

C J PETROW & COMPANY (PTY) LTD

versus

AFARAS MTAUSI GWARADZIMBA (In his capacity

as the duly authorised Administrator of SMM HOLDINGS (PVT) LTD)

HIGH COURT OF ZIMBABWE

MAFUSIRE J

HARARE, 24 February 2014 & 16 April 2014

### **Opposed application**

*A P de Bourbon SC*, for the applicant

*T. Mpofu*, for the respondent

MAFUSIRE J: Paragraph (b) of s 6 of the Reconstruction of State-Indebted Insolvent Companies Act, *Cap 24:27* (“hereafter referred to as **the Reconstruction Act**”), provides that no action or proceeding shall proceed or commence against a company subject to a reconstruction order except by leave of the administrator and subject to such terms as he may impose.

Paragraph (c) voids any attachment or execution of property put in force against the assets of the company after the commencement of a reconstruction order. Paragraph (d) also voids, *inter alia*, every disposition of the property of the company, including rights of action, unless the administrator orders otherwise.

SMM Holdings (Private) Limited (“**SMM Holdings**”) was a company under a reconstruction order. A reconstruction order is issued by the Minister of Justice (“**the Minister**”) in terms of the Reconstruction Act. It is issued against a company that is indebted to the State or to a statutory corporation or a State-controlled company through credits or guarantees received by that entity or in its favour and that are payable out of public funds or that impose any liability on the State<sup>1</sup>. The reconstruction order is issued if it appears to the Minister that by reason of fraud, mismanagement or for any other cause the company is unable or is unlikely to repay and the State has become or is likely to become liable to pay from public funds. The order is issued if it also appears to the Minister that the State-indebted company has not become, or is prevented from becoming a successful concern and that there is a reasonable probability that the company will be able to pay its debts or meet its

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<sup>1</sup> See s 3 and s 4 of the Reconstruction of State-Indebted Insolvent Companies Act, *Cap 24:27*

obligations and become a successful concern if it is placed under reconstruction and that it would be just and equitable to do so.

“Essentially, the Act is about replacement of failed management of a State-indebted company with new management capable of turning around the fortunes of the company and enabling the State-indebted company to meet its obligations.”<sup>2</sup>

SMM Holdings was also indebted to the applicant, a South African registered company. The amount of the debt was in excess of US\$3.6 million. The debt was admitted. It was the total of two loans advanced by the applicant to the administrator on behalf of SMM Holdings. The loans had been advanced after the reconstruction order. The administrator had secured the loans to pay SMM Holdings’ suppliers in South Africa. This had been intended to keep the company afloat. The company was a mining concern that produced asbestos fibre. Repayment of the loans would be through its products. The company would sell its asbestos fibre to the applicant. From it applicant would retain an amount equivalent to 40% of each invoice. The loan tenure was 28 February 2010. SMM Holdings was in breach of the loan terms. Applicant demanded payment. SMM Holdings failed to pay. All this was common cause.

In line with the provisions of s 6 of the Reconstruction Act the applicant sought the leave of the administrator to sue SMM Holdings for the recovery of the loans and the interest accrued. The leave was turned down. The reasons were stated in a letter by respondent’s legal practitioners dated 28 August 2012. They were as follows:

“SMM was placed under reconstruction in September 2004 as a result of problems arising out of mismanagement and accumulating debt to the State. The Administrator was tasked with resuscitation of the mines. However, since 2004, multiple legal battles were instigated by the former board members and beneficial Shareholders of SMM. These legal battles disrupted the Administrator’s efforts. In recent months, most of the cases were finally determined and the Administrator is now focusing on identifying potential investors. SMM currently owes several suppliers debts, some of which are in excess of what is owed to your client. To allow your client to institute legal proceedings at this stage will be opening a pandora’s box. The Administrator is aware of SMM’s obligations to your client and assures us that as soon as funding is in place, your client’s matter will be addressed. Accordingly, for the reasons set out above, the request is declined.”

Two months later the applicant brought these proceedings. It applied for an order overriding the respondent’s decision and granting the leave to sue.

