

GURTA AG  
versus  
AFARAS MTAUSI GWARADZIMBA N.O

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 12 September and 16 October 2013

### **Opposed Application**

*A. Moyo* with *U. Sakhe*, for the applicant  
*T. Mpofu*, for the respondent

MATHONSI J: Eduardo Couture, made the following seminal remarks in an article published in (1950) 25 *Tulane Law Review* at 7 which the full bench of the Supreme Court in *MDC & Anor v Chinamasa & Anor* NNO 2001(1) ZLR 69(S) 79A-C cited with approval:

“The facts tell us that when a plaintiff wants to instigate a suit he can do so although the defendant does not want him to do so, nor even the judge. This is a fact derived from legal experience, from the life of law.

Those who have been able to see this fact in historical perspective, and have noted its slow but steady growth, have realised that the law has proceeded in this direction from necessity, not from expediency. Primitive man’s reaction to injustice appears in the form of vengeance, and by ‘primitive’ I mean not only primitive in a historical sense, but also primitive in the formation of moral sentiments and impulses. The first impulse of rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.

A civil action, in final analysis, then, is civilisation’s substitute for vengeance. In its present form, this civilised substitute for vengeance consists of a legal power to resort to the court praying for something against the defendant. Whether the claim is well founded or not, is a totally different, and indifferent, fact”.

The applicant, is a company incorporated in terms of the laws of Switzerland. The respondent is the administrator of SMM Holdings (Pvt) Ltd, an entity under reconstruction, he having been appointed on 6 September 2004, the day a reconstruction order was issued in relation to SMM Holdings (Pvt) Ltd (“SMM”).

In pursuance of his duties as the appointed administrator of SMM, the respondent entered into an agreement of purchase and sale with the applicant on 9 October 2009 in terms

of which he sold certain Chrome Mining claims belonging to SMM known as Mashava Area “E” for a sum of US\$4 350 000-00. The respondent complied with all the procedural requirements including securing the authority of the Minister of Justice and Legal Affairs to sell and transfer the mining location and was duly paid the purchase price.

Although the mining claims were subsequently registered in the name of the applicant which even commenced operations, the mining location was soon claimed by a third party, one Takundwa Mjumi who used every means at his disposal, including enlisting the services of the Zimbabwe Republic Police to arrest the applicant’s employees on site, approaching this court laying a claim to the same mining location and generally preventing the applicant from enjoying the benefit of what it had purchased.

Believing that SMM was in breach of the sale agreement, in particular the warranty against eviction it having failed to obtain value despite having paid the full purchase price, the applicant says it opened lines of communication with the administrator with a view to reaching an out of court settlement, but this was rebuffed. When that effort failed, the applicant applied to the administrator in terms of s 6(b) of the Reconstruction of State – Indebted Insolvent Companies Act [*Cap 24:27*] (“the Reconstruction Act”) by letter dated 3 August 2012 written by its legal practitioners, seeking the administrator’s leave to commence legal proceedings against SMM for the cancellation or confirmation of the cancellation of the sale agreement and a refund of the purchase price.

That application was met with a deafening silence from the administrator who did not see the wisdom of responding to the application in any form. Despondent and bereft of any sense of solution, the applicant approached this court by court application filed on 1 February 2013 seeking an order in the following terms:-

“IT IS ORDERED THAT:

1. Section 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Cap 24:27*] be and is hereby declared to be in contravention of s 18 of the Constitution of Zimbabwe and is therefore null and void.
2. Alternatively, the applicant be and is hereby granted leave, in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act, to institute any action or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM HOLDINGS (PRIVATE) LIMITED (under reconstruction) to claim payment of US\$4 350 000-00 or part thereof together with interest at the prescribed rate of 5 per cent per annum and costs of suit or any other relief available to the applicant at law.

3. The respondent be and is hereby ordered to pay the costs of this application only in the event of it opposes (*sic*) this application”.

