

REPORTABLE (8)

AFARAS MTAUSI GWARADZIMBA
v
C. J. PETRON & COMPANY (PROPRIETARY) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSHWAYO JA
HARARE, SEPTEMBER 12, 2014 & MARCH 11, 2016

T Mpofu, for the appellant

A P de Bourbon SC, for the respondent

GARWE JA:

[1] In a judgment handed down on 16 April 2014, the High Court made an order setting aside the decision of the appellant refusing the request made by the respondent for leave to institute civil proceedings against SMM Holdings (Pvt) Ltd. The court further granted leave to the respondent to institute the proceedings and ordered the appellant to pay the costs of the application.

[2] This appeal is against that judgment.

FACTUAL BACKGROUND

[3] SMM Holdings (Pvt) Ltd (“SMM”) is a company under a reconstruction order issued by the Minister of Justice, Legal & Parliamentary Affairs in terms of the Reconstruction of State – Indebted Insolvent Companies Act, [Chapter 24:27] (“the Reconstruction Act”). The appellant was appointed administrator of SMM in

September 2004. Upon such appointment, the appellant was conferred by law with the power, *inter alia*, to raise money, in order to turn around the fortunes of the company.

[4] In 2008 and 2009, the appellant sought loans on behalf of SMM in order to purchase spares and other consumables from various South African suppliers. The spares and consumables were meant to capacitate Shabani Mine so that its mining operations could continue. As at 31 December 2010, the total amount outstanding on the two loans was US\$3 635 158,31 which amount the appellant acknowledged was due and owing.

[5] Efforts by the respondent to recover the debt were in vain. Accordingly, in June 2012, the respondent made a written request to the appellant to grant it leave to institute proceedings against SMM in terms of s 6 of the Reconstruction Act. On 28 August 2012, the appellant, through his legal practitioners, declined to give such leave. Consequently the respondent filed a court application in November 2012 seeking an order setting aside the decision of the appellant refusing it leave to institute civil proceedings and for the court itself to grant such leave.

PROCEEDINGS IN THE HIGH COURT

[6] The application before the High Court was made in terms of s 4 of the Administrative Justice Act, [Chapter 10:28]. The basis of the application was that the decision of the appellant refusing leave to institute proceedings was contrary to the intention of the legislature, grossly unreasonable, made in bad faith and constituted an abuse of authority; that it was an unlawful deprivation of the right of the respondent to obtain judgment in a court of competent jurisdiction; that it was not a fair decision, regard being had to the fact that the debt in question was incurred during the administration period; that there was no rational basis for the decision and lastly that the appellant had

failed to comply with his duty and obligations as an administrative authority as provided for in s 3 of the Administrative Justice Act.

[7] In his opposing papers the appellant justified the refusal of the grant of leave on the basis that there was need in the short term period to preserve the assets of the company pending its full recapitalisation and subsequent reopening of operations. He further averred that, were the respondent to obtain judgment against SMM and thereafter proceed to execute on that judgment, SMM would in the result have to be liquidated, thus negating the whole purpose of reconstruction.

[8] In heads of argument filed by both parties, various issues were identified as requiring determination. The appellant, *inter alia*, submitted that the application filed by the respondent was a review application. He further submitted that, on the papers, the application did not comply with the requirements for review. Indeed the presiding judge, in his judgment, accepted that the issue that fell for determination, amongst others, was whether the application was properly before the court.

[9] Notwithstanding the fact that the propriety of the application had been put in issue, the court *a quo*, in its judgment, did not deal with the submission but took the view that the substantive issue falling for determination was the extent to which the respondent could exercise the discretion bestowed on him.

[10] The court reached the conclusion that the decision to refuse leave was wrong, unfair and in breach of s 3 of the Administrative Justice Act. The court consequently set aside the decision. The court considered it unnecessary to decide whether or not the decision refusing leave was grossly unreasonable “in the Wednesbury sense”. The court was also of the view that this was a proper case for it to grant the leave which the

appellant had refused. Consequently the court granted such leave in para [2] of the operative part of its judgment.

APPELLANT'S SUBMISSIONS ON APPEAL

[11] In submissions before this Court, the appellant has argued that the court *a quo* erred in failing to determine the question whether the application filed by the respondent was properly before it and in particular whether the application complied with the requirements of order 33 of the Rules of the High Court. He further submitted that the fact that the court *a quo* proceeded to deal with the merits of the application suggests a tacit acceptance by the court that the matter was properly before it. The absence of reasons for such tacit acceptance and the failure by the court to expressly deal with the issue constitute a serious misdirection. He has further submitted that, on the authority of *Minister of Local Government, Rural and Urban Development & Anor v Silas Machetu & 3 Ors* SC 34/12, there is little doubt this was an application for review. The present application, having been filed some three months after the making of the decision, was therefore not properly before the court.

[12] The appellant also submitted that the refusal to grant leave was not unreasonable, unfair or wrong. Lastly he submitted that, in terms of the Administrative Justice Act, it is not permissible for the court itself to substitute its own decision in place of that of the administrator.

