

AIR ZIMBABWE [PRIVATE] LIMITED
and
AIR ZIMBABWE HOLDINGS [PRIVATE] LIMITED
versus
STEPHEN NHUTA
and
DEPUTY SHERIFF HARARE
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 25 APRIL 2013 & 2 May 2013

Urgent chamber application

Ms *B Rupapa*, for the applicants
Advocate *T Mpofo*, for the first respondent
No appearance for second and third respondents

MAFUSIRE J: The applicants brought the above application under a certificate of urgency. In the interim they sought the release of certain goods, mostly vehicles, that had been attached in execution. It was also sought as an interim relief an order that the respondents should pay any storage costs that might have been incurred as a result of the attachment of the assets. For the final order it was sought that the actions of the respondents be declared illegal for allegedly contravening s9A of the Finance Act [No2] of 2012 [*sic*] as read with the State Liabilities Act, [*Cap 8:14*]. One has to read the main body of the application to appreciate what exactly were those actions which the draft order sought to have declared as being illegal and a contravention of the two statutes.

The final relief also sought an order barring the respondents from attaching or executing against the assets of the applicants “... *and any company in the Air Zimbabwe Stable*”. Finally, the final relief sought an order of costs on the higher scale.

I heard the matter on an urgent basis on 25 April 2013. After argument I dismissed the application with costs for lack of urgency and lack of merit. I gave my reasons *ex tempore*.

On 26 April 2013 applicants' legal practitioners wrote to seek the reasons for my decision. The letter was placed before me only on 29 April 2013, presumably because of the supervening weekend. My reasons for dismissing the application now appear below.

To avoid confusion I shall refer to the first applicant as Air Zimbabwe; the second applicant as Air Zimbabwe Holdings or the two of them collectively as applicants; the first respondent as Nhuta and the second and third respondents collectively as the Deputy Sheriff.

The circumstances of the case are that Nhuta was a former employee of Air Zimbabwe Holdings. In October 2010 an award for outstanding wages and benefits had been made in his favour. He had subsequently, in September 2012, registered the award as an order of this court. He proceeded to execute. It seems that in November 2012 Air Zimbabwe filed papers with this court under the case reference no HC 9412/10. Therein the Deputy Sheriff was cited as the applicant, Nhuta as the judgment creditor; Air Zimbabwe Holdings as the judgment debtor and Air Zimbabwe as the claimant.

During argument in the urgent chamber application on 25 April 2013 all the parties before me, particularly the applicants, kept referring to HC 9412/10 as interpleader proceedings. When I repeatedly expressed concern that the so-called interpleader proceedings seemed to have lain dormant for almost three years Ms *Rupapa*, counsel for the applicants, repeatedly confirmed that indeed that had been the case. She seemed to place the blame for the delay on the deputy sheriff allegedly for not having taken any action. She also seemed to blame Nhuta allegedly for having refused to recognise those proceedings as interpleader. I now find this quite curious. Since no citation to those proceedings had been given in the founding papers to the urgent chamber application, and since during argument applicants' counsel kept making reference to those proceedings, I asked for a copy.

I now find that despite the case reference number having reflected/10 on the index [the only place or document bearing the case number], a clear reference to year 2010, on a closer inspection and of a reading of those papers it seemed in fact that the proceedings had only been filed with this court in November 2012, and not way back in 2010. The founding affidavit to those proceedings had been executed only on 15 November 2012. So I have wondered why Ms *Rupapa* maintained that the interpleader proceedings had been dormant since 2010.

Be that as it may, in those proceedings Air Zimbabwe, as the claimant, claimed ownership of the assets which the Deputy Sheriff had attached in pursuance of the writ that had been issued at Nhuta's instance. In the founding affidavit deposed to on behalf of Air

Zimbabwe in those proceedings, the order sought was one to stop the execution of certain assets allegedly belonging to Air Zimbabwe and to cancel the writ of execution. In the draft order was sought an order to dismiss Nhuta's claim! Nothing could be more confused!

It emerged from Nhuta's opposing papers in the urgent chamber application before me and in the parties' argument that on 19 December 2012 Air Zimbabwe had brought an urgent chamber application under HC 14467/12 to stop execution of the attached property but that MTSHIYA J had dismissed it for lack of urgency. These facts, which were plainly material, were conspicuous by their absence in the founding papers of the proceedings before me.

The urgent chamber application before me was premised on the allegation and contention that the assets belonging to Air Zimbabwe or Air Zimbabwe Holdings or any other company hailing from "... *the Air Zimbabwe Stable*" had become immune from attachment and execution by virtue of the Finance [No 2] Act [being Act No 6 of 2012, not Act No 2 of 2012 as wrongly cited by applicants], as read with the State Liabilities Act, [*Cap 8: 14*]. I shall refer to the Finance [No 2] Act, No 6 of 2012 as "***the Finance No 2 Act***". It was also argued that the applicants both hailed from the Air Zimbabwe stable; that both were successor companies to the Air Zimbabwe Corporation; that the Finance No 2 Act had been promulgated in December 2012; that following that promulgation Nhuta had, in response to the promulgation, caused the release of the attached assets; that it was therefore surprising that Nhuta was now apparently recanting this position by re-instructing the re-attachment of the same assets on the basis of the same writ and that this was unlawful. It was further argued that as a matter of fact the attached assets did not belong to Air Zimbabwe against which Nhuta had no judgment but to Air Zimbabwe Holdings and that the proof of such ownership was in the interpleader proceedings.

