CHENJERAI MAWUMBA
and
JULIANA MAGOMBEDZE
and
FADZAI NICOLA MAWUMBA
versus
AIR NAMIBIA PROPRIETARY LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 June 2018 & 6 February 2019

***Ex Parte* Chamber Application – Attachment of property to found and confirm jurisdiction**

CHITAPI J: The respondent has noted an appeal to the Supreme Court against my order made in case no. HC 2355/18 on 27 June 2018. The appeal is pending under case no. SC 803/18. I have been requested through the Registrar of this court to provide reasons for my order for purposes of the appeal. Herein following are the reasons. The 5 applicants filed a chamber application for attachment of the respondent's property to found and/or confirm the jurisdiction of this court in an action which the applicants intended to institute against the defendant company. The applicants prayed for an order in the following terms which I granted as my order

IT IS ORDERED:

1. The Sheriff of the High Court or his lawful Deputy be and is hereby authorised and directed to attach any of the respondent's movable property at its official address at Shop Number 202. Joina City, Harare and to impound any of the respondent's airplanes situate in Zimbabwe in order to confirm and/or found the jurisdiction of the High Court of Zimbabwe, and this order shall be his warrant to do so;
2. The Sheriff of the High Court or his lawful Deputy be and is hereby ordered to keep the property attached pursuant to this order so attached until the action which the applicants intend to institute is finalized;

3. Respondent shall be liable for the Sheriff of the High Court or his lawful Deputy's costs of storage of the property attached by the Sheriff's office pursuant to this order as well as any other costs arising from the said attachment;
4. Respondent to pay costs.

The applicants are all *incola* of and reside in Zimbabwe. The first and second applicants are husband and wife and the third, fourth and fifth applicants their minor children. The minor children are duly represented by the first applicant, their father.

The applicants averred that they made arrangements to travel to Turkey on an excursion as a family. They applied for and obtained visas as *per* requirement at cost and were duly issued with visas to enable them entry into Turkey. They took travel insurance at cost. They also made a 6 night booking for accommodation at the Sheraton Istanbul Atakoy hotel in Turkey and made advance payment for accommodation. They purchased return air tickest for their flight back and were booked to travel on Air Namibia, an airline owned by the respondent, on 15 February 2017. The journey to Turkey involved flying from Robert Gabriel Mugabe International Airport via Windhoek, then from Windhoek to Istanbul Turkey via Frankfurt in Germany. Their bookings were confirmed. They were due to arrive in Turkey on 16 February 2017 with the return journey being scheduled for 22 February 2017 on board Turkish Airlines to Johannesburg, South Africa and from Johannesburg to Harare on the same date. The return journey did not concern nor involve carriage by the respondent's air plane.

The applicants deposed in the founding affidavit that they duly boarded the respondent's airline flight No SW374 to commence their excursion on 15 February 2017 and arrived in Windhoek from where they were scheduled to board another of the respondent's air planes to Turkey via Frankfurt, Germany. They further deposed that on arrival in Windhoek, the respondent's officials refused them permission to board their scheduled and confirmed flight to Turkey. The reason allegedly given to the applicants by the respondent's official was that the applicants were not permitted to travel to Turkey because of their Zimbabwean nationality. They further alleged that the denial of permission to board was made by the respondent's officials and not by the Namibian or Turkish Immigration officials. The applicants complained that the denial of permission to travel was communicated in a racist manner and arbitrarily. They alleged that they were shouted at and told that a Mr Zaranyika, the respondents Zimbabwe based country manager had blundered in allowing the applicants to board the plane

in Harare and would face the chop together with other Zimbabwe based respondent's airline staff.

The applicants alleged that they were held in near captive conditions as they are were held against their will by the respondent's officials without proper food or accommodation being offered to them for 3 days. They deposed that they had to put up on bare hard airport benches without blankets and access basic amenities. They also alleged being subjected by respondents' officials to endless insults and disparaging remarks. They were forced to incur unbudgeted expenditure in buying highly priced food at the airport. The applicants alleged that the conduct of the respondent's officials in deporting them back to Zimbabwe after denying them permission to board their booked and confirmed flight to Turkey constituted a violation of their fundamental rights done in arbitrary fashion without being afforded a chance to be heard.

On return to Zimbabwe, the applicants became aware of a letter written by the respondent's country manager to the Namibian ambassador admitting to have barred the applicants and other Zimbabweans from travelling through Europe even if their travel papers were in order. The reasons given for such conduct was that the respondent suspected that the applicants as with other Zimbabwean were out to seek political asylum in Europe. The applicants indicated their intention to sue for contractual and dilectual damages. The contractual damages were said to be based upon the breach of the contract of conveyance which resulted in the applicants incurring expenses and losses where value was put at S7 815.13. The intended contractual claim was backed by copies of documents of evidence of expenses incurred in airline tickets, visa and travel insurance, accommodation and food and ancillaries. As for dilectual damages, the applicants expressed their intention to claim
$1 million for unlawful detention, deprivation of freedom of movement and degrading and inhuman treatment including paid, shock and suffering perpetrated by or suffered as a result of the conduct of the respondents' officials.

As regards the basis for seeking the order, the applicants averred that the respondent was a *peregrine* hence the need to cause the attachment of its property to found and/or confirm the jurisdiction of the court. The applicants averred that they were aware that the respondent operated from offices within the court's jurisdiction and that there were items of furniture and fittings available for attachment. They prayed for attachment of the aforesaid office furniture and equipment. The applicants also averred that they were aware of the fact that the

respondent's airplanes plied the Harare – Windhoek route. They prayed for the attachment of any not all or every respondent's plane situate in Zimbabwe.

The applicants brought the application *ex parte*. They averred that they had pursuant to Order 32 R 242 (1) (b) – (2) of the Rules of this Court refrained from serving the application. They averred that it was necessary not to serve the respondent with the application in order to avoid the likely risk of the respondent defeating the application by making away with the property intended to be attached or engaging in other perverse conduct. The applicants averred that there would be no prejudice to the respondent since what was intended by the attachment was *inter alia* that the respondent defends the proposed claim if so advised.

In applications of this nature, the court's powers are set out in s 15 of the High Court Act, [*Chapter 7:06*]. An attachment of property to found jurisdiction is necessary and a prerequisite to be obtained where an *incola* wishes to sue a *peregrine* defendant for a claim sounding in money or relating to property where the usual grounds to found jurisdiction are not present or apparent. An attachment may also be ordered where grounds for jurisdiction are present but there is need to strengthen or confirm the jurisdiction of the court. The latter position would apply in this case because the fact that the contract of conveyance which was allegedly breached by the respondent was concluded in Zimbabwe would suffice to found jurisdiction based on the cause of action having arisen in Zimbabwe *albeit* some of harmful effects thereof having been felt in Namibia.

Before the court may grant such application, care must be taken because the remedy is an exceptional one. It deprives the respondents of the possession and or use of his or her property and the rights which arise from such use or possession albeit temporarily. The applicant must therefore establish a *prima facie* case in regard to the claim intended to be instituted. See *Ex Parte Acrow Engineers (Pty) Ltd* 1953 (2) SA 319 (T). In *casu*, I was satisfied that the applicant had established a *prima facie* case for breach of the contract of carriage in that it had been the agreement between the parties that the respondent would by its airplane service convey the applicants to Turkey and received payment before confirming the bookings made. The breach of contract in reneging on fulfilling the conditions of the contract were *prima facie* not of the applicant's making. I was also satisfied that the alleged 3 day stay by the applicants in Namibia at the airport after being denied permission to board their scheduled flight was against their will and that their proposed claims as already outlined were *prima facie* standing on sound legal basis or grounding.

The court's powers to order the attachment are a matter of discretion and like any other exercise of judicial discretion, the court exercises it judiciously. In exercising the discretion aforesaid and consequent on my finding that the applicants had demonstrated a *prima facie* case, I also considered that the property sought to be attached was or would be within the court's jurisdiction in that the movable property was said to be at the respondent's offices whilst the airplane made scheduled landings and departures from Robert Gabriel Mugabe International Airport and such could with certainty be susceptible to attachment. The size of the claim which l did not consider to be outrageous justified in my view the attachment of an airplane. Violations of human rights constitute a serious delict. I also considered that whatever prejudice the respondent was likely to suffer by virtue of the attachment would be temporary since the attachment was intended to protect the process of the court from being a *brulmen fulmen* in the event that the court granted judgment in favour of the applicant in the main matter to be instituted.

A balancing mechanism to avert prejudice to the respondent is available in such applications which are invariably made *ex parte*. The respondent is not without a remedy when an order of attachment has been made. The respondent may apply for the discharge of the order completely where the defendant can establish the absence of any one or more of the essential elements which are a pre-requisite for the grant of the order of attachment like for example showing that the applicant does not have a *prima facie* case. The respondent can also offer alternative security which in the view of the court is adequate security and thereby have the attached property released from attachment to be replaced with the alternative security. I would hasten top state that so far as I am aware, the application for the discharge or variation of the order can be made by way of chamber application and if the grounds so exist , on an urgent basis. I was therefore satisfied that the applicant had established a case for the grant of the order of attachment of the respondents' property hence the grant of the order.

I should however point out that when I considered the order on writing my reasons for judgment, I noticed that l ordered the respondent to pay the costs of the application. The respondent has not raised the issue in the notice of appeal filed under case no. SC 803/18 on 25 October, 2018 following the grant of the application for extension of time to note the appeal and condonation granted by the Honourable MAKONI JA on 24 October, 2018. I have considered that the grant of the costs order was not justified because the respondent had not been party to the *ex parte* application and a final order to pay costs would under such

circumstances be in breach of the *audi alteram partem* rule. The order of costs would unlike the attachment order not be open to variation or discharge. The correct order should have been one ordering that costs be in the cause in the case which the applicants proposed to commence. The order however remains as given as I am *functus officio*.

Another matter which has exercised my mind on writing these reasons for judgment is whether or not the order of attachment should not have placed the applicants on terms to file their proposed action within a given time frame from the date of my order. Section 15 of the High Court Act to the extent that it may address the point in relation to fixing a time frame by which the intended action or process against the peregrine must be issued appears to be permissive and not directory in relation to fixing a time frame by which the intended action or process against the peregrine must be instituted. I do not intend to dwell much on this issue save to express the view that it would appear to be desirable to fix a time bar by which the main case should be commenced. My view in favour of putting a time bar are informed by the fact that the attachment order is punitive in nature and affect fundamental freedoms before the court has made a finding on liability. A serious applicant intending to institute proceedings should do so without delay. It may be that such applicant be required to attach to the application for attachment, a draft of the process intended to be issued against the defendant. These reflections did not however arise when I granted the order.

With the observations which l considered necessary to incorporate for posterity, I otherwise hand down the reasons for my order as requested.

Mutamangira & Associates, applicant's legal practitioners