In its founding affidavit deposed to by Gianluigi Ghezzi, the chairman of its board of directors, the applicant craved for a *declaratur* that s 6(b) of the Reconstruction Act is unconstitutional and therefore unlawful, null and void and of no force or effect by reason that it is not in keeping with the spirit of the Old Zimbabwe Constitution in that it denies it access to the courts especially as it arrogates the authority to grant or deny leave to sue a company under reconstruction upon the same administrator who controls it and enters into agreements on its behalf with the transacting public.

In the applicant’s view, the effect of s 6(b) is to deprive a party wishing to sue, the right of recourse to courts of law in that this can only be done with the leave of the administrator who is an interested party, having accumulated obligations on behalf of the company under reconstruction. This is particularly so in light of the fact that the Act does not even accord a potential litigant any right of appeal against the administrator’s decision to deny leave to sue. In so doing, the applicant argued, the section takes away one’s constitutional right to protection of the law and access to the courts.

In the alternative, the applicant applied in terms of s 4(1) of the Administrative Justice Act [*Cap 10:28*] for leave to sue SMM as the respondent’s failure to consider the application for leave and to make a decision as an administrative authority amounts to a breach of s 3 of the Act. The applicant supported its request for the court to grant leave in respondent’s stead on the basis that not only is the court armed with all the facts to enable it to make that decision, but also that the respondent appears to have taken a position not to grant leave and is unlikely to alter his position.

The respondent has opposed the application objecting to the procedure adopted by the applicant of bringing a constitutional challenge to this court instead of the Constitutional Court (then the Supreme Court). In addition, the respondent took the view that the question of whether s 6 of the Reconstruction Act violate s 18 of the Old Constitution is now *res judicata* it having been decided by the Supreme Court in 2011. The respondent also questioned the regularity of the application which, in his view, should have been brought by way of a review as s 4 of the Administrative Justice Act is:

“a codification of an established common law provision for the review of administrative authorities’ actions”.

What I am required to decide therefore is whether this court has jurisdiction to strike down current legislation; whether the constitutional issue of whether s 6(b) of the Reconstruction Act has already been decided by the Constitutional Court and therefore *res judicata*; and finally whether the applicant is entitled to leave to sue the respondent.

I propose to tackle the issue of jurisdiction first. That question has been complicated slightly by the coming into effect of a new constitution of Zimbabwe on 22 August 2013. The application itself was brought under the provisions of the old constitution which was in place at the time of filing the application in February 2013. Subsequent to that the Constitution of Zimbabwe Amendment (No. 20) Act 2013 was promulgated on 22 May 2013 although all of its provisions did not come into operation until 22 August 2013 (the effective date) which was the date of the assumption of office by the President elected in terms of the new constitution.

The fate of constitutional matters pending in court at the time of the coming into effect of the new constitution is dealt with in the 6<sup>th</sup> Schedule to the new constitution. Paragraph 18(1) of the 6<sup>th</sup> schedule defines a pending constitutional case as:

- “(a) an appeal, application or reference in which an alleged contravention of the Declaration of Rights contained in the former constitution is in issue; or
- (b) any case in which a constitutional matter, as defined in s 332 of this Constitution, is in issue;

and which, immediately before the publication date, is pending before the Supreme Court of Zimbabwe constituted under the former constitution”.

In terms of para 18(8) any pending constitutional case in which argument from the parties has not been heard before the publication date must be transferred to the Constitutional Court. These are matters which were pending before the Supreme Court which should simply be transferred to the Constitutional Court.

The present case is governed by para 18(9) which provides:

“All cases, other than pending constitutional cases, that were pending before any court before the effective date maybe continued before that court or the equivalent court established by this Constitution, as the case maybe as if this constitution had been in force when the cases were commenced; but –

- (a) The procedure to be followed in those cases must be the procedure that was applicable to them immediately before the effective date; and
- (b) The procedure referred to in subpara (a) applies to those cases even if it is contrary to any provision of chapter 4 of this Constitution”.