Incidentally, the only reference to the so-called interpleader proceedings in the founding papers before me was in paragraph 9.1 of the founding affidavit. It read:

"9.1 Of the 29 vehicles which were attached, none belonged to 2nd Applicant. The vehicles belonged to First Applicant and other companies in the Air Zimbabwe stable and as a result interpleader notices were filed to safeguard the Claimants' interests. The Interpleader notices are still pending".

The applicants argued that the wording of the Finance No 2 Act, particularly the use of the word "*any*" meant that there was no limit to the number of companies that could be

formed by “... *the shareholder or board of the National Airline ...*” as successor companies to Air Zimbabwe Corporation under the Air Zimbabwe Corporation [Repeal] Act [No 4 of 1998] [hereafter referred to as the “**Repeal Act**”].

It transpired during argument that contrary to the allegations by the applicants in their founding papers the release from attachment of the assets in question at Nhuta’s instance in February 2013 had not been the result of any respect by Nhuta of the new Finance No 2 Act which he had never at any stage recognised as applying to any company other than Air Zimbabwe, but that the release followed an agreement between Nhuta and Air Zimbabwe Holdings regarding a payment arrangement in terms of which Air Zimbabwe Holdings would liquidate the judgment debt. The re-attachment of the same assets in terms of the same writ in April 2013 was triggered by Air Zimbabwe Holding’s failure to respect the payment terms. Again this material fact was not disclosed in the applicants’ founding papers.

I dismissed the urgent chamber application firstly for lack of urgency. It was argued on behalf of the applicants that the need to act had arisen from 13 April 2013 when Nhuta had caused the re-attachment of the assets. In the certificate of urgency it was stated that the removal of the assets had been scheduled for Monday, 22 April 2013. That was the very day the urgent chamber application was filed. Therefore, somehow it was expected that the application would be filed, and on the same day the registry would complete all the necessary administrative procedures of receipting the court fee, issuing the application, allocating it to the duty judge who in turn would peruse the papers, arrange set down and advise applicants’ counsel who in turn would have had to serve the papers and still have the matter heard on the same day. As it happened the application was only heard on 25 April 2013 after applicants’ counsel had intimated that the removal of the attached property was no longer going ahead on 22 April 2013. But it was never explained when next it was feared it would happen.

In *Kuvarega v Registrar-General & Anor* 1998 [1] ZLR 188 [H] CHATIKOBO J said¹:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

¹ At p 193F - G

When Nhuta had registered the arbitral award with this court in September 2012 it must have become obvious to the applicants that his next step would be execution. Indeed he executed. Therefore when the Finance No 2 Act was promulgated in 2012, and if the applicants should have thought that the legislation applied to them, they would necessarily have had to act then. They would have applied that their assets be declared exempt from attachment. They did not. And neither the certificate of urgency nor the founding affidavit explains this delay. Instead there has been an attempt to mislead. It was concealed from the application that the parties had entered into some payment arrangement. What then triggered the urgent application was not the re-attachment of the assets in April 2013, but rather Air Zimbabwe Holding's own default of the agreed payment arrangement.

In *Kuvarega's* case above the delay between the need to act and when the application was eventually filed was some 8 days. The court said that there had been no explanation until the very last working day of the day of reckoning. *In casu*, even if I were to accept the applicants' contention that the need to act had arisen only in April 2013 when the re-attachment happened, and not in December 2012 when the Finance No 2 Act came into being, there is still the problem that the applicants' deponent has not been truthful in the founding affidavit on yet another point. It was false to say that the re-attachment was on 13 April 2013. Actually the first attempt at re-attachment had been on Air Zimbabwe. That had been on 10 April 2013. Apparently Air Zimbabwe had flagged the Finance No 2 Act to the deputy sheriff. The Deputy Sheriff had retreated. But he had then come back for Air Zimbabwe Holdings. That had been on 12 April 2013. All this is borne by the deputy sheriff's returns which were attached to Nhuta's opposing papers. In the founding papers no explanation was given why such precious time was wasted and why action was taken only some 12 days later, and on the very day of reckoning.

During argument counsel for the applicants proffered the explanation that the applicants are large corporations and that it was not feasible to assemble their boards to pass the necessary resolutions. This is unacceptable. Applicants had been seized with Nhuta's litigation since 2010. Furthermore, attached to the applicants' founding papers was an extract of a resolution by Air Zimbabwe on 13 November 2012, among other things, authorising the deponent to sign all legal documents and to do any legal acts on its behalf to safeguard its interests in the dispute between Air Zimbabwe Holdings and Nhuta. If Air Zimbabwe had felt that it was its assets that had been re-attached as was contended why did it wait?