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<sup>2</sup> Per CHIDYAUSIKU CJ in *African Resources Ltd & Ors v Gwaradzimba NO & Ors* 2011 (1) ZLR 105 (S), @ p 117G - H

Part of Mr *de Bourbon's* argument, on behalf of the applicant, and as I understood it, was that the applicant's loans to SMM Holdings should be treated preferentially. Whilst the pre-reconstruction loans had been incurred by the failed management of the company the applicant's loans had been incurred by the administrator himself. They were ordinary commercial loans. They had been meant to ensure that the company would trade out of its difficulties and be able to re-pay its pre-reconstruction obligations. As such the applicant should not suffer the restrictions of s 6(b) of the Reconstruction Act.

Mr *de Bourbon* also submitted that it had not been part of the terms of the borrowing that repayment would be dependent upon new shareholders injecting new capital into the company.

As I perceived it, the applicant's main case was that the decision by the administrator to decline leave had been grossly wrong. The decision had been concerned with self-preservation of the administrator's own position and not with considerations of fairness. Reference was made to the recent and yet to be published judgment by MATHONSI J in the case of *Gurta AG v Afaras Mtausi Gwaradzimba NO* HH 353-13.

*Gurta's* case concerned the same respondent as in this case. It concerned the same company and the same relief. The respondent in that case had sold certain mining claims to the applicant, a foreign company incorporated in Switzerland. A third party had claimed them. He had used all manner of means to evict the applicant. The applicant had sought the leave of the administrator to institute proceedings against SMM Holdings for the cancellation of the sale agreement and for a refund of the purchase price. The leave had been refused. MATHONSI J granted it.

*In casu* the applicant's fall-back position, as it had been in the *Gurta* case, was that s 6 of the Reconstruction Act is *ultra vires* the Constitution of Zimbabwe. Thus, in spite of the decision of the Supreme Court in *African Resources Ltd & Ors v Gwaradzimba NO & Ors* 2011 (1) ZLR 105 (S) declaring that s 6 of the Reconstruction Act does not violate the Constitution, and in spite of the decision by MATHONSI J in the *Gurta* case on the constitutional point to the effect that given that the case had to be dealt with in accordance with the old Constitution which had removed the jurisdiction of this court to strike down existing legislation, reposing such power in the Constitutional Court, Mr *de Bourbon* nevertheless argued that the constitutionality of s 6 of the Reconstruction Act was still an open point. He submitted that the *African Resources* case was distinguishable. The particular problem confronting this court in this matter was not what their lordships in the Supreme

Court had been called upon to exercise their minds on. They had been concerned merely with the constitutional validity of legislation in relation to a reconstruction order and not with the exercise by an administrator of a power under section 6(b) of the Reconstruction Act.

With regards to the *Gurta* case, Mr *de Bourbon* submitted that it appeared that the Honourable MATHONSI J had not been referred to s 85 of the new Constitution. This section empowers every court to grant relief in relation to a breach of fundamental rights or freedoms which are enshrined in the Constitution. Specifically, subsection (2) of s 85 of the Constitution requires the rules of a court to facilitate access to, and the determination of such matters with minimal technicalities.

The precise constitutional point raised by the applicant in this matter as an alternative argument was that s 6(b) of the Reconstruction Act purports to prevent access to the courts in contravention of s 69(3) of the Constitution which reads:

“Every person has the right of access to the courts, or some other tribunal or forum established by law for the resolution of any dispute.”

In a nutshell, that was the applicant’s case.

In opposing the application the respondent first took a technical objection. It was argued that the application being in terms of the Administrative Justice Act, and that this Act being a codification of the common law remedy for review<sup>3</sup> it was incumbent upon the applicant to have brought itself squarely within the ambit of reviews, either in terms of the common law or in terms of the Administrative Justice Act. It was argued that the application failed to satisfy the requirements for review.

Respondent also argued that the applicant sought a substantive relief. The court was being asked to effectively usurp the functions of an administrative authority by granting the leave that the respondent had turned down. This was said to be contrary to administrative law. Reference was made to the cases of *Mhanyami Fishing & Transport Co-operative Society Limited & Ors v The Director General Parks and Wildlife Management Authority NO & Ors* HH92-11 and *Affretair (Pvt) Ltd & Anor v M K Airlines (Pvt) Ltd* 1996 (2) 15 (S).

