

**REPORTABLE** (38)

**SOUTH AFRICAN AIRWAYS LIMITED**  
**v**  
**1) MINISTER OF ENVIRONMENT, WATER AND CLIMATE 2)**  
**CIVIL AVIATION AUTHORITY OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**  
**MATHONSI JA, KUDYA JA & MUSAKWA JA**  
**HARARE: 7 FEBRUARY 2022 & 12 MAY 2023**

*A. Moyo and N. Mugandiwa*, for the appellant

*T. W. Nyamakura*, for the first respondent

No appearance for the second respondent

**KUDYA JA:**

[1] On 8 January 2020, the High Court ordered the appellant to pay to the first respondent:

1. the sum of US\$877 435 being the outstanding meteorological weather services fees (Met fees) for the period January 2006 to 30 April 2014;
2. all and further outstanding Met fees from 1 May 2014 to the date of final payment;
3. interest on the above sums at the prescribed rate from the date of the service of summons to date of final payment; and
4. costs of suit on a legal practitioner and client scale.

The appellant appeals against this order.

## THE FACTS

[2] The appellant is a South African public company registered in terms of s 4 (3) of the South African Airways Act, 2007. It operates an international airline service with flights to and from Zimbabwe. The first respondent is the Minister of Environment, Water and Climate (the Minister). He administers the Meteorological Services Act [*Chapter 13:12*] and its subsidiary legislation, the Meteorological Services (Aviation Weather Services) Regulations 2005, Statutory Instrument 32/2005. The second respondent is the Civil Aviation Authority of Zimbabwe (CAAZ). It is a statutory corporation, established on 1 January 1999, in terms of s 4 of the Civil Aviation Act [*Chapter 13:16*]. At the material time, it managed all the airports and aerodromes in Zimbabwe.

[3] The Meteorological Services Department (MSD) was established in 1925. It is mandated by legislation to produce aeronautical weather services in Zimbabwe for the benefit of the general public and private players. On 2 April 2004, the Meteorological Services Act mandated the MSD to charge private players, amongst whom was the aviation industry, for the provision of these services on a cost recovery basis. The modalities for implementing the cost recovery measures were instituted in consultation and by agreement with the Airline Operators Committee between 13 June 2004 and 15 September 2004. The resultant tariffs were based on the cost and life span of the equipment used and the cost of providing the service. These aeronautical weather services were predicated upon the International Civil Aviation Organization (ICAO) and the World Meteorological Organization specifications and guidelines. They were categorized as landing, en-route or over flight and departure fees. They were to be availed to the aviation industry through CAAZ. The set tariffs were operationalized on 1 May 2005.

- [4] On 23 June 2006, the MSD concluded an agreement with CAAZ. In terms of clause 7.1 of the agreement, CAAZ became the collection agent for the cost recovery fees chargeable to the individual airlines, which serviced the local air space. Thereafter, CAAZ charged individual airlines for its own specified services in terms of the Aviation (Aeronautical Telecommunications and Information Services Regulations, 2004, Aviation (Air Traffic Services) Regulations 2010, Aviation (Air Navigation) Regulations, 2004 and Aviation (En-route Navigation Facilities) (Fees) Regulations, SI 67/1997. It combined services supplied by the MSD in a composite invoice but under the single and distinct rubric of “Met fees”.
- [5] The appellant and a few select airlines paid the specified CAAZ fees but declined to pay for the Met fees. The recalcitrant airlines sought the resolution of the impasse through the mediation of IATA and ICAO between 26 July 2006 and 26 July 2010. Notwithstanding, the breakdown of the fees by type and cost of each respective service by CAAZ to the mediators, the negotiations failed.
- [6] By an act of State, the MSD was transferred from the Minister of Transport and Infrastructural Development to the first respondent on 7 February 2014. An adverse audit report by the Auditor-General prompted the Minister to issue summons against the appellant on 20 August 2014 seeking the payment of the amounts that form the subject matter of this appeal. The summons was served on 22 August 2014.
- [7] The appellant entered its plea on 9 June 2015. It, *inter alia*, raised a special plea in bar of prescription (in terms of s 15 (c) (ii) of the Prescription Act [*Chapter 8:11*]) to the claims

preceding 22 August 2008. It admitted firstly, in paras 2.2-2.4 of its plea, that CAAZ was a collection agent of the Minister at all material times and secondly, that it had indeed received the aeronautical services. It, however, sought to avoid the claims on the main basis that it had discharged all its obligations. And in the alternative, that if it was found liable, then it should be reimbursed the putative judgment debt by CAAZ. At its instance, CAAZ was, by consent, joined to the proceedings *a quo* as the second defendant, on 8 March 2016.

