

ELIAS MARUFU, MUNASHE SOLOMON MUTANGA,
PHILIP RUNGANGA & PENIAS NCUBE
(Representing 984 other Shabanie and Mashaba
Mines non-managerial employees of SMM
Holdings (Private) Limited Under Reconstruction)
versus
AFARAS MTAUSI GWARADZIMBA (N.O)
(In his capacity as the Administrator of SMM
Holdings (Private) Limited Under Reconstruction)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 6 October 2016 and 17 May 2017

Opposed Matter

K.T. Madzede, for the applicants
T. Mpofu, for the respondent

MAKONI J: The applicants, who are non-managerial employees of SMM Holdings, made an application to the respondent seeking leave to institute proceedings against SMM in terms of s 6 of the State-Indebted Insolvent Companies Act [*Chapter 24:27*]. They intend to file a claim, against SMM, for unfair labour practice in that the employer has failed to pay their wages, salaries and benefits dating back to 2009. The respondent denied them leave to sue. They then filed the present proceedings where they seek relief in the following terms:

- (a) The decision of the respondent on of the 29th January, 2015 refusing applicants in terms of section 6 (b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] leave to institute legal proceedings for recovery of unpaid salaries and benefits be hereby set aside.
- (b) The applicants be and are hereby granted leave in terms of section 6 (b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*], to institute any action or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM Holdings (Private) Limited (under reconstruction) or its Administrator to claim payment of salaries and benefits due to them their employer.
- (c) The respondent be and is hereby ordered to pay costs of this application.

The basis for bringing the application is that the respondent is an administrative authority and must exercise discretion in accordance with s 3 (1) of the Administrative Justice Act [*Chapter 10:28*]. Where the administrative authority fails to so act, this court has power in terms of s 4 of the Act to come to the aid of an aggrieved party.

The respondent opposes the application and raises two points *in limine* namely that there is no application before the court as the applicants were not properly cited and that the applicant should have proceeded in terms of order 33 of the High Court Rules 1971.

Applicants not properly before the court

Mr *Mpofu* submitted that the deponent to the founding affidavit avers that he represents 981 others set out in Annexure A which is not an affidavit. He is not a lawyer who can represent others. The other 981 are not before the court. The other three, whose names are set out, do not allege that they are employees of the respondent. Their *locus standi* is therefore put in issue.

The law on this point was settled as far back in *Barry Thomas Proster and 35 Ors v Zimbabwe Iron and Steel Company Limited* HH 201/93 where it was stated.

“I am of the view that it would have been necessary to have gone further than that in order to properly make the other 35 persons applicants in this matter. I am satisfied that an affidavit from each of the other 35, which could have been done in simple terms simply stating that they had authorised Barry Thomas Proster to act on their behalf and confirming that they had read the papers, would have been necessary. This is particularly so when the related problem arises as to how many of the purported applicants have in fact taken up fresh employment. Accordingly, I am of the view that the papers as filed make only Barry Thomas Proster an applicant and accordingly any order made can only relate to Barry Thomas Proster.”

See also *Gudza v University of Zimbabwe* HH 85/95 at p 4

In casu, *Marufu*, in para 1 of the founding affidavit states the following

“1. I represent Shabanie and Mashaba Mines non-managerial employees of SMM Holdings (Private Limited (Under Reconstruction) in this matter. I have attached hereto as Annexure ‘A’-A²’ the duly signed authorisation form signed by the individual employees I represent and the 704 non-managerial employees who are the applicants herein. ”

The preamble to Annexure A reads as follows

“We the undersigned employees of Shabanie land Mashaba Mines operating under SMM Holdings (Private) Limited (Under re-construction) do hereby authorise one or more of the following:

- (i) Elias Marufu
- (ii) Munasha Solomon Mutanga
- (iii) Philip Runganga
- (iv) Penias Ncube

To present us in resolving our complaint of unfair Labour practice against the Employer which is pending before the Labour Officer/Arbitrator/Labour Court/High Court of Zimbabwe. In particular we have authorised Elias Marufu to depose to the founding affidavit and other supplementary affidavits which may be filed in support of our application to the High Court for leave to be granted to sue the Administrator of SMM Holdings (Private) (Under Reconstruction).”

Thereafter is a list which sets out the pay number, surname, name and signature of the 981 others. It is not in affidavit form.

