PALEHOUSE INVESTMENTS (PVT) LTD
versus
HWANGE COLLIERY COMPANY LIMITED
and
DALE SIBANDA N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 22 October 2021 & 01 March 2022

Opposed application – Review

P. Mukumbiri, for the applicant
D. Sanhanga, for the respondent

MUSITHU J**:**

INTRODUCTION

The applicant seeks a review of the decision of the second respondent denying the applicant leave to sue the first respondent which is under administration. The applicant is in the business of hiring out earth moving equipment. In the conduct of its business it hired out its equipment to the first respondent. The first respondent was subsequently placed under reconstruction in terms of the *Reconstruction of State Indebted Insolvent Companies Act* (the Act).[1] The second respondent was appointed as administrator of the first respondent. The relief sought by the applicant is set out in the draft order as follows:

> "1. The decision by the first respondent arrived at on the 29th day of March 2021 denying Applicant leave to sue the first respondent be and is hereby set aside.
> 2. That in its place, it be substituted by the following,
> *"Leave be and is hereby granted to the Applicant to sue the first respondent"*
> 3. The first and second respondent jointly and severally with one paying the other to be absolved be ordered to pay costs…."

The respondents opposed the application.

BACKGROUND

Before the first respondent was placed under reconstruction, the applicant and the first respondent had sometime in August 2017, concluded an equipment hire agreement in terms of which the applicant hired its equipment to the first respondent for use in its mining operations.

[1] [*Chapter 24:27*]

In terms of clause 8 of the agreement, the first respondent was required to pay the applicant the sum of US$225,230.00 in respect of mobilisation costs (which included any disassembling and assembling costs) of the excavators to the mine at Hwange from South Africa. The applicant submits that the first respondent breached the agreement by failing to pay the mobilisation fees.

In terms clause 18, if either party breached any provision of the agreement or neglected or failed to carry out any of its obligations under the agreement, the non-defaulting party was entitled to terminate the agreement on fourteen (14) days' notice. The applicant claims that the first respondent abruptly terminated the agreement without affording the applicant an opportunity to remedy its breach. Attached to the applicant's founding affidavit was the termination letter dated 31 January 2018. It reads as follows:

> "RE: NOTICE TO TERMINATE-EQUIPMENT HIRE AGREEMENT
> The above matter has reference.
> Hwange Colliery Company Limited ("the Company") hereby notifies Palehouse Investments (Private) Limited ("Palehouse") of its intention to terminate the Equipment Hire Agreement between the parties with effective from the 15th of February 2018.
>
> The decision to terminate has been occasioned by Palehouse's breach of the agreement. The Company considers the breach to be material and unable to proceed under the agreement. In particular, since their commissioning to date, none of the hired excavators ("the machines") has been able to achieve the agreed monthly production target and none has been able to achieve 85% availability. This has been mainly due to performance failures of the machines.
>
> Despite your efforts to redress the breach same has not yielded the desired results. Due to performance failures of the machines, production targets have not been met. Consequently the Company has been financially prejudiced.
>
> We shall soon reach out to you with our final quantification of the damages suffered.
> ……."

The Applicant's Case

The applicant contends that as a result of the unlawful termination, it suffered damages in the sum of USD 4, 000, 000.00 representing the full contract income it would have realised, but for the unlawful termination.

In terms of clause 7.2 of the agreement, the first respondent was required to pay a deposit of US$352,000.00, excluding Value Added Tax (VAT), plus 50% of the first month's rental, equivalent to US$176,000.00 excluding VAT. That amount was to be paid to the contractor after the signing of the agreement. The amounts were to be recovered from the applicant's monthly charges. According to the applicant, these amounts were duly paid.