[8] On 7 August 2016, CAAZ pleaded that it was enjoined by ss 45, 45 (1) (o) of the Civil Aviation Act as read with ss 3 (1) and (4) of SI 67/97 and article 15 of the Chicago Convention on International Civil Aviation to charge for its own account boarding fees, bussing fees, parking fees, landing fees and navigation or *en route* fees for the use of its airport facilities and air space. In addition to these charges, it levied the airlines the similarly named landing, *en route* and departure fees under the acronym “Met fees” on behalf of the MSD for the use of the aeronautical weather services provided to the airlines by the MSD. To wit the appellant averred that the Met fees levied on the globalized invoice constituted a duplication of the separate and distinct line items of the same name charged for the account of CAAZ.

#### **THE ISSUES REFERRED TO TRIAL *A QUO***

[9] The court *a quo* was required to determine whether the claims prior to 22 August 2008 had prescribed and whether the appellant was indebted to the Minister in the amount claimed or in any lesser amount. In determining the second issue, the court *a quo* was enjoined to decide whether there had been any duplication of the landing, *en route* and departure fees chargeable for the account of CAAZ and the unpaid Met fees sought by the Minister.

## **THE EVIDENCE**

- [10] The monthly tax invoices issued to the appellant between 2009 and 2016 show that the Met fees constituted between 4 percent and 7 percent of the similarly named fees charged for the account of CAAZ. The number of airline operators in Zimbabwe during the 2006 to 2016 period ranged between a minimum of 45 and a maximum of 85 airlines. An average of 60 percent of the airlines paid the Met fees.
- [11] The appellant produced proof of monthly payments of the fees charged less the disputed Met fees for the period November 2008 to January 2017. It declared in its respective remittances that it would not pay the Met fees until the dispute was resolved.
- [12] The Minister called the oral testimony of his former MSD Fund Administrator, Morris Vengesai Sahanga. He narrated the consultations and agreement reached with the airlines for the levying of the Met fees. He asserted that at the time all the airlines appreciated the distinction between the similarly named prospective charges sought by the MSD. The aviation weather services provided to airlines encompassed temperature, wind direction and speed and atmospheric pressure forecasts to the airlines flying over, landing in and departing from Zimbabwe. The information was relayed through CAAZ. He produced the monthly schedules and the invoices of the amounts billed, paid and unpaid by the appellant during the period from 1 January 2009 to the date of summons. He asserted that the Met fees due to the MSD were distinct from those of a similar name charged by CAAZ for its own account. The Met fees were for the provision of the aviation weather services that he narrated while those for the account of CAAZ were for the use of CAAZ's infrastructure and the Zimbabwe air space. The permanent secretary Grace Tsitsi Mutandiro testified that

the MSD was transferred to the Minister with all its assets and liabilities. CAAZ charges were for the use of the local airspace and its landing and take-off infrastructure and not for the utilization of weather information.

- [13] The appellant's application for absolution from the instance was dismissed in a separate judgment issued as HH 173/19 on 6 March 2019. Thereafter, it dispensed with the calling of oral evidence in preference to the documentary evidence produced by consent at the commencement of trial. CAAZ declined to participate in the trial, opting to abide by the order of the court.

#### **THE CONTENTIONS A QUO**

- [14] It was common cause that the amounts sought for the period January 2006 to 21 August 2008 is in the total sum of US\$274 944, consisting of US\$104 085 for 2006, US\$96 637 for 2007 and US\$74 222 for the period commencing 1 January 2008 to 21 August 2008.
- [15] The appellant contended that the claims preceding 22 August 2008 constituted a debt owed to the State, which in terms of s 15 (c) (ii) of the Prescription Act, prescribes after 6 years. It further argued that the claimed Met fees, subsequent to 22 August 2008, duplicated landing and *en route* fees charged for the account of CAAZ, which it discharged in full. It also argued that the Minister lacked *locus standi* to sue for the fees in question on the following bases. Firstly, that the claim arose before the MSD was assigned to him. Secondly, that an unspecified section of the Meteorological Services Act, conferred the exclusive right to sue or be sued on the Director of the MSD. Lastly, that ss 6 (1) (d), 45 (1)

and 47 of the Civil Aviation Act, which came into effect on 1 January 1989, imbues CAAZ with the sole and exclusive power to provide aeronautical information services and charts of aerodromes, air traffic control, meteorological services, hazards to air navigation and the right to levy fees and charges. In its closing submissions the appellant also argued that the Minister did not have a cause of action against it.

