

REPORTABLE (67).

(1) **HWANGE COLLIERY COMPANY LIMITED** (2) **DALE**
SIBANDA N.O
v
PALEHOUSE INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, BHUNU JA & CHIWESHE JA
HARARE: 20 JUNE 2022 & 7 JULY 2023

T. Zhuwarara, for the appellant

T.L Mapuranga, for the respondent

CHIWESHE JA: This an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare dated 1 March 2022, setting aside the second appellant's decision to deny the respondent leave to sue the first appellant and granting the respondent leave in terms of s 6 (b) of the Reconstruction of State Indebted Insolvent Companies Act [chapter 24:27] (the Act) to institute proceedings against the first appellant for damages for breach of contract.

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Aggrieved by the decision of the court *a quo*, the appellants have noted the present appeal for relief.

THE PARTIES

The first appellant is a company under administration pursuant to the provisions of the Act.

The second appellant is the administrator to the first appellant. In terms of the Act, a company under reconstruction, such as the appellant, cannot be sued without leave granted by its administrator.

The third respondent is a company duly registered in terms of the laws of Zimbabwe.

FACTUAL BACKGROUND

On 17 August 2017 the first appellant and the respondent entered into an agreement in terms of which the respondent was to hire out to the first appellant certain equipment for use at its mining operations. It was a term of the agreement that the first appellant would pay the respondent the sum of US\$ 220 000-00 as mobilisation and demobilisation fees for the equipment. It was a further term of the agreement that in the event of termination by either party, fourteen (14) days' written notice shall be given to the defaulting party, calling upon it to remedy its breach within those fourteen (14) days' failing which the agreement would be cancelled by the aggrieved party.

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On 31 January 2018, the first appellant addressed to the respondent a letter headed "Notice to terminate- equipment hire agreement" wherein it notified the respondent that it intended to terminate the agreement with effect from 15 February 2018. The first appellant alleged that the respondent had breached the agreement in a material way in that "since their commissioning to date, none of the hired excavators has been able to achieve the agreed monthly production target and none has been able to achieve 85% availability".

The respondent's view was that the first appellant's letter of termination did not comply with the provisions of the termination clause of the agreement. It therefore considered such termination to be unlawful. The respondent contended that as a result, it suffered damages in the sum of US\$ 4 000 000-00, representing the full contract price it would have realised had the contract run its full course. It also contended that the first appellant owed it the sum of US\$ 220 000-00 being the mobilisation fees.

By the time of this fall out the first appellant had been placed under reconstruction in terms of the Act and the second appellant was appointed as its administrator.

The respondent wrote to the second appellant seeking leave to sue the first appellant. Leave to sue was denied for the reason, *inter alia*, that the respondent's case had no merit and that instead it was first appellant who should be suing the respondent whom it had overpaid.

Aggrieved by the stance taken by the first appellant to deny it leave to sue the first appellant, the respondent approached the court *a quo* seeking review of the second appellant's decision. It listed grounds for review as follows:

- “(a) Gross unreasonableness of the decision arrived at. Judgment No. SC 67/23
- (b) Unfair withholding of leave to sue. Civil Appeal No. SC 136/22
- (c) Bias or interest in the cause.”

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After a full hearing the court *a quo* granted the application for review and issued the following order:

- “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.”

It is that order that is the subject of this appeal.

GROUND OF APPEAL

The grounds of appeal are as follows:

- “1. The court *a quo* erred in granting the respondent “leave to sue when such relief cannot be granted by a court acting in accordance with s 4 of the Administrative Justice Act [Chapter 10:28].
2. Furthermore the court *a quo* misdirected itself setting aside second appellant’s administrative decision in circumstances where the said court makes no finding of illegality, gross impropriety, manifest irrationality, arbitrariness or a failure by the administrative authority to apply his mind to the facts of the matter.
3. The court *a quo* also erred in enquiring into the merit of the dispute inter parties instead of evaluating whether, in the circumstances, the respondent was entitled to negation of the moratorium enjoyable by the first appellant under s 6 (b) of the Reconstruction of State Indebted Insolvent Companies Act [Chapter 24:27].
4. Concomitant to the aforementioned ground, the court *a quo* further erred in granting the respondent unconditional leave to institute proceedings against the first appellant in circumstances where the putative claim was not cognizable at law.”