On 26 March 2021, the applicant wrote to the second respondent, seeking leave to bring legal proceedings against the first respondent to recover damages for breach of contract. The said letter from the applicant's then legal practitioners, *Chinyama Attorneys* reads as follows:

> "RE: EQUIPMENT HIRE AGREEMENT – PALEHOUSE INVESTMENTS (PVT) LIMITED –V- HWANGE COLLIERY COMPANY LIMITED
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>
> 1. We act for an on behalf of our Client, Palehouse Investments (Pvt) Limited. Kindly note our interests.
> 2. Our Client instructs that sometime around August 2017, it entered into a written agreement of equipment hire with Hwange Colliery Company Limited ("Hwange"). ……
> 3. In terms of Clause 8 of the written agreement, Hwange is responsible for the mobilization costs (which include any disassembling and assembling costs) of the excavators to the mine at Hwange from South Africa at an estimated cost of US$225 230.00.
> 4. In breach of the said clause 8 of the agreement, Hwange did not pay for the assembling and disassembling costs.
> 5. Hwange purported to terminate the agreement but has refused to pay for the mobilisation costs of the excavators back to South Africa. The excavators to date remain on site at Hwange.
> 6. Further, Hwange's purported cancellation of the agreement is in breach of Clause 18.1 of the parties' agreement in that the termination was abrupt and without notice calling our Client to remedy the breach within 14 days.
> 7. As a result of the unlawful termination of the contract, our Client suffered damages and has instructed us to sue for the full contract price which is in the sum of US$5 592 960.00.
> 8. In terms of the Reconstruction of State Indebted Insolvent Companies Act [Chapter 24:27], we hereby seek leave from you as the administrator to bring an action to recover;
>   8.1 The sum of US$450 460.00 being mobilization costs which Hwange was supposed to pay in terms of clause 8 of the parties' agreement and which despite repeated demand, Hwange has refused and failed to pay.
>   8.2 Damages for unlawful termination of the contract amounting to US$5 592 960.00.
> 9. Let us hear from you within five (5) business days from the date of this letter.
>
> ……."

The second respondent responded to the applicant's letter through his letter of 29 March 2021. It reads in part as follows:

> "1. I note your interest in the matter and agree with paragraphs 2-3 of your letter. However, my investigations show Hwange Colliery Company Limited ("HCCL") did not breach clause 8 of the agreement between the parties as purported in your correspondence.
> 2. Presently, I actually note that your client received more payments than was due being mobilisation fees and advance payments, and I am not satisfied on why this was done.
> 3. I am not satisfied at all that termination of the agreement by HCCL was unlawful given the seriously unsatisfactory quality of the equipment and the excessive payment your client had received. Notice your client received on 18th of January 2018 gave your client an opportunity to remedy the breach.
> 4. Further, it is common cause that it is your client's responsibility to ensure that it collects its equipment from the mine to mitigate its loss. To date I have not heard of any such attempts by your client.
> 5. Given the facts before me and my powers and obligations set in the Reconstruction of State Indebted Insolvent Companies Act (Chapter 24:27), I do not see a genuine cause of action here.

> Consequently, I cannot allow such a claim to proceed, as your client has dirty hands and is acting in bad faith. Leave to institute an action to recover is therefore denied.
>
> ……"

The applicant contends that the decision of the second respondent is reviewable on the following bases: gross unreasonableness, unfairness and bias or interest in the cause. It was submitted that the decision was grossly unreasonable because after acknowledging that the applicant was entitled to receive mobilisation fees for the equipment, the second respondent proceeded to assert, without any evidence, that the applicant had been overpaid mobilisation fees and some advance payments made by the first respondent. The denial of leave was unfair as it caused serious prejudice to the applicant which now had to absorb the cost of mobilising the equipment back to South Africa. The allegation of bias was based on the fact that the second respondent seemed preoccupied with protecting the first respondent's interests at the expense of the applicant's interests. It forgot that once leave to sue was granted, first respondent could always bring a counterclaim against the applicant for any overpaid amounts.

The Respondents' Case

Second respondent admitted that the first respondent terminated the agreement pursuant to a breach by the applicant. This was because none of the equipment met the specifications for which it was hired. Attached to the opposing affidavit was first respondent's internal report setting out the numerous defects identified on the equipment. The second respondent claimed that on 18 January 2018, notice was given to the applicant to remedy its defective performance, but it failed to do so. The alleged breach went to the root of the contract such that no normal contractual relationship was sustainable. The second respondent further averred that from his investigations, the applicant was overpaid in respect of mobilisation costs and advance payments. On that account, it was therefore imprudent for the second respondent to grant the applicant the requested leave. If anything, it was the first respondent that had a claim against the applicant.