Mr *Moyo* for the applicant submitted that as the application was commenced on 1 February 2013 it may be continued as if the new constitution had been in force when the application was filed but using the procedure that was applicable before 22 August 2013. Mr *Mpofu* for the respondent agreed with that interpretation but added the rider that prior to 22 August 2013, this court did not have jurisdiction to strike down current legislation. In his view, it was upon a realisation that this court did not have jurisdiction, that the current constitution has given it power in s 171(1)(c) which provides:

“The High Court may decide constitutional matters except those that only the Constitutional Court may decide”.

I do not agree with Mr *Moyo* that the provisions of the new constitution conferring upon this court jurisdiction in constitutional matters apply to the present case. This is because para 18(9)(a) of the 6<sup>th</sup> schedule makes it clear that the procedure to be followed is the procedure that was applicable to this case immediately before the effective date. What should be followed therefore is the procedure in terms of the old regime.

I agree with Mr *Mpofu* that procedurally this court, composed as it is of a single judge, could not strike down current legislation, which was a preserve of a full bench of the Supreme Court in terms of s 24(4) of the former Constitution. Mr *Moyo* urged me to dissociate myself from the judgment of NDOU J, relied upon by Mr *Mpofu*, in *Nyamandlovu Farmers Association v Minister of Lands & Anor* 2003(1) ZLR 185(H) mainly because it was a decision of a single judge of this court and not 2. I am unable to do that as I agree with the pronouncement of NDOU J at 191G; 192 A-E that;

“In our case, it is clear that our Supreme Court sits as a Constitutional Court. When it does so, its composition is prescribed. It is only when it is so composed that it is in a position to deal with constitutional matters. In my view, reference to the Supreme Court in s 24 is consistent with the latter sitting as a constitutional court. With respect to GILLESPIE and DEVITTIE JJ (who decided in *S v Chakwinya* 1997(1) ZLR 109(H) and *S v Kusangaya* 1998 (2) ZLR 10(H) that this court had jurisdiction) reference to the Supreme Court alone in s 24 is a deliberate limitation of the inherent jurisdiction of the High Court. It is consistent with making constitutional matters the domain of the Supreme Court sitting as a constitutional court. Section 24 does not mention the Supreme Court *ex abundante cautela*. It does so by design. Neither is it a procedural mechanism. The jurisdiction of this court in constitutional matters is deliberately limited thereby. This is consistent with the creation of a special dispensation to deal with constitutional matters as evinced by the fact that these matters are considered so fundamental that they can only be considered by the highest court in the country exercising original jurisdiction. When the matter ends up in the Supreme Court, there is provision for a special composition to deal with it”.

In my view, that conclusion by NDOU J is consistent with that of the Supreme Court in *Guwa & Anor v Willoughby's Investments (Pvt) Ltd* 2009(1) ZLR 380(S) 383D that:

“The High Court, on the other hand, has jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid”.

It occurs to me that this court can, in the exercise of its inherent jurisdiction reposed to it by s 14 of the High Court Act [*Cap 7:06*] issue *declaratur*s, but the law forbids the issuance of such *declaratur*s in constitutional matters and specifically limited the power to strike down existing legislation to the Supreme Court sitting as a constitutional court. The newly found jurisdiction bestowed by the new constitution does not come into it because we are proceeding in terms of the procedure that obtained prior to the effective date.

I conclude therefore that this court lacks jurisdiction. Mr *Moyo* urged of me the decision to refer the matter to the Constitutional Court for a determination of the constitutional issue. To me, that is a fall-back position informed by desperation which does not appear in the application. It is an after thought.

I proceed to consider the next issue relating to whether the constitutionality of s 6 of the Reconstruction Act has been determined by the Supreme Court sitting as a Constitutional Court. In *African Resources Ltd & Ors v Gwaradzimba N.O & Ors* 2011(1) ZLR 105(S), the Supreme Court considered the constitutionality of that section from the point of view of the conferment on the administrator the control and management of the company and the possession of all its assets. It drew the conclusion at 124E that:

“There is nothing in s 6 of the Act that contravenes s 6 or s 18 of the Constitution”.