The respondent’s next argument was that his refusal to grant leave had not been grossly unreasonable. His decision could only be set aside if it was so grossly unreasonable as to be irrational in the *Wednesbury* sense, that is to say, a decision so grossly irrational as to be

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<sup>3</sup> See my recent judgment in *Kennedy Godwin Mangenje v TBIC Investments (Pvt) Ltd & Ors* HH377-13 @ p 20 of the cyclostyled judgement, and the case of *Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor* 2006 (2) ZLR 10 (H) which I referred to therein.

outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it<sup>4</sup>.

Finally, the respondent argued that in the light of *Africa Resources*, a decision of a superior court, in which it was decided that s 6 of the Reconstruction Act does not violate the Constitution, this court, being inferior, had no choice but to follow that decision.

Mr *Mpofu*, for the respondent submitted that the applicant's loans did not deserve preferential treatment. On the contrary they should rank lower. The applicant had advanced them well knowing the precarious financial position of the company and had therefore taken a well calculated risk.

On *Gurta's* case, Mr *Mpofu* submitted that the last word regarding the constitutionality or otherwise of s 6(b) of the Reconstructive Act had not yet been spoken. The *Gurta* judgment had been appealed against. Both counsel were set to argue the appeal in the Supreme Court on the following day<sup>5</sup>.

Aside from the constitutional point, in my view the substantive issue before me was the extent to which the respondent could exercise the discretion bestowed on him by s 6(b) of the Reconstruction Act. What factors ought he take into account? What factors ought he not take into account?

According to Mr *de Bourbon*, an administrator of a company under reconstruction to whom leave to sue is sought should only have regard to the following factors:

- 1 whether the proposed claim is *bona fide* or is simply intended to harass the administrator or to improperly interfere with his administration of the company;
- 2 whether the cause of action arose prior to the reconstruction order or after;
- 3 whether the administrator himself was responsible for incurring the liability that is sought to be enforced in the legal proceedings;
- 4 whether the claim made is admitted;
- 5 whether any culpable person was involved in the facts giving rise to the cause of action;
- 6 whether an applicant, given the known history of the company under reconstruction, should as a matter of policy be deprived of the right to sue.

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<sup>4</sup>See *CCSU v Minister for the Civil Service* [1984] 3 All ER 939 (HL) at p 950 – 951 which was quoted with approval by DUMBUTSHENA CJ in *Patriotic Front – ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1986 (1) SA 532 (ZS) at p 548 (also reported in 1999 (2) ZLR 305).

<sup>5</sup> At the time of this judgment I had not yet been apprised of the outcome.

Other than the first criterion postulated by counsel I find the rest of them somewhat narrow. They seem tailor-made to suit the particular circumstances of the applicant in this case. One is mindful of the dangers of being too prescriptive and of trying to lay down a one-size-fit-all criterion.

I am content to accept that in deciding whether or not to grant leave under s 6(b) of the Reconstruction Act, an administrator of a State-indebted company must consider whether the proposed claim is *bona fide* or is simply intended to harass him or to improperly interfere with his administration of the company. A court reviewing the decision of the administrator will, in my view, scrutinise it on such broad terms as such decisions are generally scrutinised in the field of administrative law.

An administrator of a company under reconstruction in terms of the Reconstructive Act whose leave is sought to institute legal proceedings against the company in terms of s 6 (b) of that Act must act in accordance with s 3 of the Administrative Justice Act, particularly subsection (1)(a) thereof. He must act reasonably and in a fair manner. His decision must not be whimsical or capricious. He must not advance self-interests otherwise his decision will be unfair. Whilst his paramount consideration is to turn around the fortunes of the company and bring it out of the financial doldrums so as to free the State from any obligation to pay, that cannot be his singular consideration. He must not be blind to the interests of the other stakeholders in the company otherwise his efforts may produce unintended results. He must strive to strike a balance.