Applicants' counsel dismissed *Kuvarega's* case on the basis that it was wrongly decided. I did not agree. *Kuvarega* has withstood the test of time. It was decided in 1998. It has been referred to with approval in several subsequent cases. I was satisfied that there was no urgency in the matter and that if there was any, it was demonstrably self-created.

I also dismissed the application for lack of merit. Section 8 [1] of the Finance No 2 Act which was published under General Notice 613/12 on 28 December 2012 inserted a new s 9A into the Repeal Act. The new section reads:

“9A Legal proceedings against Corporation or successor company

“The State Liabilities Act [Chapter 8: 14] applies with necessary changes to legal proceedings against the Corporation or any successor company.”

Sub-section [2] of s 8 of the Finance No 2 Act then reads as follows:

“(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 section 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.”

In terms of the State Liabilities Act, [Cap 8: 14], state property is immune from attachment and execution. Therefore, by the aforesaid amendment the same immunity was being extended to the property of the Air Zimbabwe Corporation [hereafter referred to as “***the Corporation***”] or any successor company. By virtue of subsection [3] of the Finance No 2 Act that immunity is to last until 1 January 2015.

The crux of the matter before me in the urgent chamber application was whether it was correct that ***any*** company formed by “... *the shareholder or board of the National Airline,*” as it was put to me, would automatically enjoy the same immunity provided by the amendment above. Furthermore, was Air Zimbabwe Holdings, not Air Zimbabwe, also such a successor company to the Corporation as would enjoy the same immunity?

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 **all successor companies**", or "... or any **of the successor companies**".

The Oxford Advanced Learner's Dictionary shows that the pronoun "any" can be used not only with uncountable or plural nouns to refer to an amount or number of something however large or small but also with singular countable nouns to refer to one of a number of things or of people when it does not matter which one [my emphasis]. I am satisfied that given the wording of that amendment the use of "any" was meant to refer to a singular countable noun, i.e. "company".

A reading of the Repeal Act as a whole militates against the construction that more than one successor company to the Corporation was envisaged. For example, in terms of s 5 the Minister is empowered to transfer the assets and liabilities of the Corporation to the successor company. In terms of the other sections, the successor company inherits the rights and obligations of the Corporation, including contracts of employment in terms of s 8. If it was meant to refer to more than one successor company it would mean that any person against whom the Corporation had any cause of action could be faced with an indeterminate number of suits from an indeterminate number of creditors all claiming to be successor companies. Likewise, a creditor of the former Corporation could be placed in the same dilemma of determining the particular successor company that would have to meet his or her claim. Such an absurdity was obviously never intended.

The matter does not end there. The power to declare a successor company to the defunct Corporation in terms of the Repeal Act was not given to all and sundry. It was not given even to the shareholders or board of that defunct entity. The power is that of government through the minister of transport. The Repeal Act defines "successor company" as **the company** referred to in section three. Section 3 reads:

"3 Formation of successor company

*"Subject to this section, the Minister shall take steps as are necessary under the Companies Act [Cap 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" [my emphasis].*

The preamble to the Act gives the purpose of the Act as being to provide for the dissolution of the Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a company formed for the purpose. Plainly, such wording, by itself, does not admit of more than one company all being successor companies to the defunct Corporation.

The matter goes further. The proviso to s 3 of the Repeal Act envisaged that the company that the Minister could nominate or direct as being the successor company could be one already in existence prior to the Act. Thus if the Minister did not want to form a new company he had a choice to nominate a pre-existing one. Air Zimbabwe was already in existence when the Repeal Act became law. The Form C. R. 14 attached to Nhuta's papers showed that it was incorporated sometime in 1997. In the judgment by KUDYA J in *Jayesh Shah v Air Zimbabwe Corporation* HH133-10 it was noted that Air Zimbabwe was incorporated on 20 November 1997. It was held in that judgment that Air Zimbabwe was the successor company to the former Corporation. This the Minister did by means of a legal instrument, namely General Notice No 120A/2000.

On the other hand Air Zimbabwe Holdings appears to have been formed sometime in 2005 according to the C. R. 14 to Nhuta's papers. Other than a declaration from the bar by applicants' counsel that Air Zimbabwe Holdings was formed by the Minister also as a successor company to the Corporation nothing was presented before me to this effect. On the contrary we have the legislation analysed above and the judgment of this court aforesaid both militating against such a construction. In the premises I rejected the contention that Air Zimbabwe Holdings was a successor company to the Corporation.

There is one more point. 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].

At the end of the day I was satisfied that the urgent chamber application was an abuse of the court process. I therefore dismissed it with costs.

Mutumbwa Mugabe & Partners, applicants’ legal practitioners
Matsikidze & Muchenje, first respondent’s legal practitioners