[16] *Per contra*, the Minister contended that the Met fees constituted a tax, which in terms of s 15 (a) (iii) of the Prescription Act only prescribed after a period of 30 years. He also contended that the appellant did not pay any Met fees, which were demonstrably distinct from the similarly named fees paid to CAAZ for the use of its own facilities and infrastructure. In regards to *locus standi* he contended that, as the Minister in charge of the MSD, who assumed its assets and liabilities on assignment, he had the necessary legal standing to recover its debt in terms of s 3 of the State Liabilities Act [Chapter 8:14] as read with s 39 of the Interpretation Act [Chapter 1:01]. The Minister also contended that he had not only a statutory cause of action but also a contractual one.

## **THE FINDINGS OF THE COURT A QUO**

[17] The court *a quo* found against the appellant on all the issues that were referred to trial. It held that the Minister, as the authority assigned to administer the MSD and its constituent legislation, had the requisite statutory *locus standi* to sue for the recovery of the debt notwithstanding that some of it had been incurred when the MSD fell under the auspices of the Minister of Transport and Infrastructural Development. It further held that the MSD was neither autonomous nor imbued with legal capacity but falls under the aegis of the Minister assigned to administer the Meteorological Services Act when action is instituted.

It reasoned that the provisions of ss 3, 4, 6 and 8 of the Meteorological Services Act gave Minister a direct and substantial interest and overarching control in the operations of the MSD. It also held that the Minister derived his *locus standi* from the common cause fact that CAAZ was an agent of the MSD. It further found that the Minister's cause of action against the appellant and his legal right to sue for any debts accrued before the Meteorological Services Act was assigned to him.

[18] On prescription, the court held that the debt was in the nature of a tax and would therefore prescribe after a period of 30 years. It further held that the essential factors that constitute a tax, which were enunciated in *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 8B-D, were fully met. The court *a quo* reasoned, in its judgment, at p 899 of the appeal record that:

“In *casu* we are dealing with some levies that the first defendant is obligated to pay under the relevant enactments, especially the MSA. For that reason, this is not only a debt due to the State but also levied under some enactments. It would not be correct to strictly interpret that the debt is owed to the State only and disregard statutory obligations. I would therefore agree that the debt *in casu* is also covered under s 15 (a) and for that reason part of the debt is not prescribed.”

## THE GROUNDS OF APPEAL

[19] The appellant is aggrieved by the findings of the court *a quo*. It appeals to this Court on the following grounds.

1. The court *a quo* erred and misdirected itself in law in failing to find that the first respondent's claim in so far as it related to the period prior to 22 August 2014, had prescribed by dint of the provisions of s 15 (c) (ii) of the Prescription Act [*Chapter 8:11*].
2. Having found, as it did, that the administration of the Meteorological Services Act [*Chapter 13:21*] was assigned to the 1<sup>st</sup> respondent on the

7<sup>th</sup> February 2014, the *court a quo* erred in law in finding as it did that the 1<sup>st</sup> respondent had a statutory claim against the appellant retrospectively, to wit, from January 2006.

3. The *court a quo* erred and misdirected itself in law in failing to find that by dint of the provisions of s 6 (3) of the Meteorological Services Act [*Chapter 13:21*], the 1<sup>st</sup> respondent had no direct statutory nexus with the appellant in respect of the provisions of the meteorological weather services and could therefore not sustain a statutory claim against the appellant.
4. The *court a quo* erred and misdirected itself in failing to find that, by dint of the provisions of sections 6 (1) (d), 45 and 47 of the Civil Aviation Act [*Chapter 13:16*], the statutory duty to provide meteorological services to the appellant and other airlines exclusively reposed in the Civil Aviation Authority of Zimbabwe (the second respondent herein).
5. By extension, the *court a quo* further erred in then failing to find that only the Civil Aviation Authority of Zimbabwe could institute a claim for meteorological services against the appellant.
6. It being common cause that the appellant had, during the material period, paid the meteorological services to the Civil Aviation Authority of Zimbabwe (2<sup>nd</sup> respondent herein) the court erred in failing to find that the claim by the 1<sup>st</sup> respondent constituted a duplication of the same statutory claim.
7. Overall, having found as it correctly did, that the disposition of this matter turned on questions of law only, the *court a quo* erred and misdirected itself at law by failing to determine the question of the establishment of a cause of action by the 1<sup>st</sup> respondent by reference to the applicable statutory provisions.
8. The *court a quo* erred in granting an order for costs on a legal practitioner and client scale in situations where there was no basis for such punitive costs.”

It seeks the success of the appeal with costs and the setting aside of the judgment and its substitution with a dismissal of the first respondent’s claim with costs.

## **THE ISSUES ON APPEAL**

[20] These eight grounds of appeal raise the following three issues:

1. Whether or not the respondent had *locus standi* to institute proceedings and had a cause of action against the appellant.
2. Whether or not the court *a quo* erred when it held that part of the claim had not prescribed.
3. Whether or not the court *a quo* could properly impose costs on a higher scale.

### **THE SUBMISSIONS BEFORE THIS COURT**

[21] Mr *Moyo*, for the appellant submitted that the question of whether or not the Minister had established a cause of action as against the appellant could be dispositive of the appeal. In this regard, he contended in the main that notwithstanding that the MSD was the ultimate source of the meteorological services, CAAZ, and not the Minister, had in terms of ss 6 (1) (d), 45 and 47 of the Civil Aviation Act the exclusive statutory duty to provide meteorological services to the appellant. He also took the alternative point that such a statutory duty could possibly fall on the director of the MSD and not his Minister. He premised the alternative contention on the provisions of s 6 (3) of the Meteorological Services Act, which reposes on the director the power to make suitable financial arrangements for the provision of meteorological services with other State entities. He resultantly conceded the validity of the agreement executed between the MSD and CAAZ on 23 June 2006. He however contended, tongue in cheek, that the effect of that agreement was that the MSD could only seek recompense from CAAZ and not the appellant. He, therefore, nailed his contentions on the mast of the Civil Aviation Act and submitted that as the Meteorological Services Act did not expressly confer the Minister with the requisite right of action as against the appellant, it was remiss of the court *a quo* to find that he had both the *locus standi* and the concomitant cause of action to sue the appellant.

- [22] Regarding the question of prescription, he submitted that it was not necessary for the appellant to lead evidence to establish the existence of prescription. This was because the facts from which the issue of prescription could be determined were correctly found by the court *a quo* to have been common cause. He, therefore, contended that the claims prior to 22 August 2008 had been extinguished by prescription. He strongly argued that these claims constituted an ordinary debt owed to the State and were not in the nature of a tax. They had, thus, prescribed after a period of six years and would not do so after thirty years.
- [23] Mr *Nyamakura*, for the Minister, made the contrary contentions, which we summarize in this paragraph and in paras [24] and 25]. The failure by the appellant to lead evidence on the existence of prescription or the prescribed amounts was fatal to its special plea. The requirement to lead evidence to establish a special plea is enunciated in *Van Brooker v Mudhanda & Anor and Pierce v Mudhanda & Anor* SC 5/2018 at p 14 and in *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed at p 600.
- [24] The question of the Minister's entitlement to sue for the debt owed to the MSD was asserted in paragraphs 3 to 5 of his declaration. It was not disputed by the appellant in parag 3.2 of its plea, which was never subsequently amended. It is therefore taken to have been admitted. The appellant also expressly admitted that CAAZ was the Minister's duly authorized collecting agent to whom it had paid the claimed amounts. It could, therefore, not properly argue against the Minister's *causa* or *locus standi* without amending its pleadings or leading any evidence.

[25] The date of assignment to the Minister could not and did not retrospectively affect the existence of the cause of action nor his legal capacity to claim the debt. The assignment of functions did not create a new law nor extinguish extant obligations that arose before the assignment. This position is codified by s 39 of the Interpretation Act [*Chapter 1:01*], which in essence equates an assignment with a cession. The statutory cause of action is to be found in the Meteorological Services Act and the Meteorological (Aviation Weather Services) Regulations SI 32/2005. These two pieces of legislation impose an obligation upon the appellant to pay for the services that it enjoys when its aeroplanes use Zimbabwean's airspace and airports. These extant pieces of legislation and the administrative acts made under them enjoy a presumption of validity, remain lawful and binding, bidding obedience from all subjects of the law, inclusive of the appellant.

## **ANALYSIS**

[26] The second, third, fourth and fifth grounds of appeal raise the sole issue of whether or not the Minister had the legal standing to sue the appellant in respect of the provision of the aeronautical weather services. The seventh ground of appeal deals with the question of whether he had a cause of action as against the appellant. Aligned to it is the sixth ground, which relates to the duplication between the claimed "Met fees" and the landing and over flight fees paid to CAAZ. The first ground deals with the issue of prescription, while the last ground questions the propriety of the court *a quo*'s costs order.