When a person is appointed an administrator of a State-indebted company and clothed with the powers of paragraphs (b) and (d) of s 6 of the Reconstruction Act, he is, in a sense, being empowered and authorised to be judge over his own cause. All control and management of the company is vested in him. He decides for and on behalf of the company. He is the face of the company. He is the brains and soul of the company. He must know what is good for the company. But in spite of all that he must remain objective.

Section 6(b) of the Reconstructive Act gives no suggestion as to how an administrator should treat the pre- and post- reconstruction obligations. However, it seems to me that in general both the pre- and post- reconstruction obligations should be accorded equal treatment. But circumstances might arise when they may be treated differently. Every case will have to be considered on its own set of circumstances. In my view it should not be the date when a particular debt was incurred that must decide preferential treatment or otherwise. Rather it should be the circumstances surrounding the particular debt.

In the present matter SMM Holdings had been under a reconstruction order because it was indebted to the State. The Minister must have been satisfied that the company's management had been fraudulent, negligent or guilty of some such serious infraction. The respondent had been appointed administrator. His duty was to turn it around so that it would be able to repay its debt and free the State from the obligation to utilise public funds. He had to return the company to profitability. From the respondent's lawyer's letter of 28 August 2012 it was not only the debt to the State that the company had been saddled with. It was said there were other debts much bigger in size than the applicant's loans. That was the state of affairs when the respondent had taken over.

In his wisdom the respondent had borrowed from the applicant. As his general powers of administration in relation to a company under reconstruction he had had such power to raise money in any way in terms s 18(d) of the Reconstruction Act. When he borrowed from the applicant the purpose had been to ensure that the company continued to produce and to trade. From the loan terms not only would the company be able to repay the applicant's loans, but also it would remain with 60% of the proceeds from its products to utilise for other purposes. But from the papers and from the submissions during the hearing, it appeared that the company, under the control and management of the same respondent, who himself had incurred the debt, albeit on behalf of the company, had neither kept the arrangement of supplying the company's products to the applicant nor repaid the loans by due date. The applicant became entitled to sue the company. But the law said it must first get permission from the respondent. The respondent refused that permission despite acknowledging the debt, and, tacitly, the breach. His fear had been that the applicant's suit would open up the floodgates, a Pandora's Box, as his lawyers had put it.

There is something in the respondent's conduct that offends against notions of justice and fair play in the minds of reasonable men. There is something callous in the submission that the applicant was not entitled to cry foul when it had got, as it were, its fingers burnt allegedly because it had entered into the loan arrangements with its eyes wide open. Yet it had been the respondent himself, not the failed management of the past, who had brought about the state of affairs giving rise to the debt due to the applicant. In my view, his decision to refuse the leave had classically been concerned with self-preservation. It had evidently been designed to shield himself from the consequences of his own infractions. That was wrong. That was unreasonable. That was unfair. That was in breach of s 3 of the Administrative Justice Act. For that reason I set aside the respondent's decision.

I should not concern myself with whether or not the decision of the respondent in turning down the applicant's request for leave to institute proceedings for the recovery of its loans was grossly unreasonable in the *Wednesbury* sense. I am satisfied that in coming up with his decision the applicant had failed to leave up to the principles set out in s 3(a) of the Administrative Justice Act.

The respondent argued that it was not competent for this court to usurp the function of an administrative authority by, in this case, granting the leave that the respondent ought to have granted. It was pointed out that in terms of s 4 of the Administrative Justice Act, the courses open to the court are to set aside or confirm the decision or to refer the matter back to the administrative authority or to give appropriate directions to the administrative authority.

I was urged to follow the approach of MAKONI J in the *Mhanyami Fishing* case. In that case the learned judge declined to grant the fishing licences that the applicants had clamoured for. She had felt that to do so would be tantamount to substituting the decision of the court for that of the administrative functionary.

The approach in such matters was set out by McNALLY JA in the *Affretair* case. Quoting from BAXTER *Administrative Law*, at p 681, the learned judge of appeal said<sup>6</sup>:

“The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise ‘would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator’. Thus it is said that: ‘[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness.’”

