air Zimbabwe Holdings') which was not protected by the provisions of the Finance Act, such protection having been afforded only to the first appellant ('Air Zimbabwe'). While admitting that he had ordered the Deputy Sheriff to release the attached motor vehicles, it was averred that the release was not on account of the provisions of the Finance Act but was in consequence of a tender by Air Zimbabwe Holdings of a payment plan in terms of which the latter promised to pay the debt owed to the first respondent in agreed instalments. When that commitment was not honoured, the Deputy Sheriff was instructed to reattach and remove the goods formerly released, hence the attempt at attachment on 10 April 2013.

The learned Judge having heard the matter dismissed it on the basis that it lacked both urgency and merit. The following grounds of appeal were relied on by the appellants:-

GROUNDS OF APPEAL

1. The court *a quo* erred in declining to hear and determine the matter on an urgent basis by the exercise of its discretion on whether to hear and determine the matter on an urgent basis on a wrong premise, such wrong premise amounting to an irregular exercise of judicial discretion.
2. The court *a quo* erred in not holding that, upon a proper construction of s 9A of the Air Zimbabwe Corporation (Repeal) Act, No.4 of 1998, as inserted by s 8 Finance (No.2) Act, 2012, both appellants are successor companies to the Air Zimbabwe Corporation.
3. The court *a quo* erred in not holding that judicial attachment and sale in execution of any property belonging to either of the appellants is proscribed by s 9A of the Air Zimbabwe Corporation (Repeal) Act, No.4 of 1998, as read together with the provisions of s 5(2) of the State Liabilities Act [*Cap 8:14*]

The first ground of appeal makes no sense because the court *a quo* did not decline to hear the matter. Indeed, having found that the matter was not urgent it nevertheless proceeded to hear and determine it on an urgent basis. In so doing the court *a quo* contradicted itself. What it should have done once a finding of lack of urgency was made, was to strike or remove the matter from the roll of urgent matters and not proceed to hear the merits for, once a hearing has taken place and a decision made on the merits, the question of urgency becomes irrelevant. For this reason a determination on the first ground of appeal would be unnecessary. Suffice it to say

that no wrong premise was disclosed to this Court (and indeed none was apparent on perusal of the judgment) and the evidence on the record adequately supports the finding of the learned Judge that any urgency there was, was self-created.

The second and third grounds of appeal raise the issue whether Air Zimbabwe Holdings is a successor company of Air Zimbabwe Corporation as contemplated in s 9A of The Air Zimbabwe Corporation (Repeal) Act (No. 4 of 1998)("the Repeal Act"). If it is, then it would follow that the attachment of its property by the Deputy Sheriff was illegal.

It was the appellants' contention before this Court, as before the court *a quo,* that the word **<u>any</u>** was meant to convey the meaning that any company formed by the shareholder or Board of the National Airline would automatically enjoy the same immunity provided by the amendment and that, in the premises, Air Zimbabwe Holdings was such a successor company as would enjoy the immunity. The learned Judge rejected this contention. At p 6 of the cyclostyled judgment he said:

> "I do not accept that it was the intention of the legislature to extend such immunity to an indeterminate number of companies some shareholders or board somewhere could think of floating. I do not see the provisions of the amending section aforesaid as granting the power to anybody, let alone some shareholder or board of directors somewhere, to create a successor company, let alone several of them, to the defunct Corporation. The words used in the amendment are '… *or any successor company*'. The word '*company*' is used in the singular. I do not accept applicants' argument that the use of the pronoun 'any' before the noun 'company' transformed the word 'company' from the singular to 'companies' in the plural. A reading of the whole amendment leaves me in no doubt that it was intended to refer to one successor company. If it was meant to refer to more than one company, the legislature could have easily used plurals so that that portion of the amendment would have read '… *or **<u>all</u>** successor compan**<u>ies</u>***', or '… *or any **<u>of</u>** the successor compan**<u>ies</u>***'". (Emphasis is contained in the judgment).

The correctness of the learned Judge's ruling becomes evident when the legislative history is considered.

The Repeal Act was brought into operation on May 8 1998. Its purpose, as set out in the preamble, was 'to provide for the dissolution of Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a company formed for the purpose; to provide for the repeal of the Air Zimbabwe Corporation Act [*Cap 13:02*]; and to provide for matters connected with or incidental to the foregoing'. (The underlining is mine)

Section 3 of the Repeal Act provided:

> **3. Formation of a successor company**
> Subject to this section, the Minister shall take such steps as are necessary under the Companies Act [*Chapter 24:03*] to secure the formation of a company limited by shares, which shall be the successor company to the Corporation for the purposes of this Act:
> Provided that, if such a company has been incorporated for the purpose before the date of commencement of this Act, the Minister may, by notice to the Corporation, direct that that company shall be the successor company to the Corporation for the purposes of this Act." (Emphasis provided)

Section 4 of the Repeal Act made provision for the shareholding of the successor company and s 5 for the transfer of assets and liabilities of the Corporation to the successor company.