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RELIEF SOUGHT

The appellants seek the following relief:

- “1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* be set aside and substituted with the following:
 - (i) The application is dismissed.
 - (ii) The applicant shall pay the respondent’s costs.”

THE ISSUES

The grounds of appeal raise the following issues:

1. Whether or not it was competent for the court *a quo* to grant leave to sue acting in accordance with s 4 of the Administrative Justice Act [Chapter 10:28] “AJA.”
2. Whether or not the court *a quo* erred in setting aside the second appellant’s decision in the absence of a finding of illegality gross impropriety, irrationality, arbitrariness or a failure by the administrator to apply his mind to the facts of the matter.
3. Whether or not the court *a quo* erred in enquiring into the merits of the matter instead of determining whether in the circumstances it was proper to protect the first appellant against the suit as provided for by the Act.
4. Whether or not the putative claim was recognized at law.

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ANALYSIS

The application for review in the court *a quo* was premised on the provisions of s 4 of AJA, which reads:

“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 s 3 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 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 s 3.
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.
 4. The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).”

The appellant contends that AJA does not give the court *a quo* the power to substitute the decision of the second respondent with its own. It is argued that in doing so the court *a quo* assumed power where none was provided for thereby usurping the function of parliament. The respondent has argued to the contrary, expressing a position which in my view, correctly interprets AJA on the point. It is a position which accords with previous decisions of this Court in similar cases. The question whether a court approached under the AJA may substitute its own decision for that of the administrative authority was answered in the affirmative in *Gwaradzimba v Gurta* AG SC 10/15 where it was held that

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“This ground of appeal by the appellant is without merit.

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 of the Act.

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.

The respondent's application to the appellant for leave to sue SMM, dated 3 August 2023 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, 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*."

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Accordingly the appellant's contentions to the contrary have no merit.

The appellants submit that the court *a quo* should not have set aside the second appellant's decision in the absence of a finding of illegality gross impropriety, irrationality, *arbitrariness* or failure by the administrative authority to apply his mind to the facts of the matter.

It is further submitted that the court *a quo* erred in enquiring into the merit of the matter instead of determining whether in the circumstances it was proper to protect the first appellant against the suit as provided for by the Act.

In deciding to decline leave to sue, the second appellant considered that there was no merit in the respondent's intended suit. He held for instance that the respondent had on the

whole, been overpaid in respect of the mobilisation fees and advance payments. However, the second appellant did not, through evidence, demonstrate the alleged over payments and the extent of such overpayment. Any overpayment should surely have been proved by reliance on proof of payment such as receipts. Further, as correctly observed by the court *a quo*, the second respondent failed to apply his mind to the question whether the agreement had been properly terminated. In terms of the agreement, a party seeking to terminate the same must give fourteen (14) days' notice to the defaulting party, calling upon it to remedy the alleged breach. In the event that the defaulting party fails to remedy the breach within the notice period, and only then, is the aggrieved party entitled to terminate the agreement. In *casu* the first appellant addressed a letter of notice to terminate. The same letter also served as the actual letter of termination. As observed by the court *a quo*: "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." The court *a quo* also noted that attached to the second appellant's report was an internal report highlighting the defects found on the respondent's equipment. There was no indication whether that report had been shared with the respondent, and if so, what the respondent's comments thereon were. In other words, there was no evidence that the respondent had been heard on that point contrary to the "*audi alteram partem*" rule.

The inconsistencies in the second appellant's reasons for declining the respondent's request for leave to sue the first appellant are glaring. The court *a quo* correctly noted these inconsistencies and granted the respondent's application for review. The court *a quo* did not make the traditional finding of illegality, gross impropriety, irrationality, *arbitrariness* or failure on the part of the second appellant to apply his mind to the facts before him. That on its own does not constitute a misdirection given the circumstances of this

case. The court *a quo* was of the view that the application for leave to sue had not been properly dealt with. It gave reasons for that view based on the papers before it. It described the second appellant's decision as being "contradictory" and "inconsistent" with the facts before it. It observed that certain evidence had not been shared with the respondent, who could not have been heard on that point. It also found that some critical positions had been taken in the absence of supporting evidence. In short, the court *a quo* found that the second appellant acted irrationally and failed to apply his mind to the facts before it. The second appellant, by not hearing the respondent on aspects of the evidence placed before him by the first appellant, breached a fundamental rule of natural justice, the need to hear both parties to the dispute before a decision is taken. The decision of the court *a quo* cannot be impugned. On the whole the second appellant's decision was grossly irrational.

The appellants have criticised the court *a quo* for determining the merits of the case instead of determining the application for review placed before it. This criticism is unwarranted. The court *a quo* was alive to the fact that in an application for review the court should not interrogate the merits of the matter. It categorically stated as follows:

"I have already highlighted that, it is not within the purview of this Court to interrogate the merits or demerits of the appellant's claims against the first respondent."

Indeed in finding against the appellants the court *a quo* did not determine the merits of the dispute between the parties. It merely granted leave for the respondent to sue the first appellant. On the contrary, it was the second appellant who based his reasons for refusal of leave to sue on the merits of the respondent's case. Assuming the second appellant acted properly in determining the merits of the case, all the court *a quo* did was to examine the manner in which that determination was arrived at. It found that the second appellant's decision was at variance with the evidence placed before him, that he had not properly

applied his mind to the facts before him and generally that the decision was grossly irrational. It also found that the second appellant had breached the rules of natural justice. All these shortcomings are recognized grounds of review. We agree with counsel for the respondent that the decision of the court *a quo* cannot be faulted. In the case of *Reserve Bank of Zimbabwe vs Granger and Anor* SC 34/2000 this Court held that:

“A gross misdirection of facts is either a failure to appreciate a fact at all or a finding that is contrary to the evidence actually presented, or a finding that is without factual basis or based on misrepresentation of facts”

The findings of the second respondent fail to meet the required standards of a trier of facts. For that reason they were grossly irregular.

Mr *Mapuranga*, for the respondent, submitted that the appellant’s fourth ground of appeal, raised belatedly, has no merit. Mr *Zhuwarara*, for the appellants, sought to argue that the respondent’s putative claim was not cognizable at law and for that reason the second appellant could not have granted leave to sue on such a defective claim. We agree with Mr *Mapuranga* that the respondent’s suit for breach of contract is clearly recognized at law. To argue otherwise is an attempt to turn the law of contract upside down.

The appellants further argued that the respondent’s intended claim is in United States dollars contrary to the provisions of Statutory Instruments 33 of 2019 which require that the transaction which arose in January 2018 be denominated in RTGS dollars at the rate of 1:1 with the United States dollar. In support of this contention the appellants relied on the decision in the case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R Barber (Pvt) Ltd and Anor* SC 3/20 wherein Malaba CJ had this to say:

“...the Presidential Powers (Temporary Measures) Amendments of Reserve Bank of Zimbabwe Act and issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars) (SI 33/19) expressly provides that assets and liabilities, including

judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one to one rate.”

Further reliance was placed on the remarks of Dube J (as she then was) in *Manica Zimbabwe (Pvt) Ltd* HH 705/20 where she correctly held that:

“...the effect of the Zambezi Gas case is that these provisions affect those assets and liabilities that existed prior to the effective date, were valued and expressed in United States dollars and were still so valued and expressed on the effective date, other than those referred to in s 44 c (2) of the principal Act, which shall be deemed to be values in RTGS dollars at a rate of one to one to the United States dollar. These legislative provisions prevent a court from awarding a judgment sounding in foreign currency unless in the case of the exceptions listed.”

