



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 398 OF 2014

REPUBLICAPPLICANT

VERSUS

COMPETITION AUTHORITY.....1ST RESPONDENT

CABINET SECRETARY

FOR NATIONAL TREASURY.....2ND RESPONDENT

EXPARTE INTERNATIONAL AIR TRANSPORT ASSOCIATION

JUDGEMENT

Introduction

1. By a Notice of Motion dated 5th November, 2014, the ex parte applicant herein, **International Air Transport Association**, seeks the following orders:
 1. **An order of Mandamus directed at the Cabinet Secretary in charge of the Ministry of National Treasury, compelling him to exercise his powers under Section 71(2) of the Competition Act, and specifically to appoint the Chairman of the Competition Tribunal.**
 2. **Costs be awarded to the Applicant.**

Ex Parte Applicant's Case

3. The application is supported by a verifying affidavit sworn by **Raphael Kuuchi**, the Vice President of the African Region of the Applicant on 22nd October, 2014.
4. According to the deponent, **The International Air Transport Association (IATA)** [hereinafter the Applicant] is an international trade association of the world's airlines, drawing its membership from over 230 International Airlines and is a non-profit organization which provides a wide range of services and programmes to its member airlines, the broader aviation community and by extension the travelling public. It was further deposed that the Applicant leads a number of industry initiatives involving safety, security, environment and simplifying business that improve the quality of air travel.
5. According to the deponent, by an agreement made on 17th December 1984 with the Government of Kenya, the Applicant established a regional office in Kenya in order to enable it carry out its activities throughout Kenya and the Indian Ocean. To him, the Applicant accredits over 70,000 travel agents ("agents") worldwide to ensure that they provide the high standards of service and dependability required in the airline industry. The said agents sell both international and domestic

- tickets on behalf of IATA's members' airlines.
6. It was averred that the Applicant established a Billing and Settlement Plan (BSP) in a number of countries worldwide to facilitate and simplify the selling, reporting and remitting procedures of the accredited transport agents which BSPs were designed to be an efficient interface for invoicing and payment between the agents and the airlines. The said BSPs are in essence a global settlement service for all tickets sales by IATA licensed travel agents worldwide and consolidate the amounts owed by each agent and the amounts due to each airline and enables settlement through a single financial transfer to each participant. Agents and airlines in Kenya participate in the BSP for the East African region.
 7. It was contended that in order to ensure that all parties meet their obligations under the BSPs, the Applicant's members passed Resolutions requiring the provision of financial risk management systems for the agents who were granted ticketing authority by the various airlines since, as the tickets are sold on credit with the agent making remittances in monthly cycles, it is crucial to ensure that the agent's liability is met on its due date.
 8. The deponent added that in the local Financial Criteria passed pursuant to the Resolutions and governing the Kenya market, two options were agreed by the members; one being the provision of a bank guarantee to be collected in advance of any dealing and the other an insurance cover. The Resolutions and Local Financial Criteria are contractually accepted and agreed by the agents participating in the BSPs. The insurance cover, known as the Default Insurance Plan (DIP), is designed to indemnify the Applicant's airline members against loss from the financial default of the ticketing agent and to provide airline passengers with certainty that fees paid to agents for their tickets will be remitted to the airlines and that their tickets will be honoured. Given that the premiums are paid over a course of time and at manageable rates, it is also seen as a financial assistance programme which ensures that the agents are able to run their business more easily than they would if they were required to provide the bank guarantees.
 9. It was averred that the DIP cover is for the benefit of the member airlines of the Applicant and the criteria of the selection of providers was set out in Resolutions passed by the members, agreed and accepted contractually by the agents and applied globally and that the qualifications are stringent in light of the nature of the risks involved and the criteria of the transactions run through the BSPs. Any insurance company proposing to provide DIP cover is evaluated through criteria that are applied globally.
 10. Pursuant to the Resolutions agreed by the airlines and the agents, the Applicant is not permitted to deviate from these criteria in appointing DIP providers and where no provider meets the criteria, no DIP is available. The Applicant does not look for nor suggest insurance providers but its mandate it to consider applications made and evaluate them. Whilst the Applicant evaluates and approves the DIP provider, each agents elects whether or not to participate in the DIP system and confirms such election by an application sent to the DIP provider. The Applicant is not involved in the negotiation of the premiums.
 11. It was deposed that in Kenya a company known as **Saham Assurance Company Limited** (previously known as Mercantile Assurance Company Limited) [hereinafter "Saham"] was approved by the Applicant as a provider for the DIP cover. Other players in the market have shunned this particular segment of the market as it is a small but very complex segment of the insurance business. It is also because it is a niche market that the requirements set by the Applicant are very important, as many carriers do not have the familiarity with the market to provide the proper type of coverage with appropriate reinsurance agreement as needed.
 12. It was the applicant's case that at all material times, the Applicant's contract as a police holder with Saham has been on a non-exclusive basis and that the Applicant continues to accept and review any and all applications from additional providers. This year, the Applicant has received interest form ICEA-LION and Xplico Insurance Companies to apply for approval as DIP providers. These applications have begun the application process but have not yet fully supplied the required documents and information to Applicant. As soon as the applications have been completed, Applicant will undertake the requisite evaluation at its head office in Montreal, Canada.
 13. However, on 22nd September 2014, the Applicant received a letter from the 1st Respondent (hereinafter referred to as "the Authority") stating that it had received complaints that the Applicant intended to renew the agreement with Saham on an exclusive basis and expressed the

