

SMM HOLDINGS (PRIVATE)LIMITED
versus
DOROTHY MAPIMHIDZE
and
JONASON MURAPA
and
MILCA CHIUTSA
and
VINCENT NDLOVU
and
JOLINE MABURUKWA
and
LOVENESS MUTERO
and
REGISTRAR OF THE HIGH COURT
and
DEPUTY SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 5 June 2014

Opposed Application

Z T Zvobgo, for the applicant
Ms P Chiwetu, for the 1st to 6th respondents

ZHOU J: On 5 June 2014 I granted an order for the confirmation of the provisional order granted in this matter on 31 January 2013 and gave brief reasons. I advised the parties that my written reasons could be availed upon request by any of the parties. The applicant has asked for those written reasons. These are the reasons.

This matter was instituted as a chamber application under a certificate of urgency on 30 January 2013. On 31 January 2013 a provisional order was granted in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms –

1. The writ of execution issued by the 7th Respondent under High Court Case No. HC 8400/11 be and is hereby declared to void.
2. The writ of execution issued by the 7th Respondent under High Court Case No.

HC 8400/11 be and is hereby set aside.

3. The first to 6th Respondents shall bear the costs of suit.

INTERIM RELIEF GRANTED

That pending determination of this matter, the applicant is granted the following relief:

1. The 7th Respondent be and is hereby ordered to forthwith suspend the writ of execution issued under High Court Case number HC 8400/11.
2. The 8th Respondent be and is hereby ordered to refrain from proceeding with the implementation of the writ of execution issued under High Court Case No. HC 8400/11.
3. The first to sixth respondents shall bear the costs of this application.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the respondents by the applicant's legal practitioners or by a person in the employ of the applicant's legal practitioners or by the Deputy Sheriff."

The applicant is a company incorporated in terms of the Companies Act (*Chapter 24:03*). The first to sixth respondents are employees of the applicant. In September 2004 the applicant was placed under reconstruction by the Minister in terms of the provisions of s 4 of the Reconstruction of State-Indebted Insolvent Companies Act (*Chapter 24:27*). Afaras Mtausi Gwaradzimba was appointed to be the administrator to manage the affairs of the applicant during the period of the reconstruction.

The applicant failed to pay the salaries and benefits of the first to sixth respondents. The dispute relating to non-payment of salaries and benefits was referred to arbitration in terms of the provisions of the Labour Act (*Chapter 28:01*). On 14 June 2011 the arbitrator rendered an arbitral award in terms of which he ordered the applicant to pay to the employees a sum of US\$294 591-06. The arbitral award was registered by this court in terms of s 98(14) of the Labour Act for the purpose of enforcement. A writ of execution was issued to enforce the order. In response, the applicant applied for and was granted a provisional order as referred to above. The basis of the application was that in terms of the Reconstruction of State-Indebted Insolvent Companies Act (hereinafter referred to as the 'Reconstruction Act') the writ was invalidly issued. The first to sixth respondents opposed both the granting of the provisional order and its confirmation. The basis of the opposition is that s 6(c) of the

Reconstruction Act applied only to creditors who were owed debts before the company concerned was placed under reconstruction. As the salaries owed to the respondents relate to the period after the applicant had been placed under reconstruction, so goes the argument, the right to the protection afforded by s 6(c) of the Reconstruction Act were not available to the applicant.

Section 4(1) provides the following:

“If it appears to the Minister that, by reason of fraud, mismanagement or for any other cause –

- (a) A State-indebted company is unable or is unlikely to be able to make any repayment of a credit made to it from public funds on a date when the repayment is due; or
- (b) The State has become or is likely to become liable to make any payment from public funds in terms of a guarantee issued in favour of a State-indebted company;
And it further appears to the Minister that –
- (c) the State-indebted company has not become or is prevented from becoming a successful concern; and
- (d) there is a reasonable probability that if the company is placed under reconstruction it will be enabled to pay its debts or meet its obligations and become a successful concern; and
- (e) it would be just and equitable to do so;

the Minister may, after affording the company an adequate opportunity to make representations in the matter issue a reconstruction order in relation to the company and publish the order by notice in the *Gazette*:

Provided that where the Minister considers that immediate action is necessary to prevent irreparable harm to the company or its creditors, members or employees, the Minister may take such action before affording the company an opportunity to make representations in terms of this subsection.”

The reconstruction order in relation to the applicant was published in the *Government Gazette* of 6 September 2004.

The purpose of a reconstruction order has been adequately explained in this jurisdiction. See *African Resources Ltd & Ors v Gwaradzimba NO & Ors* 2011 (1) ZLR 105(S) at 112B-D. Further discussion on that aspect will not serve any meaningful purpose.

Section 6 of the Reconstruction Act provides for the effect of a reconstruction order as follows:

“A reconstruction order shall have the following effect, namely that –

- (a) the administrator shall assume the control and management of the company and

- recover and take possession of all the assets of the company; and
- (b) 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; and
 - (c) any attachment or execution put in force against the assets of the company after the commencement of the reconstruction shall be void.; and
 - (d) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the reconstruction, shall, unless the administrator otherwise orders, be void.”

Paragraph (c) is the provision applicable to the instant case. The clear meaning of that provision is that any execution or attachment of the assets of a company under reconstruction is null and void *ab initio*. That provision seals the fate of the writ of execution issued pursuant to the registered arbitral award. The writ is invalid. I should go further and point out that para (b) of s 6 invalidates even the arbitration proceedings pursuant to which the award was rendered, as those proceedings were commenced after the reconstruction order had been published and the applicant was already under reconstruction. Section 6 applies to creditors whose debts arose when the company was already under reconstruction as well as those whose debts arose before the reconstruction order was issued. The prohibition of execution is not a denial of the existence of the debt. It is only a remedy availed to a company under reconstruction to ensure that its assets are not depleted by execution thereby frustrating the purpose of reconstruction which is to enable the company to become a successful concern in order to prevent loss of public funds and protect the interests of creditors.

In the circumstances, the writ of execution issued by the Registrar at the instance of the first to sixth respondents was invalid, and must to be set aside.

Dube Manikai & Hwacha, applicant's legal practitioners
Gwaunza & Mapota, 1st to 6th respondents' legal practitioners