Clearly therefore the court considered the constitutionality of s 16 viz-a-viz s 18 of the constitution, the same attack which the applicant has subjected the section to. I agree that the angle adopted by the applicant in *casu* is different from what was before the court in that case but that does not detract from the reality that the matter was considered. As to whether the highest court would be willing to reconsider the issue is a matter for that court to decide. I am fortified in that position by the fact that I have already concluded that this court cannot deal with the constitutional leg of this application.

Finally, I turn to the application for leave to sue. It cannot be disputed that once appointed as administrator of a company under reconstruction, the administrator is an

administrative authority which, in terms of s 2 of the Administrative Justice Act [*Cap 10:28*]  
is:

“.... any person who is -

- (a) an officer, employee, member, committee, council, or board of the state or a local authority or parastatal; or
- (b) a committee, or board appointed by or in terms of any enactment; or
- (c) a Minister or Deputy Minister of the State; or
- (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty;  
and who has the lawful authority to carry out the administrative action concerned”.

In terms of s 6(b) of the Reconstruction Act once a reconstruction order is issued by the Minister of Justice, no action or proceeding can be proceeded with or commenced against the company under reconstruction except by the leave of the administrator and subject to such terms as he may impose. It was in line with that provision that the applicant applied to the respondents for leave to bring legal proceedings in pursuance of the sale agreement of the parties. The administrator, as I have said, dithered and in the end did not deal with that application. It is only in his opposing affidavit that he has come out openly to say that he will not grant leave because the applicant has no cause of action on the merits as he is standing on firm ground having lawfully sold the mining location and given possession to the applicant.

In para 18.2, the respondent stated:-

“Annexure K (referring to the letter of Dube, Manikai & Hwacha dated 29 May 2012 which is in fact not annexure K to the applicant’s founding affidavit but is erroneously marked “B”) being my legal practitioners’ letter to applicant’s legal practitioners, was really my final position on the matter at the relevant time. It was supported by an order of court and I do not believe that I did anything wrong nor do I believe SMM breached its contract with the applicant. In fact, ‘Annexure 1’ is itself evidence that the law recognises what I am saying now: SMM gave vacant possession to applicant and Mujumi was an unauthorised third party to the agreement between the parties with no lawful right to the claims. The applicant should, in fact, institute proceedings against Takunda Mujumi and not myself or SMM.”

Therein lies the trick and perhaps the biggest challenge with the provisions of s 6(b) of the Reconstruction Act, which appear to permit an interested party to be the judge over his own case. What comes out from the above passage in the respondent’s deposition is that not only did he assume the obviously biased view that the applicant had no case against him and therefore could not sue him or SMM but also that he arrived at that position prematurely and without regard to due process in that his “final position” was achieved months before an

application for leave which was only made on 3 August 2012. That final position was arrived at on 29 May 2012 and therefore preceded the application for leave. As contained in the letter from his legal practitioners to applicant's legal practitioners it was to the effect that:-

“We refer to the above matter and to your letter of 10 May 2010 and that of 4 April 2012. Kindly accept our apology for failing to respond to your letters. We advise that our client has no other way of resolving the impasse expect (*sic*) by finalising the litigation matters with Mr Mujumi. We believe that our client will succeed in court”.

In my view, this was self-serving and detached from the responsibility of considering the application for leave to sue which was made by the applicant. The respondent was pre-occupied with his own defence in the intended suit and not with considerations of fairness and according the applicant the opportunity to present his case before an impartial court or tribunal of competent jurisdiction. The respondent, inevitably fell into the trap of self-preservation. As they say; “he that conducts his own defence has a fool for a lawyer”.

Now s 3(1) of the Administrative Justice Act sets out the responsibilities of an administrative authority. It provides:

“An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall -

- (a) act lawfully, reasonably and in a fair manner; and
- (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
- (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period within a reasonable period after being requested to supply reasons by the person concerned”.