RESPONDENT'S SUBMISSIONS ON APPEAL

[13] In submissions before us, the respondent has argued that the Administrative Justice Act, in effect, created a new jurisdiction not only in respect of the obligations of an administrative authority but also in respect of the manner in which challenges to such administrative authority could be made. In the absence of a provision in the Act

requiring applicants to comply with Order 33 of the High Court Rules, no obligation arises to comply with the various provisions under Order 33. To the contrary, it is the provisions of Order 32, and in particular r 226 of the High Court Rules, 1971, which are applicable. Consequently, in the absence of any period stipulated by the Minister in terms of s 10 (2) (b) of the Administrative Justice Act, no time limits apply to applications in terms of s 4 of the Act.

[14] On the question whether the court *a quo* failed to resolve the issue raised by the appellant, namely, that the proceedings, being of the nature of a review, were subject to the provisions of Order 33 of the High Court Rules, the respondent has submitted that it is quite permissible for a court not to deal with each and every submission raised by the parties and instead confine itself only to those issues which are critical to its decision.

[15] The respondent has further submitted that the central issue that fell for determination before the court *a quo* was whether the appellant, as an administrative authority, acted lawfully, reasonably and in a fair manner in declining to give the necessary leave for the institution of proceedings against SMM. On the facts, it is quite clear that the decision of the appellant was irrational and unreasonable.

[16] The respondent has further argued that s 6 (b) of the Reconstruction Act is not valid in terms of the current Constitution, regard being had to the provisions of s 69 of the Constitution, which provide for the right of access to the court for the resolution of any dispute.

[17] Lastly the respondent has submitted that s 4 of the Reconstruction Act cannot be interpreted as preventing the High Court, in an appropriate case, from substituting its own decision for that of the administrative authority.

ISSUES FOR DETERMINATION BEFORE THIS COURT

[18] A number of issues arise from the heads of argument and oral submissions made by counsel. However it is essential to deal first with the submission whether the court *a quo* erred in not dealing with the preliminary point taken by the appellant in the *Court a quo* that the application before it, having been one of review, was not properly before it. That this submission was made by the appellant in argument before the court *a quo* is not in dispute. Indeed, in its judgment, the court *a quo* confirms that the appellant had argued that “the application failed to satisfy the requirements for review”.

[19] Although it was alive to the fact that the appellant had raised this preliminary point, the court *a quo* said nothing further on the matter and instead concluded that “aside from the constitutional point the substantive issue before [the court] was the extent to which the respondent could exercise the discretion bestowed on him by s 6 (b) of the Reconstruction Act.”

[20] I am inclined to agree with the respondent that, in proceeding to determine the substantive issue that fell for determination before it, the court must have tacitly accepted that the application was property before it. Had the court concluded otherwise, it would not have proceeded to deal with the merits of the application.

[21] In general, I agree with the respondent’s submission that, in a case where a number of issues are raised, it is not always incumbent upon the court to deal with each and

every issue raised in argument by the parties. It is also correct that a court may well take the view that, in view of its finding on a particular issue, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter.

[22] In the present case, the substantive issue that was determined by the court *a quo* did not dispose of the matter. The question still remained whether the application was, in the first instance, properly before the court. This was not an issue that the court *a quo* could ignore or wish away. The court was obliged to consider it and decide whether the matter was properly before it. It was, in short, improper for the court to proceed to determine the substantive factual and legal issues without first determining the propriety or otherwise of the application itself. If the court, as it appears to have done, tacitly accepted that the matter was properly before it, then reasons for such tacit acceptance should have been given.

[23] The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, “unless the issue so determined can put the whole matter to rest” – *Longman Zimbabwe (Pvt) Limited v Midzi & Ors* 2008 (1) ZLR 198, 203 D (S)

[24] The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Charles Kazingizi v Revesai Dzinoruma* HH 106/2006; *Muchapondwa v Madake & Ors*

2006 (1) ZLR 196 D-G, 201 A (H); *GMB v Muchero* 2008 (1) ZLR 216, 221 C-D (S).

[25] Although it is apparent in this case that the judge in the court *a quo* may have considered the question whether the matter was properly before him when he considered the merits, 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, which is a gross irregularity – *S v Makawa & Anor* 1991 (1) ZLR 142

[26] Consequently the failure by the court *a quo* to specifically determine the question whether or not the application was properly before it, its tacit acceptance that this was the position and the consequent failure on its part to give reasons why it had proceeded to deal with the substantive issues in the light of the preliminary point taken, vitiated the proceedings.

[27] In the light of the above conclusion, it becomes unnecessary to deal with the rest of the issues raised by the parties to this appeal.

DISPOSITION

[28] In the circumstances, it seems to me that the most appropriate course would be for this matter to be remitted to the court *a quo* for a determination whether, in the first instance, the application was properly before it, and, if so, whether the decision of the appellant denying leave is, on the facts and the law, sustainable.

[29] In the result this court makes the following order:

1. The appeal is allowed with the costs of the appeal being in the cause with those in case No HC 13496/12.

2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for a determination of the preliminary point taken by the appellant and, thereafter, if need be, the substantive issues raised by the parties.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Dube, Manikai & Hwacha, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners