

REPORTABLE (11)

ARAFAS MTAUSI GWARADZIMBA N.O.
v
GURTA A.G.

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & PATEL JA
HARARE, FEBRUARY 25, 2014 & MARCH 6, 2015

T. Mpofu, for the appellant

F. Girach, for the respondent

GWAUNZA JA: This is an appeal against part of the judgment of the High Court, Harare, handed down on 16 October 2013. The specific part of the judgment appealed against reads as follows;

- “1) ...
- 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.”

Although the appellant filed detailed grounds of appeal, it is agreed that two main issues arise in this appeal¹. These are:-

¹ Appellant’s heads of argument paragraph 1

- (a) whether there was a proper application before the court *a quo* and,
- (b) whether the court *a quo* was correct in holding that the appellant could not consider the merits of the respondent's complaint in relation to the question of the grant of leave.

In addition to these two issues, the appellant also attacks the decision by the court *a quo* to award fifty per cent of the costs to the respondent.

The background to the dispute may be summarised as follows:

The appellant was appointed Administrator of SMM Holdings (Private) Limited ("SMM"), an entity under reconstruction, on 6 September 2004. The appellant on 9 October 2009 entered into an agreement with the respondent in terms of which the latter purchased and paid for certain Chrome Mining claims belonging to SMM (Mashava Area "E") for US\$4 350 000. Despite registration of the mining claims in the respondent's name, and its assumption of operations on the location in question, it met with fierce resistance from a third party who claimed ownership of the same location. The third party also made it virtually impossible for the respondent to enjoy the benefit of the claims that it had purchased. Lines of communication that thereafter opened between the respondent and the appellant to resolve these problems yielded no positive results. This led the respondent by letter dated 3 August 2012, to apply to the appellant for leave to commence legal proceedings against SMM for cancellation or confirmation of cancellation of the sale agreement as well as a refund of the purchase price paid. The application to the appellant was made in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [Chapter 24:27] ("the Reconstruction Act"). Having, for over one year, received no response from the

appellant the respondent approached the High Court claiming, in the alternative, the relief that it was granted and against which the appellant has filed this appeal. The application was made in terms of s 3 (1) (b) and 4(1) of the Administrative Justice Act [Chapter 10:28]. Sections 3 and 4 of the Act read 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) **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 (my emphasis)**
 - (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.

4 Relief against administrative authorities

- 4(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. (my emphasis)**
- (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 to the administrative authority concerned for consideration or reconsideration;
 - (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court.
 - (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
 - (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section three.
- (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the

administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.”

The court *a quo* did not grant any of the forms of relief listed in s 4 (2) of the Act but took it upon itself to grant the leave, that is, take the action that the appellant *qua* administrator should have taken, as requested by the respondent.

I will now consider the appellant’s grounds of appeal.

1. Whether or not the application was properly before the court *a quo*.

Mr *Mpofu*, for the appellant, argues that s 4 of the Act is an embodiment of the common law grounds for review and the respondent should accordingly have brought a review application before the court *a quo*, in terms of Order 33 of the High Court of Zimbabwe Rules 1971. By essentially bringing proceedings which “in substance” were for review, without complying with the provisions of the law relating to review proceedings, the respondent, contends Mr *Mpofu*, had employed the wrong procedure. The result was that the application was not properly before the court *a quo*. Mr *Mpofu* further challenges what he refers to as the “contradictory” conclusion of the court *a quo* in that, after concluding that the application was not a review, it went on to justify its interference on the basis of review principles.

Mr *Girach* for the respondent, on the other hand, contends that the application *a quo* was not one for review and therefore r 257 of the High Court Rules did not apply. The application *a quo* was primarily a constitutional challenge to specific provisions of the Reconstruction Act. In the alternative, the respondent sought leave to sue the appellant.

Further, and in any event, a proper case had been made out by the respondent for leave to be granted. Lastly, he contended that at the time the application for leave was filed in the court *a quo*, the request to the Administrator for the same relief, dated 3 August 2012, had not been adjudicated upon, meaning that there was no decision, nor were there any proceedings, to be reviewed.

In holding that the application before him was not one for review, the judge *a quo* stated as follows in his judgment;

“Mr *Mpofu*, for the respondent protested that a wrong procedure was employed as s 4 of the Administrative Justice Act is an embodiment of the common law grounds for review. For that reason the applicant should have brought a review application in terms of 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 applicant 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.”

I find little to fault in the reasoning of the court *a quo* on this point. As correctly stated, s 4 (1) of the Administrative Court Act (“the Act”) provides that the statutory relief referred to by the judge *a quo* may be sought by way of an application to the High Court. However no specific format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application, there is nothing in s 4(1) to suggest that any other form of application for judicial review would in any way offend against that sub-section as long as it meets the requirements of an ordinary court application.

I find this position to be fortified by s 26 of the High Court Act [*Chapter 7:06*] which reads as follows;

“PART V

POWERS OF REVIEW

26 Power to review proceedings and decisions

Subject to this Act **and any other law**, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.

27 Grounds for review

- (1) Subject to this Act **and any other law**, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
 - (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
 - (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
 - (c) gross irregularity in the proceedings or the decision.
- (2) **Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.** (my emphasis)

My understanding of this provision is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of “any other law.” Specifically, judicial review may be done in terms of another statute, for instance the Administrative Justice Act, as happened *in casu*. Further to this, and as clearly indicated above in subsections (1) and (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed.

Mr *Mpofu* also argues that an allegation to the effect that a public official has failed to give reasons or to make a decision altogether, is a reviewable issue. He has referred

the court to a number of decisions to support this contention. (*Muchapondwa v Madake and Others* 2006 (1) ZLR 196 (H); and *S v Mapiye* (S) – 214/88). These authorities in the main relate to judicial officers who, after hearing argument in matters before them, made and communicated their decisions to the parties, but failed to provide reasons for such decisions. In addressing this oversight, the learned judge in *S v Makawa & Another* 1991(1) ZLR 142 (SC at 146 D-E) stated as follows;

“Although there are indications in this case that the Magistrate may have considered the case, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances this amounts to an omission to consider and give reasons. There is gross irregularity in the proceedings ... see *R v Jokonya* 1964 RLR 236 ...”

In casu it is evident that the appellant, who must have had reasons for not acting on the request made to him by the respondent, chose not to commit them to paper nor communicate them to the latter. The reasons therefore remained “stored” in his mind. Based on the authorities cited I am satisfied that the failure by the appellant as an administrative authority to take action when properly requested to do so, constituted an irregularity which may properly be the subject of judicial review. However, for the reasons stated above, I am not persuaded that the only form of review proceedings in the circumstances of this case, would be those in terms of Order 33 r 257 of the High Court Rules.

It should be noted that in any case an attempt to satisfy the requirements of Order 33 of the High Court Rules, in particular r 259, given the circumstances of this case, might present practical difficulties. The rule provides as follows;

“259. Time within which proceedings to be instituted

Any proceedings by way of review **shall** be instituted within eight weeks of the termination of the suit, action

or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

“Provided that the court may for good cause shown extend the time.” (my emphasis)

The appellant *in casu* took no action at all following the respondent’s request for leave to sue SMM. There was effectively no ‘termination’ to speak of since, by its nature, the appellant’s inaction was a continuing default. The ascertainment of a date from which to reckon the 8 weeks stipulated in r 259 would thus be problematic.

I find, in any case, that the appellant’s conduct is contemplated by see 3(1)(b) of the Act, cited above. His failure to act within a reasonable period after being requested to do so by the respondent, constituted a ground for review which, *albeit* not listed in s 27 of the High Court Act, was nevertheless established in terms of “any other law”.

Accordingly the respondent was within its rights to approach the High Court with an application in terms of the Act, for the relief that it had requested from the appellant but did not secure.

In all respects therefore I find there is no merit in the ground of appeal that alleges that the application *a quo* was not properly before that court.

2. Whether the court *a quo* was correct in holding that the appellant could not consider the merits of the respondent’s complaint in relation to the question of the grant of leave.

This ground of appeal challenges the competency of the order made by the court *a quo*, whose effect was to effectively rule out any opportunity for the appellant to consider the merits of the respondent’s request to it, for leave to sue an entity under its

administration. As already indicated, the court *a quo* did not grant any of the specific forms of relief provided for in s 4 (2) of the Act. The judge *a quo*, being fully cognisant of the provisions in question, justified his non observance thereof, in the following terms:

“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 may be 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.”

It is pertinent to note that the *Affretair* case that the judge *a quo* premised its decision on, was an application for review in terms of Order 33 of the High Court Rules. It is on this basis that Mr *Mpofu* for the appellant argued that the court *a quo* contradicted itself by justifying its interference on the basis of review proceedings, when it had found that the proceedings in question were not those for a review.

This argument seems to suggest that review proceedings that are brought in terms of Order 33 of the High Court Rules enjoy a monopoly over the grounds on which interference with an order or proceedings of an inferior court or tribunal, may be justified. I am not persuaded that is the case. As indicated above ss 26 and 27 of the High Court Act [Chapter 7:06] and r 256 of the High Court Rules do not rule out review proceedings being brought in terms of “any other law.” I take the view that such other review proceedings may properly rely on the same or similar grounds as a basis for some interference or other, by a superior tribunal, with a lower tribunal’s order or proceedings². What is important at the end of the day is that justice and fairness prevail, following upon a court ruling that is premised on cogent reasoning and sound principles of law.

I am satisfied, in any case, that the propriety of the relief granted by the court *a quo* is put beyond doubt when regard is had to s 2(2) of the Act, which reads as follows:

“(2) The provision of this Act shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or apply for any other form of relief in respect of any administrative actions to which this Act applies” (*my emphasis*)

Related to the circumstances of this case, I find that while s 4(2) of the Act lists the types of relief the High Court could have granted, that list is not exhaustive. Rather, it is additional to any other relief that may be sought in respect of any administrative action relevant to the Act.

² For instance, in *Johannesburg Consolidated Investment Co and Anor v Johannesburg City Council* 1903 TS 111 the court distinguished three types of reviews, being review by summons, a wider power of review granted by statute and thirdly.....review by motion.

The respondent's application to the appellant for leave to sue SMM, dated 3 August 2012 was, for over a year and in the words of the court *a quo*, "met with deafening silence" from the latter. Not only was there silence, no reasons were proffered for it within a reasonable or any, period at all. In my view, while the High Court could have sent the matter back to the administrator with specific instructions or conditions on how to address the respondent's request for leave, it was nevertheless, within its competence in terms of s 2(2) of the Act, to grant the relief sought. I am persuaded that a proper case has been made for the leave in question to be granted by the court *a quo*.

Mr *Mpofu* argues *inter alia* in respect of the order granted by the court *a quo*, that the court took the incorrect position that the merits or demerits of the matter were irrelevant. He contends that s 6(b) of the Reconstruction Act requires the Administrator to consider a matter and deal with it on the merits.

I am not persuaded by this argument.

The facts of this matter show, and the papers before the court confirmed, that the appellant was singularly reluctant to grant the leave sought from him by the respondent. The appellant made this very clear in his opposing papers. It may in fact be assumed from this attitude that the appellant must have considered the merits of the request and that this had influenced his decision not to act on it. That being the case, the court *a quo* and indeed the respondent cannot be blamed for, in my view, safely assuming that the appellant's decision on the merits of the request for leave would have been negative.

It is evident from the judge's reasoning, cited above, that after considering the papers before him which revealed to an appreciable extent the merits of the case, he took the view that he (a) had all the facts on which to base the decision that he made and (b) was in as good a position as the administrator to make such decision. The Judge was also persuaded that any further delay in resolving the dispute would prejudice the respondent.

I find no reason to fault the judge's reasoning. To my mind, there can be little doubt that the respondent did have a grievance. As correctly submitted by Mr *Girach*, it has paid nearly \$4.5 million but, through no fault of the respondent itself, has not enjoyed nor been allowed to enjoy the benefit of its investment. I am persuaded by the further contention that, in any case, the factual position of the dispute as well as its merits or demerits will ultimately be a matter for the trial court. At this stage all that has been granted is leave for the respondent to commence proceedings against SMM, and possibly the appellant as well, for the redress that it wishes to secure. All parties will therefore have their day in court, as it were.

In the final result, I find that the appellant's second ground of appeal lacks merit and must be dismissed.

3. Costs

The final ground of appeal challenges the *quantum* of costs awarded against the appellant, which the court *a quo* justified thus in its judgment:

“Regarding the question of costs, the applicant (respondent) has been partially successful given that its main application for the declaration of s 6 as 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 per cent of its costs”

The appellant contends that the judge *a quo* exercised his discretion injudiciously in respect of the fifty per cent award of costs, given that the court had considered three main issues and found for the respondent in respect of only one of them. Accordingly, the appellant contends, the costs for each of the three issues should have been thirty three per cent. I am not persuaded by this contention. A look at the draft order of the respondent in the court *a quo* clearly shows that it sought, apart from costs, one main and one alternative form of relief. It was successful in respect of the alternative relief sought. To the extent that costs could be apportioned based on a mathematical calculation of the issues considered by the court, the 50 per cent, even by the appellant’s own formula, would be reasonable. I however entertain some doubt as to the practicality of such an approach.

Mr *Mpofu* argues in the alternative that even if only two issues were determined by the court *a quo*, there should either have been no order as to costs, or each party should have borne its own costs. I hold a different view. All that the respondent in reality craved was the removal of any obstacle to the prosecuting of its claim against SMM. It sought two orders in the alternative, either one of which would have given the respondent the relief it craved. The court granted the alternative relief, even though it and all the parties had expended time in arguing and considering the merits or demerits of the main relief sought by the respondent. Since the respondent in the end secured the entirety of the relief that it wanted, my view is that it was entitled to part, if not all, of its costs. However, there having been no cross appeal by the respondent on this aspect, there would be no basis for interference at this stage. Costs being a matter for the court’s discretion, I do not in any case

find that this discretion was exercised injudiciously by the judge *a quo*, when he ordered the appellant to bear half of the costs.

In all respects, therefore, I find that the appeal lacks merit and should be dismissed.

It is in the result ordered as follows:-

“The appeal be and is hereby dismissed with costs.”

GARWE JA: I agree

PATEL JA: I agree

Dube Manikai and Hwacha, Appellant’s Legal Practitioners

Kantor and Immerman, Respondent’s Legal Practitioners