Section 4 of that Act authorises any person aggrieved by the failure of an administrative authority to comply with s 3 to apply to this court: *Makromed (Pvt) Ltd v Medicines Control Authority of Zimbabwe* 2011(1) ZLR 324(H) 327E. I must add that so fundamental are the rights to administrative justice that they have now been elevated to constitutional rights in s 68 of the current constitution.

It is those rights to administrative justice that the applicant has sought to enforce in the second leg of this application. Mr *Mpofu* for the respondent protested that a wrong procedure was employed as s 4 of the Administrative Justice Act is an embodiment of common law grounds for review. For that reason the applicant should have brought a review application in terms Order 33 of the High Court Rules. I do not agree.

Section 4 allows an aggrieved party to seek recourse in this court. It makes no reference to a review application. I agree with Mr *Moyo* for the application that if the legislature desired to provide for a remedy of review in terms of Order 33, it would have specifically said so. It however elected to create a statutory remedy in terms of which a party is entitled to approach this court by application where the administrative authority has come short.

In *casu* we have a situation in which the respondent entered into a sale agreement with the applicant involving a sum in excess of \$4 million while acting on behalf of SMM. He was paid that sum but the applicant finds itself without possession because of a conflicting claim of a third party. Years down the line the issue remains unresolved and that is certainly not a temporary issue as alleged by Mr *Mpofu*. The applicant applied to the respondent for leave to sue which application was completely ignored, even though the respondent is tasked with the responsibility of determining such application. In fact the respondent has now emphatically stated that he will not grant leave because the applicant has no cause of action against him, a true case of pre-judging the matter.

I accept that the applicant is indeed entitled to its day in court. It matters not that the respondent sees no merit in the case. Whether the case is well founded or not is neither here nor there as civilisation dictates that the litigant must be allowed to bring a civil action to protest its right. To deny a party that opportunity would be to expose the party to the impulses of a rudimentary soul, to resort to his hand in order to achieve justice.

The applicant has urged of me the grant of the leave to sue which should have been granted by the respondent mainly because the respondent is not going to grant the leave, having already nailed his colours onto the mast, and in any event because I have all the facts with which to base such decision. While it is rare that the court would be justified in usurping the decision making function of the administrative authority, McNALLY JA set out four situations where the court might take such action in *Affretair (Pvt) Ltd & Anor v M.K. Airlines (Pvt) Ltd* 1996(2) ZLR 15(S). These are:

1. Where the end result is a foregone conclusion and it would be a waste of time to refer the matter back;
2. Where further delay could prejudice the applicant;
3. Where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction again; and

4. Where the court is in as good a position as the administrative body to make the decision.

In this case, although some of the requirements maybe said to be mutually exclusive, I am of the view that all of them exist. To my mind it is a foregone conclusion that the applicant should be granted leave, although the respondent thinks otherwise. The applicant has waited for leave for more than a year and further delay would be unfair to him. I have already expressed my suspicion of the existence of bias the respondent being an interested party. In any event, I am in as good a position to make the decision as the respondent.

Regarding the question of costs the applicant has been partially successful given that its main application for the declaration of s 6 as being unconstitutional has not found favour with me, while the alternative claim has. For that reason, I consider that it cannot recover all its costs. It has only made a case for 50% of its costs.

Accordingly it is ordered that;

1. The application for a declaration that s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Cap 24:27*] is unconstitutional is hereby dismissed.
2. The alternative relief is hereby granted and accordingly the applicant is granted leave in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Cap 24:27*] to institute any action or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM HOLDINGS (PVT) LTD (under reconstruction), to claim payment of US\$4 350 000-00 or part thereof together with interest thereon at the prescribed rate of 5% per annum and costs of suit or any other relief available to the applicant at law.
3. The respondent shall bear 50% of the applicant's costs of suit.

*Kantor & Immerman*, applicant's legal practitioners

*Dube, Manikai & Hwacha*, respondent's legal practitioners