It is not an absolute position that a court will not substitute its own decision for that of the administrative functionary. In exceptional circumstances it will. Section 4 of the Administrative Justice Act does not lay down an absolute course of action that the court should follow. It gives broad guidelines. The list of those guidelines, in subsection (2), cannot be said to be exhaustive. In subsection (1) the right to a recourse that an aggrieved party may seek from this court in terms of that section is made subject to that Act “*and any other law*”. Furthermore, the court may follow any of the courses suggested in subsection (2) only in “*appropriate*” circumstances.

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<sup>6</sup> At p 25D - F

A court will substitute its own decision for that of the administrative functionary in exceptional circumstances. There are four criteria. These were discussed by McNALLY JA in the *Affretair* case<sup>7</sup> and aptly summarised by MATHONSI J in the *Gurta* case<sup>8</sup>. They 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;
- 4 where the court is in as good a position as the administrative body to make the decision.

The *Mhanyami Fishing* case is clearly distinguishable from this one. In that case the court dismissed the application on the basis of the points raised *in limine*. One of them was the question of whether or not the court could substitute its own decision for that of the administrative functionary. The court held that it could not. In my view, and with due respect, the court was quite correct. There had simply been no sufficient information laid before it to grant the licences sought.

In the *Gurta* case the court granted the leave to institute legal proceedings under s 6(b) of the Reconstructive Act. It found that all the four criteria above existed. Again that decision was, with due respect, also correct.

*In casu* I consider that the applicant's case is even stronger than that of the applicant in the *Gurta* case. Among other things, in the *Gurta* case the respondent had declined leave because he had perceived that he had some kind of defence to the proposed action. That was an improper exercise of discretion. In the present case, the respondent admitted the debt. All the facts germane to the issue were common cause. The respondent acknowledged the applicant's right to be paid. Part of the letter of 28 August 2012 reads: "***The Administrator is aware of SMM's obligations to your client and assures us that as soon as funding is in place, your client's matter will be addressed. Accordingly, for the reasons set out above, the request is declined.***" Thus he had no defence to the claim. Leave was refused for fear that a suit by the applicant would trigger several other suits by other creditors. That was an improper exercise of discretion.

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<sup>7</sup> At pp 24 - 25

<sup>8</sup> At pp 9 – 10 of the cyclostyled judgment

Just as in the *Gurta* case, I am satisfied that the applicant *in casu* has met all the criteria for this court to take the exceptional step to substitute its own decision for that of the respondent. It will be a waste of time to refer the matter back to the respondent. The delay will prejudice the applicant. These were commercial loans. Delays are undoubtedly prejudicial even without considering the question of the prescription of debts. Most importantly, the court is in as good a position as the respondent to make the decision. It is not fettered by self-serving interests as the administrator undoubtedly was. That the applicant's litigation may open what the respondent termed "a Pandora's Box" was not a relevant consideration. Section 6 (b) of the Reconstruction Act was evidently not designed to provide an administrator of State-indebted companies some form of immunity from civil suits. In terms of s 18(1)(e) the administrator is authorised and empowered, among other things, to defend legal proceedings of a civil nature on behalf of the company. He is also authorised and empowered, in terms paragraph (g) of subsection (1) of s 18, *inter alia*, to compromise or admit any claim or demand against the company.

In the premises I grant the leave sought by the applicant under s 6(b) of the Reconstruction Act.

Having reached a decision on the substantive claim I find it unnecessary to deal with the constitutionality of s 6(b) of the Reconstruction Act.

### **DISPOSITION**

It is ordered that:

1. The decision of the respondent on 28 August 2012 refusing the request by the applicant in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act, [*Cap 24:27*] for leave to institute civil proceedings against SMM Holdings (Private) Limited is hereby set aside.
2. The applicant is hereby granted leave to institute proceedings against SMM Holdings (Private) Limited in respect of a claim for the sum of US\$ 3 635 158-31 (three million six hundred and thirty five thousand one hundred and fifty eight United States dollars and thirty one) together with costs of suit and interest as applicable thereon.
3. The respondent shall pay the costs of this application

*Kantor & Immerman*, applicant's legal practitioners  
*Dube, Manikai & Hwacha*, respondent's legal practitioners