## **WHETHER OR NOT THE MINISTER HAD THE REQUISITE *LOCUS STANDI* TO SUE THE APPELLANT**

[27] Mr *Moyo*, for the appellant, attacked the Minister's legal standing to claim for the aeronautical weather services on the main basis that he lacked a statutory basis to sue the

appellant. In the alternative, counsel contended that the Minister could not properly sue for debts incurred before 7 February 2014, which was the date on which the administration of the Meteorological Services Act was assigned to him. *Per contra*, Mr Nyamakura, for the first respondent, argued that the Minister had the requisite legal standing to sue in the two impugned instances.

[28] Mr Moyo's main argument that CAAZ and not the Minister had the sole and exclusive *locus standi* to sue the appellant was predicated on the provisions of ss 6 (1) (c) and (d), 45 (1) (a) to (d) and (o) and 47 (1), (2) and (3) of the Civil Aviation Act. These sections provide the following.

**“6 Functions of Authority**

(1) Subject to this Act, the functions of the Authority shall be—

(c) to provide aviation meteorological services in relation to Zimbabwe;

(d) to provide aeronautical information services with respect to aerodromes, air traffic control and facilities, meteorological services, hazards to air navigation and such other matters relating to air traffic as may be prescribed or as the Authority may consider appropriate;

**45 Aeronautical information services and publications**

(1) The Authority shall provide aeronautical services, which shall comprise the collection and dissemination of aeronautical information and instructions with respect to—

(a) aerodromes; and

(b) air traffic control services and facilities; and

(c) communication and air navigation services and facilities; and

(d) meteorological services and facilities; and

(o) fees and charges

**47 Meteorological services**

(1) The Authority shall be responsible for providing aviation meteorological services in Zimbabwe.

(2) The Authority shall ensure that information concerning weather conditions is provided to all aircraft in Zimbabwean airspace in a timely and orderly fashion.

- (3) The Minister shall ensure that the State provides meteorological information to the Authority on terms and conditions agreed between the State and the Authority.”

[29] On the other hand, Mr *Nyamakura* relied on the provisions of s 3 of the State Liabilities Act [*Chapter 8:14*] and ss 4 (1) (a) and (e), 6 (1)-(4), 7, 8 and 11 of the Meteorological Services Act for his contrary contention. S 3 of the State Liabilities Act provides that:

**"3 Proceedings to be taken against Minister of department concerned**

In any action or other proceedings which are instituted by virtue of section *two*, the plaintiff, the applicant or the petitioner, as the case may be, may make the Minister to the headship of the Ministry or department concerned has been assigned nominal defendant or respondent:

Provided that, where the headship of the Ministry or department concerned has been assigned to a Vice-President, he may be made nominal defendant or respondent.”

The sections of the Meteorological Services Act cited by Mr *Nyamakura* provide that:

**“4 Functions of the Department**

- (1) Subject to this Act, the functions of the Department shall be to—
  - (a) construct, establish, acquire, maintain and operate seismological and meteorological `undertakings;
  - (e) provide specific operational meteorological services to major users such as the aviation, agriculture, energy, defence, tourism and water resources industries;
- (2) The Department shall have the power to—
  - (b) do or cause to be done, with the approval of the Minister and the Minister responsible for finance, either by itself or through its agents, any of the things specified in the First Schedule.

**“6 Charges, levies and fees**

- (1) The Director shall have power, subject to any directions of the Minister and in consultation with the Minister responsible for finance, to charge and levy fees for the services specified in Part I of the Second Schedule.
- (2) `No charges or fees shall be levied for the services specified in Part II of the Second Schedule.
- (3) The Director shall, subject to the approval of the Minister, enter into financial arrangements with other State departments for payment in respect of specialised services provided to them by the Department.
- (4) The Minister, with the approval of the Minister responsible for finance and in consultation with the Director, may by statutory instrument prescribe the

amounts of levy to be paid by persons or associations who obtain for their own or collective use, meteorological products and services provided by the Department.”

Part I of the Second Schedule reads as follows:

**“SECOND SCHEDULE (Section 6)**  
**SERVICES OFFERED BY THE DEPARTMENT**  
**PART I**  
**SERVICES OFFERED ON A COST RECOVERY BASIS**  
1. Aeronautical services to the aviation industry at all airports.  
2. Special weather and climate-related publications for specific users.”

Section 3 of the same Act creates the MSD while s 5 places the day to day control and management of the MSD under a director, who in turn operates under the control and direction of the Minister assigned to administer the Act. In terms of s 7, “all moneys received by the Department (from) the fees and charges payable for services and facilities provided by the Department levied in terms of section six” fall under the auspices of the Meteorological Services Fund, which at the material time was regulated by a constitution drawn up in terms of s 30 of the Audit and Exchequer Act [*Chapter 22:03*]. Section 8 gives the Minister overarching powers over the Director, relating to policy which the Minister considers to be necessary in the national interest, which the Director is obliged to obey. Lastly, s 11 imbues the Minister with wide powers to amend the First and Second Schedules to the Act.