The company nominated by the Minister in terms of s 3 was Air Zimbabwe (Private) Limited. See *Jayesh Shah v Air Zimbabwe Corporation*[2].

[2] HH133/10 KUDYA J remarked:

"Section 3 of the Repeal Act mandated the Minister of Transport and Energy to secure the formation of a company limited by shares in terms of the Companies Act [*Cap 24:03*] to succeed the

On 28 December 2012 the Finance Act amended the Repeal Act by inserting a new s 9A. Section 8 of the Finance Act provided:

> “**8 New section inserted in Act No.4 of 1998**
>
> (1) The Air Zimbabwe Corporation (Repeal) Act (No.4 of 1998) is amended by the insertion of the following section after s 9-
> ‘9A Legal proceedings against Corporation or Successor Company
> The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to all legal proceedings against the Corporation or any successor company.’
>
> (2) Subject to subsection (3), the amendment effected by subsection (1) applies to all legal proceedings against the Corporation or successor company (as those terms are defined in s 2 of the Air Zimbabwe Corporation (Repeal) Act (No.4 of 1998)), that were commenced or completed before the date of commencement of this Act.

The term ‘successor company’ was defined in s 2 of the Repeal Act as follows:-

> ‘“successor company” means the company referred to in section *three*.’

It admits of no doubt, therefore, that the legislature clearly had in mind one successor company. It is also clear that had the appellants’ contention to the contrary been correct, the legislature would have expressed itself in words which lend themselves clearly and unambiguously to the meaning contended for by the appellants. As submitted by Mr *Mpofu* by way of illustration, the Air Zimbabwe Corporation was only one of the many companies which

Corporation. If such a company was in existence before the commencement of the Act, the Minster was empowered to notify the Corporation and direct the company to become the successor to the Corporation. The company he nominated as the successor company, Air Zimbabwe (Private) Limited, was already in existence by the time the Repeal Act was published. It had been incorporated on 20 November 1997”.

were unbundled. Similar provisions were made in legislation repealing the Electricity Act. For example s 68 of the Electricity Act [*Chapter 13:19*] provides:

> **"68 Formation of successor companies**
> (1) The Minister shall, not later than six months after the fixed date, take such steps as are necessary under
> the Companies Act [*Chapter 24:03*] to secure the formation of one or more of the following companies limited by shares, which shall be the successor company or successor companies to the Authority—
> (*a*) a company to take over the electricity generation plants of the Authority;
> (*b*) a company to take over the transmission system of the Authority;
> (*c*) a company to take over from the authority the distribution and supply of electricity;
> (*d*) such other companies as the Minister may approve;
> (*e*) a company to hold the shares of the State in the companies referred to in paragraphs (*a*) to (*d*)."

Clearly, then, the learned Judge's finding that Air Zimbabwe Holdings is not the successor company referred to in s 9A of the Repeal Act is unassailable. It follows, therefore, that the property of Air Zimbabwe Holdings is not protected from execution by the statutory provision.

As to the ownership of property attached, it was alleged by the appellants that that property belonged to Air Zimbabwe and not to Air Zimbabwe Holdings. In support of this allegation a number of registration books were attached to the appellants' papers. The learned Judge determined this issue as follows:

> "Applicants alleged that the attached assets did not belong to Air Zimbabwe Holdings against which Nhuta had a judgment, but against Air Zimbabwe which not only was not indebted to Nhuta but also the assets for which are immune from attachment. But not a shred of evidence was placed before me that the assets belonged to Air Zimbabwe. During argument it was contended from the bar that the evidence of ownership was in the interpleader proceedings. It will be remembered that until I had requested a copy of the pleadings in those proceedings, none had been placed before me. No case reference

> number had been given. Nonetheless, having perused those papers I find that Air Zimbabwe laid claim to 20 out of 29 of the attached vehicles and to 1 motor cycle. As proof of ownership of those vehicles some registration books were copied and attached. From those registration books about six of the vehicles were in the name of "**Air Zimbabwe Corporation**" which could be either or both of the applicants according to their argument that both are successor companies. The rest of the vehicles were in the name of "**Air Zimbabwe**" which again could mean either or both of the applicants. At any rate emblazoned on every registration book was a "***WARNING***" that read "*This registration book* ***is not proof of legal ownership***. (My emphasis)"

I find no fault with the above reasoning. It is trite that registration books are not proof of ownership. In any event the appellants have, still open to them, the option of pursuing the interpleader proceedings in which the issue of ownership can properly be ventilated and determined.

The appeal, for the reasons set out above, lacks merit and is hereby dismissed with costs.

GARWE JA: I agree

PATEL JA: I agree

Messrs Mutumbwa Mugabe & Partners, appellants' legal practitioners

Matsikidze & Mucheche, respondents' legal practitioners