Following the termination of the agreement, the applicant was expected to collect its equipment, but it failed to do so. Reminders were dispatched but the applicant remained obstinate. The second respondent averred that if indeed there was any value attached to the equipment, then the applicant would have long collected it to mitigate its losses.

The second respondent further contended that the applicant had been unable to back up its claims of unlawful termination of the agreement and the loss suffered by its failure to attach the requisite evidence.

The second respondent further averred that the reconstruction process would be impeded if all those with claims against the first respondent were granted leave to sue that entity. According to the second respondent, there had to be what he termed "extenuating circumstances" for leave to be granted. In the instant case, none existed.

The Applicant's Reply

In reply the applicant denied that the equipment was defective. It denied breaching the agreement with the first respondent. The first respondent had apparently carried out a pre-shipment inspection of the equipment whilst it was still in South Africa, in order to satisfy itself on its condition. The agreement was only concluded after the first respondent was satisfied on the condition of the equipment. The equipment was then conveyed to the mining site in Hwange. The applicant denied receiving any overpayment from the first respondent. It also denied receiving mobilisation fees insisting that the failure by the first respondent to attach the requisite proof was quite telling. No such payment had been made.

The applicant further averred that the equipment had not been removed from the first respondent's site because no mobilisation fee had been paid. The applicant insisted that it had a legitimate claim against the first respondent. The equipment was only delivered after the first respondent had carried out its own due diligence processes in South Africa. The applicant further averred that the termination of the agreement did not comply with clause 18.1 of the parties' agreement. In the event of a breach, that clause required that 14 days' notice be given to the defaulting party. In the instant case, the termination was abrupt, making it highly irregular.

The applicant further averred that the first respondent had been under administration since October 2018, and since then, there had been no clear administrative plan to address creditors' claims. The second respondent had been the second administrator to be appointed since first respondent was placed under administration.

THE SUBMISSIONS

In her submissions, Ms *Mukumbiri* for the applicant argued that the second respondent's decision was grossly unreasonable in its defiance of logic. It did not comply with section 3 of

the Administrative Justice Act.[2] Counsel referred to the case of *Maqele & Ors v Vice Chancellor NM Bhebhe (N.O.) & Ano*[3]. Counsel further submitted that the reasons advanced to deny leave were unsatisfactory. These were that: there was no cause of action; the applicant was overpaid; and that cancellation of the agreement was lawfully done. The applicant's counsel argued that the applicant's cause of action was based on the irregular manner in which the contract was allegedly terminated, and the failure to pay the mobilisation fees.

Counsel further submitted that the second respondent had acted unfairly and biased towards the first respondent's cause. His decision failed to take into account the fact that there was a pre-shipment inspection of the equipment before the agreement was signed. The second respondent also allegedly made certain averments that were not supported by facts or evidence. Counsel further submitted that the question whether the applicant's case was meritorious was not the prime consideration. The primary consideration was whether the decision to deny the applicant leave was reasonable under the circumstances. In support of this submission, counsel for the applicant referred to the case of *Gurta AG v Gwarazimba N.O.*[4] Counsel urged the court to set aside the second respondent's decision in terms of section 4(2) of the Administrative Justice Act.

In her response, Ms *Sanhanga* for the respondents submitted that the agreement was properly terminated as the applicant was given the required notice. The agreement was terminated on the basis of the faulty equipment, and the applicant had not challenged the first respondent's internal report that highlighted the defects found in the equipment. Counsel further submitted that the applicant had failed to set out the material respects on which the alleged unreasonableness, unfairness and bias were founded.

Ms *Sanhanga* submitted that the deposit of US$352 000.00, plus 50% of the first month's rental equivalent to US$176 000.00, which were to be paid to the applicant after the signature of the agreement were supposed to be recovered from the applicant's monthly charges. She further submitted the equipment failed to meet the minimum threshold set out in clause 6.1 of the agreement, because it was defective.[5] Counsel further submitted that the

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[2] [*Chapter 10:28*]
[3] HB 129/16
[4] HH 353/13
[5] Clause 6.1 under the heading "Nature and Scope of Work" required the applicant:
"To maintain their excavators and ensure plant availability of a minimum standard of 85% so as to meet targets and deadlines"

mobilisation fee was not for the applicant to remove the equipment from Hwange to South Africa. Clause 8 of the agreement provided that the first respondent was only responsible for the mobilisation costs of the equipment to the mine from South Africa at an estimated cost of US$225,230.00. The first respondent was not contractually obliged to pay for the mobilisation costs for conveying the equipment back to South Africa. Paragraph 8.1 of the applicant's letter of 26 March 2021 referred to mobilisation costs in the sum of US$450 460.00, yet the agreement only referred to half of that amount. The applicant had been requested to remove its equipment from site, but had not done so. That confirmed that the equipment was of no value. No cause of action had been established because the second respondent was being asked to consider figures that were not contractually provided for. In paragraph 8.2 of the said letter, the applicant claimed that it had suffered damages amounting to US$5 592 960.00 as a result of the unlawful termination. Yet in paragraph 7(f) of its founding affidavit, the applicant claimed it had suffered damages of US$4 000 000.00.

It was further submitted on behalf of the applicant that the applicant had failed to establish any unfairness or bias. The applicant was seeking a review of a decision of the second respondent but basing it on different facts altogether from what the second respondent had been asked to consider. Counsel further submitted that as a general rule, an entity under debt reconstruction could not be sued so as to afford it an opportunity to make it a viable concern again. A party that sought leave to sue such an entity had to place before the court clear and cogent reasons justifying such a request. Counsel submitted that the claim was frivolous and vexatious and ought to be dismissed with costs.

In reply, Ms *Mukumbiri* insisted that the second respondent did not exercise his discretion in good faith. There was no proof of payment of the amounts the applicant is said to have received. She also denied that the equipment was defective. Counsel also insisted that mobilisation also included costs of the return trip to South Africa. She further submitted that the merits of the case were not important at this stage.

ANALYSIS

The issue that falls for determination is whether the second respondent's decision to deny applicant leave to institute proceedings against the first respondent was grossly unreasonable so as to warrant an interference by this court in terms of section 4(2) of the Administrative Justice Act. Section 4 provides as follows:

"**4 Relief against administrative authorities**

> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
> (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—
> (*a*) confirm or set aside the decision concerned;
> (*b*) refer the matter back to the administrative authority concerned for consideration or reconsideration;"

Section 3 of the Administrative Act behoves an administrative authority to act in a certain manner, when undertaking administrative action. It states as follows:

> **"3 Duty of administrative authority**
> (1) 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*) …….;

That the second respondent occupies the position of an administrative authority is not in dispute. Section 2 of the Administrative Justice Act defines 'administrative authority' to include a person in the second respondent's position.

A reconstruction order has the effect of reposing in the second respondent immense powers that in a way leave him in an invidious position. He is expected to be a judge in his own cause. He is expected to make a determination in a matter in which he has a vested interest. In terms of section 6(b) of the Act, *"no action or proceeding shall be proceeded with or commenced against the company except by leave of the administrator and subject to such terms as the administrator may impose".*

The court is mindful of the fact that at this stage it is not required to interrogate the merits or demerits of the applicant's claims against the first respondent. In the *Gurta AG v Gwarazimba N.O.*[6], MATHONSI J (as he then was), explained the position as follows:

> "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."

In its heads of argument, the applicant pointed to two key issues which it contends founds its cause of action against the first respondent. It pointed to the failure by the first respondent to pay mobilisation fees and the alleged unlawful termination of the agreement between the parties. On his part, the second respondent argued that the first respondent was not

[6] HH 353/13

responsible for any mobilisation fees associated with the return of the equipment to South Africa. He also claims that at any rate, the mobilisation fee that was due was paid. There is a dispute on whether the undisputed mobilisation fee was indeed paid. Nothing was placed before the court to confirm the payment. The applicant admitted though that it was paid a deposit of US$352,000.00 referred to in clause 7.2 of the agreement.[7] What is not clear from the papers is whether this deposit also covered the mobilisation costs. The second respondent contends that the applicant got overpaid in respect of mobilisation fees and advance payments. Those sentiments were expressed in the second respondent's letter of 29 March 2021, in which he declined leave to sue. Given that the alleged overpayments were part of the reason why leave was declined, the second respondent was expected to demonstrate the extent of the overpayment, but he did not.

Clause 18 regulated the termination of the contract in the event of a breach. It states as follows:

> "18.1 If either party breaches any provision of this agreement or neglects or fails to carry out any of its obligations hereto the non-defaulting party shall be entitled to terminate this agreement on fourteen days' notice.
> 18.2 The guilty party shall in this event be liable to the innocent party in full or for any damages arising from the breach and the legal costs thereof."

In its supplementary heads of argument, the applicant contends that the notice letter of 31 January 2018 did not call upon the applicant to remedy any breach. On that basis, it contends that the alleged termination was unlawful. The second respondent dealt with the issue of termination of the contract in his opposing affidavit as follows:

> "6.2. First Respondent duly terminated its contract with Applicant on 31 January 2018, following a breach by Applicant of the hire agreement, in that none of the equipment hired met the specifications hired.
> 6.3 Notice was given to the Applicant on 18 January 2018 to remedy its defective performance which it failed to do."[8]

In the heads of argument, the second respondent dealt with the issue as follows:

> "1.5 Subsequently, by way of a letter dated 31 January 2018, First Respondent advised the Applicant of its breach of the terms of the Agreement and failure to rectify the same and gave it fourteen days' notice of its intention to terminate the Agreement.
> 1.6 The Applicant did not dispute the claim of breach by the First Respondent neither did it remedy the breaches. Accordingly, the Agreement was terminated on 15 February 2018."[9]

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[7] Paragraph 7(g) of the applicant's founding affidavit on page 4 of the record.
[8] See page 24 of the record
[9] See page 59 of the record

The contradiction is evident. It is not clear when exactly the notice to remedy the alleged breach was given. It is also not clear when exactly the agreement itself was terminated. The termination of the agreement could only have been done pursuant to a notice to remedy the alleged breaches. I do not believe that the intention of the parties was that the same notification letter served as the termination letter. The court's view is that the two processes cannot be combined. Attached to the second respondent's opposing affidavit was an internal report highlighting the defects in the equipment. The second respondent does not state whether that report was ever brought to the attention of the applicant, and if so, when. The court finds it difficult to place reliance on that report, especially when it is not clear from the respondents' papers whether that report was ever shared with the applicant.

I have already highlighted that it is not within the purview of this court to interrogate the merits or demerits of the applicant's claims against the first respondent. However, for reasons stated above, this court is satisfied that the decision of the second respondent cannot be allowed to stand. There is clearly a dispute on whether the applicant was paid its mobilisation costs. There is also a dispute on whether the agreement between the parties was lawfully terminated, thus justifying a claim for damages for breach of contract. The inconsistencies in the second respondent's papers on this very issue are highly revealing. They cannot be ignored.

COSTS

Counsel for the applicant asked the court to make an award of costs on the attorney and client scale, jointly and severally against both first and second respondents, one paying the other to be absolved. No sufficient justification was given for the court to make such an award of costs. This is a case in which this court would be inclined to determine that each party bears its own costs of suit.

DISPOSITION

Resultantly it is ordered as follows:

1. The second respondent's decision of 29 March 2021, denying the Applicant leave to sue the first respondent be and is hereby set aside.
2. The applicant is granted leave in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] to institute proceedings against the first respondent for damages for breach of contract and unpaid mobilisation costs.
3. Each party shall bear its own costs of suit.

Rubaya-Chinuwo Law Chambers, applicant's legal practitioners
Dube, Manikai & Hwacha, respondents' legal practitioners