The respondent has submitted that its putative claim is one for damages. A claim for breach of contract is an unliquidated claim and as such cannot be affected by the provisions, of SI 33 of 2019. We agree with those submissions. The value of the claim is still to be assessed by a competent court. In the *Zambezi Gas case supra*, Malaba CJ clarified the positions as follows:

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“ If, for the example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4 (1) (d) of SI 33/19 would not apply to such a transaction even if the payment would thereafter be in United States dollars. It is the assessment and expression of the value of the assets and liability in United States dollars that matters.”

In any event s 3(1) of SI 33/2019 amended the Reserve Bank Act by the insertion after s 44 B thereof of s 44 C which it provides for the issuance and legal tender of RTGS dollars, s 44 C (2) provides as follows:

“(2) The issuance of any electronic currency shall not affect or apply in respect of-

- (a) Funds held in foreign currency designated accounts, otherwise known as “Nostro FCA account” which shall continue to be designated in such foreign currencies and
- (b) Foreign loans and obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency.”

Thus the above provisions provide exceptions to the general rule that all assets and liabilities denominated in United States dollars on or before the effective date shall be deemed to be payable in RTGS at the rate of 1:1. The payment of foreign obligations in foreign currency is thus permissible. As long as these exceptions exist, the respondent cannot be denied leave to sue in United States dollar terms. The onus will be on the respondent to convince the trial court that his case is covered by either of those exceptions. The second appellant cannot take it upon himself to make that determination.

DISPOSITION

The appellant’s grounds of appeal are without merit. It is now settled that a court seized with a review application brought under s 4 of AJA may grant a remedy other than those specified therein. Indeed s 2 (2) of that Act specifically bestows upon a court the liberty to do so. It provides in clear and unambiguous language, that:

“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 administrative actions to which this Act applies.”

Any argument to the contrary by the appellants is misplaced. Although the court *a quo* does not formally make a finding as to illegality, gross impropriety, irrationality or *arbitrariness*, the record shows that the decision was replete with the same. The fact that the court *a quo* found the decision riddled with inconsistencies and contradictions suffices in the circumstances of this case. Further, the court *a quo* found that the second appellant had not complied with the rules of natural justice, a clear ground of review.

In general where a reviewing court finds the decision under review to be *ultra vires* the enabling legislation it should set it aside and refer the matter back to the administrative authority for a fresh decision. In *Affretair (Pvt) Ltd v MK Aircines (Pvt) Ltd* 1996 (2) ZLR 15 (5) this Court held that

“...the 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.”

The appellants have criticised the court *a quo* for usurping the second appellant’s discretion. However as indicated in the *Affretair* case *supra*, the rule is not absolute. In an appropriate case, a court may decline to refer back and instead substitute the decision of the tribunal with its own. In particular the court may, at its own discretion, make the substitution

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- (a) Where the end result is a foregone conclusion and it would be a waste of time to remit the matter, or
- (b) Where further delay would prejudice the applicant, or
- (c) Where the extent of bias or incompetence displayed is such that it would be unfair to force the applicant to submit to the same jurisdiction, and
- (d) Where the court is in as good a position as the administrative body or functionary to make the appropriate decision. (see the *Affretair* case *supra*).

The court *a quo* acted within its discretion in substituting as it did, the decision of the second appellant with its own. Its reasons for doing so can be gleaned from the tenor of its judgment, namely the extent of the incompetence displayed by the second appellant.

The record shows that the court *a quo* did not determine the merits of the matter as alleged by the appellant. It is also not correct that the respondent’s putative claim was not recognized at

law. As already shown the respondent was perfectly within the law in seeking to mount its claims.

For these reasons the appeal has no merit. It must be dismissed. Costs will follow the cause.

In the result it is ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellants shall jointly and severally pay the costs of the appeal, the one paying the other to be absolved.

MAVANGIRA JA: I agree

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BHUNU JA: I agree

Dube, Manikai & Hwacha, appellant's legal practitioner.

Rubaya-Chinuwo Law Chambers, respondent's legal practitioners.