[30] In both his oral and written submissions, Mr *Moyo* conceded that while the Civil Aviation Act was promulgated before the Meteorological Services Act, both statutes were extant. Mr *Nyamakura* also conceded that the latter promulgation of the Meteorological Services

Act neither expressly nor impliedly repealed the earlier provisions of the Civil Aviation Act that dealt with the provision of aeronautical weather services to the aviation industry and the concomitant levying of the requisite fees. Both counsel correctly agreed that there exists in our law the presumption of validity of legislation, until declared otherwise by a competent court. See *Econet Wireless (Pvt) Ltd v Minister of Public Service & Ors* 2016 (1) ZLR 1066 (S) at 1071B. Further, that our courts are required to construe legislative provisions, be it in disparate Acts or the same Act in conformity with each other, so as to give effect to each provision.

[31] It is pertinent to note that Mr *Moyo* did not impugn the validity of the above cited provisions of the Meteorological Services Act. A clear reading of those provisions places the MSD and its director under the control and direction of the Minister. Neither the MSD nor its director are vested with the legal capacity to sue or be sued. Indeed, the MSD is not an autonomous department. The position is settled in our law that a statutory body can only sue or be sued if it is imbued with the legal capacity to do so. See *Privatization Agency of Zimbabwe & Anor v Ukubambana Kubatana Investments (Pvt) Ltd & Anor* SC 9/2003 at pp 4 and 7. In *casu*, had the Legislature intended the MSD to have the legal capacity to sue or be sued it would have expressly said so, as it expressly did in respect of CAAZ in s 4 of the Civil Aviation Act. The very fact that the MSD is a department under the control and direction of the Minister accords him with the legal capacity to sue and be sued in its place. We, therefore, agree with Mr *Nyamakura* firstly, that the Minister is reposed by the Meteorological Services Act with the statutory direct and substantial interest to sue and be sued on behalf of the MSD. Secondly, that s 3 of the State Liabilities Act, by making a Minister a nominal defendant or respondent in any suit launched against his or her

department, accords to him or her the correlative power to be an applicant or plaintiff in cases such as the present one. Thus, the fact that CAAZ could have sued the appellant in its own right under the provisions of the Civil Aviation Act does not detract from the power of the Minister to do so under the Meteorological Services Act.

[32] There is a further basis upon which Mr *Moyo*'s main submission may be dismissed. In its plea, the appellant made the fatal judicial admission that CAAZ was a collecting agent of the Minister. It correctly recognized the validity of the agreement that was concluded between the MSD and CAAZ on 23 June 2006. Coincidentally, at the time the agreement was consummated, the two Acts were administered by the Minister of Transport and Infrastructural Development. The validity of the agreement is confirmed by the provisions of s 47 (3) of the Civil Aviation Act, which allows the Minister, on behalf of the State to execute an agreement such as the one concluded by the MSD and CAAZ on 23 June 2006. In addition, s 6 (3) of the Meteorological Services Act, also allows the Minister to consummate similar agreements with other statutory bodies. After all, he is empowered in the preamble of the Act to provide "the legal framework for the levying of commercial rates for the Department's services to allow it to operate on a cost recovery basis" and by s 6 (4) thereof to "by statutory instrument prescribe the amounts of levy to be paid by persons or associations who obtain for their own or collective use, meteorological products and services provided by the Department".

In any event, in our law, a principal has the legal standing to sue or be sued for the acts of his or her or its agent. See *Ziswa & Anor v Chadwick & Anor* SC 92/22 at p 20. The main

submission by the appellant that the Minister lacks the legal standing to sue the appellant is therefore devoid of merit.

[33] The alternative argument that CAAZ possessed the exclusive *locus standi* to sue the appellant also lacks merit for the reasons already adverted to in paras [31] and [32] above. It was an agent of the MSD, a non-autonomous department without the legal capacity to sue or be sued, which falls under the purview of the Minister. In the circumstances of this case, CAAZ did not have the sole prerogative to sue the appellant. The further alternative argument that the power to sue reposed in the MSD is also devoid of merit and falls to be dismissed for the reasons already adverted to in the preceding three paragraphs.

[34] The appellant also argued that the Minister lacked the *locus standi* to assume action for the claims that accrued before the Meteorological Services Act was assigned to him on 7 February 2014. That argument overlooked two important factors. The first related to the provisions of s 39 of the Interpretation Act. It reads:

**“39 Validity of acts done before assignment or transfer of functions.**

Where a function conferred or imposed on any person by any enactment is assigned or transferred to another person, whether in terms of this Act or any other enactment, any statutory instrument or other thing made or done before the date of the assignment or transfer and in force on that date shall be deemed to have been made or done by the person to whom the function has been assigned or transferred, and may be amended or repealed accordingly.” (my emphasis)

The acts done by the MSD at the time the relevant Act and its regulations were assigned to the Minister of Transport and Infrastructural Development on assignment to the Minister on 7 February 2014 were deemed to have been performed by him. The second, is that a

statutory assignment is equivalent to a common law cession, which gives retrospective powers of substitution to the cessionary. The argument on the absence of *locus standi* and concomitant *causa* to the claims prior to the date of assignment also lacks merit and must therefore fail.

[35] The determination of the absence of a cause of action argument is closely aligned to the decision on *locus standi*. The finding that the acts of the MSD are statutorily deemed to be the acts of the Minister disposes of this argument. In any event, that the Minister had the requisite cause of action was properly articulated by the court *a quo* in its judgment on the dismissal of the appellant's application for absolution from the instance in judgment no. HH 173/19. It correctly held on the authority of *Amler's Precedents of Pleadings* 8<sup>th</sup> ed (2015) p 352, McKerron in *Law of Delict* 7<sup>th</sup> ed p 276 and *Lascon Properties (Pty) Ltd v Wadeville Investment Company (Pty) Ltd & Anor* 1997 (4) SA 578 (W) at 580G-I, that statutory breach founds a cause of action. The seventh ground of appeal was therefore misplaced and ought to fail.

**WHETHER THE CLAIMS PRIOR TO THE DATE OF SERVICE OF SUMMONS ON 22 AUGUST 2016 HAD PRESCRIBED.**

[36] Mr *Moyo* strongly submitted that all the claims, which were made some six years prior to the service of summons on 22 August 2014 were afflicted by prescription in terms of s 15 (c) (ii) of the Prescription Act. *Per contra*, Mr *Nyamakura* argued that the claims had not prescribed as they constituted a tax, which in terms of s 15 (a) (iii) of the same Act, would only prescribe after a period of 30 years. The court *a quo* held that the claims were in the nature of a tax and as 30 years had not passed, had not prescribed.

[37] What constitutes a tax was determined by this Court in *Nyambirai v National Social Security Authority & Anor, supra* and confirmed by the Constitutional Court in *Benard Wekare v The State & Ors; Musangano Lodge (Pvt) Ltd t/a Musangano Lodge v The State and Anor* CCZ 9/16 at p 11-13. The essential elements of a tax outlined in these two cases are the following:

- “(i) it is a compulsory and not an optional contribution,
- (ii) imposed by the legislature or other competent public authority,
- (iii) upon the public as a whole or a substantial sector thereof,
- (iv) the revenue from which is to be utilized for the public benefit and to provide a service in the public interest.”

[38] It is apparent from the facts of this case that the disputed fees constitute a compulsory and not optional contribution by the aviation industry. They were imposed by the Minister in his official capacity. He is therefore a competent authority.

[39] The revenue raised is, undoubtedly, utilized to provide aeronautical weather services which are for the benefit of the public and in the public interest to the flying public and the public as a whole. These services guarantee the safety and protection of a vast array of people and passengers who come into contact with the appellant’s aeroplanes from the dangers associated with their landing in, departure from and flight over Zimbabwe. The fees therefore inure for the benefit of the public as a whole or a specific sector of the public. The public herein must per force consist of the passengers and crew who fly the appellant’s aeroplanes, the passengers and crew of the other airlines who come into proximity with the appellant’s aeroplanes, airport workers and visitors and all those who reside and work under the flight path of the appellant’s aeroplanes.

[40] The question that has exercised the court’s mind is whether the third element of what constitutes a tax is met. The crisp question for determination is therefore whether the Met fees were imposed “upon the public as a whole or a substantial sector thereof”. It was common cause that the fees *in casu* were imposed on a maximum of 85 entities during the impugned period.

[41] Mr *Moyo* argued that the airline industry did not constitute the public as a whole or a substantial sector thereof. He contended that the insignificant numbers the targeted airline industry could not conceivably be regarded as constituting a substantial or large portion of the public. He submitted that, the Met fees would not, for that reason, fall into the ambit of a tax.

[42] *Per contra*, Mr *Nyamakura* contended that the phrase under consideration did not connote the size of the public but its classification or categorization as an identifiable or a distinctive or specific section of the public.