- view that the intended renewal of the agreement would contravene Section 21(3) (e) and (i) of the **Competition Act** (hereinafter referred to as “the Act”). The 1st Respondent therefore ordered the Applicant to stop and desist from renewing the agreement with Saham on an exclusive basis which order was to remain in force until 1st Respondent’s investigations are concluded.
14. It was the applicant’s case that it was not given notice of the complaint or an opportunity to respond in advance of the order issued by the letter dated 22nd September 2014 and that despite the Applicant’s request on 26th September 2014, the Applicant has to date still not been provided with particulars of the complaint.
 15. By letter dated 26th September 2014 the Applicant informed the 1st Respondent that the agreement with Saham has never been on an exclusive basis and that it was in the process of evaluating applications begun (although not yet completed) by other insurance companies to provide DIP, and would approve such applications in the event that the insurance companies met the required criteria. The Applicant therefore advised the 1st Respondent that the plain language of the order does not prohibit renewal of the non-exclusive agreement with Saham. The Applicant also informed the 1st Respondent of the repercussions of failing to renew the agreement with Saham considering it is only DIP provider in Kenya currently. Upon receiving this correspondence, the 1st Respondent by letter dated 29th September 2014 (pages 32 and 33) requested additional documents but declined to withdraw the stop and desist order but instead informally advised the Applicant that it believes the order prohibits any renewal of the agreement with Saham, irrespective of the fact that the agreement has never and will not include any exclusivity provision. Further correspondence was exchanged between the Applicant and the 1st Respondent between 1st October 2014 – 8th October 2014 (pages 34 to 39) but no resolution was reached that would ensure that the airline business continues without any uncertainty on the part of the airline members who stand to suffer loss if there is no DIP cover and in the absence of bank guarantees. Instead, the 1st Respondent initially insisted that the agreement with Saham be renewed solely on a three month basis, and then amended its position on 8th October 2014 to agree to a six month renewal. Throughout this correspondence the 1st Respondent consistently refused to withdraw its order or otherwise permit the Applicant to renew its agreement with Saham pursuant to the ordinary course of business.
 16. The deponent disclosed that it had been advised by Saham that though the calculation of the premiums for the DIP policy is made on a yearly basis, Saham was willing on an exceptional basis to provide an offer for coverage for the six-month period demanded by the 1st Respondent which offer was amenable to the applicant. Consequently on 15th October 2014 it requested that the 1st Respondent confirm that this renewal would proceed. In this correspondence the Applicant again confirmed that it would complete a review and provide a response on all completed applications for alternative providers within 90 days, and again requested that the 1st Respondent lift its order. However, on 16th October 2014 the 1st Respondent, indicated that the agreement with Saham could instead be renewed on the standard twelve-month term. For the first time, however, the 1st Respondent also insisted as a condition for this renewal that Applicant agree that alternative providers would be approved – rather than a decision made as to whether they meet the criteria - within a 90 day period. This demand was entirely inconsistent with previous correspondence from the 1st Respondent, including its letters of 9th September, 1st October, and 8th October 2014 as the Applicant has indicated throughout this matter, it was unable to commit to appointing additional providers within 90 day period without regard to whether they met the required criteria. However, the 1st Respondent replied by email on 17th October 2014 stating that this undertaking was unsatisfactory, and demanding that the Applicant agree to appoint additional providers within 90 days, again without regard to whether they meet the required criteria.
 17. Aggrieved by the decision of the 1st Respondent, the Applicant filed an appeal against the said decision to the Competition Tribunal established under Section 71 of the Act. It was however contended that the Tribunal cannot sit as it lacks quorum in view of the fact that the 2nd Respondent has not appointed the Chairman of the Competition Tribunal. The Applicant cannot therefore properly exercise the right of appeal or seek any measures of protection in the interim and faces a real threat if having the airline business in Kenya disrupted as a result of the actions of

the 1st Respondent.

18. It was the Applicant's case that the Stop and Desist order issued by the 1st Respondent which stands to be enforced unchallenged if this court does not intervene would have the effect of:

- a. Causing the loss of all DIP providers and covers in Kenya pending the review of applications for additional providers.
- b. Depriving the members of the Kenya Association of Trade Agents of the DIP covers, thereby depriving the travel agents of the option of the financial security provided by such DIP cover.
- c. Compelling the Applicant to require members of the Kenya Association of Trade Agents and all other Trade Agents accredited by the Applicant to immediately place bank guarantees as alternative forms of financial security in order to avoid the suspension of the Billing and Settlement Plans (BSPs) which may result in serious and irreparable damages to those members who cannot raise the collateral that may be required by banks for such guarantees.
- d. Creating uncertainty in the airlines service industry as travel agents unable to obtain alternative financial security may be forced to effect a partial or complete shutdown of their businesses.
- e. Resulting in the loss of jobs, tickets sales and other negative effects that are against public interest and competition in the market.
- f. Infringing on the Applicant's Constitutional right to a fair hearing and administrative action that is lawful, reasonable and procedurally fair.

19. To the applicant, the criteria for qualifying as a DIP provider as set by the Applicant pursuant to Resolutions approved and agreed by both the airlines and the travel agents in Kenya does not have the effect of preventing, distorting or lessening competition in the insurance industry. Instead, the guidelines are crafted as to protect the market, including passengers who purchase tickets through travel agents participating in the Billing and Settlement Plans (BSPs), by providing financially secure insurance coverage to protect against potential travel agent defaults.

20. The applicant insisted that it had not in any way restricted any party from submitting an application to be considered for the provision of this service, and welcomes the participation of additional qualified insurance providers. On the contrary, the order of the 1st Respondent shall itself prevent, distort, or lessen competition in the agent industry, by removing an important option for financial security for the agents and requiring all agents to place bank guarantees in order to continue in participation in the BSP.

21. It was therefore the Applicant's belief that it had good grounds to appeal the decision of the 1st Respondent but it had been rendered unable to do so by the failure of the Respondent to appoint the Chairman of the Competition Tribunal (hereinafter referred to as "the Tribunal") hence the orders sought herein.

Determinations

14. Though served with the application the Respondents did not respond thereto. Accordingly the averments in the supporting affidavit remained uncontroverted and the application was unopposed.

15. I have considered the material before me.

16. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly

it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

2. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment.”

60. Section 40(1) of the Act provides that a party aggrieved by a determination of the Authority made under Part III of the Act shall appeal in writing to the Tribunal within 30 days of receiving the Authority’s decision. Section 71(1) and (2) of the Act establishes the Tribunal and provides its composition as a chairman and not less than two members and not more than four members.
61. The Applicant’s case is that whereas the members of the Tribunal were Gazetted, the Chairman has never been appointed thus the activities of the Tribunal have been crippled.
62. As the Respondents have for reasons best known to them deprived themselves of the opportunity to participate in these proceedings, this Court has not been given an insight into the reasons which have led to the failure to appoint the Chairman of the Tribunal.
63. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 21(1) of the Constitution on the other hand provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The law places the obligation to appoint the Chairman on the 2nd Respondent in order to facilitate the Tribunal in undertaking its statutory duties. To fail to do so amounts to abdication of the Constitutional duties imposed upon the State and in applying a provision of the Bill of Rights this Court is enjoined by Article 20(3)(b) of the Constitution to adopt the

interpretation that most favours the enforcement of a right or fundamental freedom. See **Vaina Investments Pool Ltd vs. Capital Markets Authority and Others Civil Application No. 139 of 2014** and **R vs. The Competent Authority ex parte Kenya Association of Music Producers and Others JR No. 335 of 2013.**

64. In the absence of any explanation from the 2nd Respondent, this Court cannot fathom the reason warranting the 2nd Respondent being absolved from the performance of their statutory duties taking into account the fact that the members of the Tribunal are already in the office. To keep them in the office with no work to do while entitling them to draw allowances from the public coffers is clearly contrary to Article 201(d) and (e) of the Constitution which stipulates that some of the principles guiding all aspects of public finance in the Republic are that public money shall be used in a prudent and responsible way and that financial management shall be responsible, and fiscal reporting shall be clear.
65. In the premises, I find merit in the Notice of Motion dated 5th November, 2014 and grant an order of mandamus directed at the Cabinet Secretary in charge of the Ministry of National Treasury, compelling him to exercise his powers under Section 71(2) of the ***Competition Act***, and specifically to appoint the Chairman of the Competition Tribunal.
66. The said appointment to be undertaken in any event within 60 days from the service of this order on the 2nd Respondent.
67. As the application was not opposed, there will be no order as to costs.
68. It is so ordered.

Dated at Nairobi this day 20th day of May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochieng for Miss Kirimi for the Applicant

Cc Patricia