[43] The context in which the third element was derived in the *Nyambirai* case, *supra*, was premised on legislative provisions, which targeted “all employees or such classes of employees as the Minister might specify by notice in a Government Gazette”. In coming up with the third essential element of a tax in the *Nyambirai* case, *supra*, this Court relied, amongst other foreign cases, on the Australian case of *Leake v CoT (State)* (1934) 36 WALR 66 at 67 where the relevant tax target was identified as “the general body of subjects or citizens, as distinguished from individual levies on individuals.” (my underlining for emphasis in both instances)

The underlined words clearly identify the target of a tax as a group, either of the public as a whole or a distinct or identifiable portion of the public.

- [44] It is also noteworthy that one of the many synonyms of “substantial” that is found in the *Merriam-Webster* dictionary, *Thesaurus.com* dictionary and the *Collins English Dictionary* is “being of substance”. The *Collins English Dictionary* further defines the words “being of substance” as “having independent existence.” The other synonyms of the word provided in these dictionaries are “material, consequential, distinctive, significant, important, essential, large, considerable, essential, and sizable”.
- [45] The definition of “substantial” provided in the *Collins English Dictionary* resonates with the tax regime in Zimbabwe. The lived reality in this country is that Parliament has the legislative power to impose a tax on the generality of the public or on any distinctive section of the public. It is in this context that the phrase “upon the public as a whole or a substantial portion thereof”, should also be construed. The targeting is therefore not premised on the number of the individual prospective taxpayers who constitute the group.
- [46] The submission by Mr *Moyo* that the phrase “upon the public as a whole or a substantial portion thereof” refers to the number of prospective taxpayers in the targeted group is therefore incorrect. We agree with Mr *Nyamakura* that it refers to a targeted class of prospective taxpayers. It therefore relates to the classification of prospective taxpayers into a specific sector.

[47] In *casu*, the airline industry falls into the category of a substantial or specific or distinctive or identifiable sector of the public. It therefore falls squarely into the ambit of the third essential element of a tax.

[48] In the circumstances, the Met fees imposed by the Minister constituted a tax. The finding *a quo* that it was a tax, which would prescribe after a period of 30 years, was therefore correct. The first ground of appeal is unmeritorious and must, therefore, fail.

[49] Regard being had to the consultative process undertaken between the MSD and the Airlines Operating Committee, in which the appellant was fully represented and the subsequent agreement reached between them, we are satisfied that the appellant clearly understood the distinction between the Met Services invoiced by CAAZ on behalf of the MSD and the landing and overflight fees charged by the CAAZ for its own account. The former was for the use of the aeronautical weather services and the latter for the use of CAAZ's infrastructure and facilities and the local airspace. There was, therefore, no duplication of the invoiced Met fees. The sixth ground of appeal accordingly is devoid of merit and falls to be dismissed.

#### **WHETHER COSTS ON THE HIGHER SCALE WERE APPROPRIATE A QUO**

[50] The imposition of costs is always in the discretion of a court seized with the matter. The court *a quo* did not justify the imposition of costs on the higher scale. The failure constitutes a misdirection. See *Barros v Chimphonda* 1999 (1) ZLR 58 (S) and *PG Industries (Zimbabwe) Ltd v Mark Bvekerwa & Ors* SC 53/16 at p 5. We are therefore at large. We take the view that the issues raised *a quo* were neither frivolous nor vexatious. They did

not constitute an abuse of court process but raised important legal issues concerning the Minister's legal standing in the light of the provisions of both the Civil Aviation Act and the Meteorological Act, and the determination of whether or not the fees constituted a tax. In our view, the suitable order for costs *a quo* should have been on the ordinary scale. The last ground of appeal is meritorious and must succeed.

### **COSTS IN THIS COURT**

[51] In this Court, the Minister has substantially succeeded. There is no reason why costs should not follow the result.

### **DISPOSITION**

[52] The following order shall issue.

1. The appeal be and is hereby allowed in part.
2. The judgment of the court *a quo* be and is hereby amended in para 4 to read:

“The first defendant shall pay the plaintiff's and the second defendant's costs of suit on the ordinary scale.”
3. The appellant shall pay the first respondent's costs on the ordinary scale.

**MATHONSI JA:**

I agree

**MUSAKWA JA:**

I agree

*Kantor and Immerman*, the appellant's legal practitioners

*Chinamasa, Mudimu & Maguranyanga*, 1<sup>st</sup> respondent's legal practitioners

*Mhishi Nkomo Legal Practice*, 2nd respondent's legal practitioners