The issue is whether the list produced by the deponent establishes his claim that he is duly authorised to represent the body concerned. The answer can be found in *Mashave v Zimbabwe United Passenger Co. Ltd & Anor* 1998 (1) ZLR 567 H the following was stated in the headnote:

“For the applicant to prove such authorisation it is not necessary in every case for him to produce an individual affidavit from each applicant to be represented, stating in express terms that he has authorised the applicant to act on his behalf. Proof of authorisation to start proceedings on behalf of another in the High Court is not normally required to be in affidavit form and there is no reason in principle why some document, other than an affidavit, if properly presented, could not be used to prove the authority to represent others. Especially where there are a large number of applicants, there is no objection in principle to the filing of a joint document of authorisation and there are practical reasons of convenience why this should be allowed. In the present case, however, the joint document contained a number of defects and did not prove the authority of the applicant to represent the other applicants.”

This position was confirmed by the Supreme Court in *Mashave & Ors v ZUPCO* 2000 (1) ZLR 478 at 479 E-G where the following was stated:

“It may be that when the Class Actions Act [*Chapter 8:17*] (Act 10 of 1999) comes into effect, it will be easier for persons in this position to proceed as a group or class. In the meanwhile, we have to deal with the problem as best we can under r 89 of the High Court Rules, using the guidelines set out in the *High Court in Gudza v University of Zimbabwe* HH 85-95 and *Prosser & Ors v Zimbabwe Iron & Steel Co Ltd* HH 201-93.

In the court a quo, the learned judge held, after applying the guidelines, that none of the appellants, other than Mr Mashave, was properly before him. What he had before him were two long lists of names, one of which has 409 names and the other 324. Many of the names in the first list have signatures next to them, which purport to indicate that those persons support the averments put forward by Mr Mashave. But quite a large number of the signatures are not there. None of the signatures is authenticated; some are first names only, some are signed “pp”. the person concerned. And there are other problems, which the learned judge specified.”

Going by the *Mashave supra* my view is that the 908 employees, set out in Annexure A, are properly before me. It would be impractical to obtain individual affidavits from such a large number of persons and the record would be unacceptably burdened and clumsy to work with if courts were to insist that individual affidavits be obtained from each prospective representee in every case.

With regards the issue of *locus standi* of the other three applicants, they associate and align themselves to averments contained in the affidavit by Marufu. Marufu makes reference to Annexure A where their names are mentioned and given authority to represent the other workers in legal proceedings.

I will therefore make a finding that the application was instituted by the named applicants and 981 others set out in Annexure A.

Whether the applicants should have proceeded in terms of Order 33

Mr *Mpofu* submitted that the applicants seek a review of the decision of the respondent and should have proceeded in terms of 0.33. The provisions of 0.33 have not been complied with and therefore the application is not properly before me.

Mr *Madzedze* submitted that the application is properly before the court. He referred *Gurta AG v Afaras M Gwaradzimba NO* HH 353/13 where the same issue was raised and determined.

At p 4 of the cyclostyled judgment MATHONSI J determined the issued as follows:

“Section 4 allows an aggrieved person 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 a remedy 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 agree entirely with the position and will find that that he application is properly before me.

Merits

Mr *Madzedze* submitted that the application is brought in terms of s 4 (1) of the Administrative Act [*Chapter 10:28*]. The applicants were aggrieved by the respondent's failure to act in accordance with s 3 (1) the Administration Act [*Chapter 10:28*]. He further submitted that the court is empowered to grant an order for leave to institute proceedings against the company which is under reconstruction as the respondent has already stated that he is not prepared to grant such leave. He relied on the authority of *Affretair (Pvt) Ltd & Anor v M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S).

He further submitted that the respondent's conduct violates s 65 of the constitution which protects *inter alia* employees' rights to fair and safe labour practices and employee's entitlement to be paid fair and reasonable wages.

He also referred to s 12 A of the Labour Act [*Chapter 28:01*] which provides that remuneration due to an employee shall be paid at a regular basis and that it is an unfair labour

practice if it is not adhered to. He further submitted that in terms of s 2A of the Labour Act [*Chapter 28:10*], the provisions of the Labour Act prevail over any enactment which is inconsistent with its provisions.

He lastly contended that the respondent's fears that allowing due process of litigation to commence will prejudice the viability of the company are covered by s 6 of the Act which protects the assets of the company from execution.

Mr *Mpofu* submitted that there is confusion in the applicants' case. At one point they say the request has not been responded to and on the other seeking the setting aside of the first respondent's decision.

Mr *Mpofu* submitted that there was serious non-disclosure by the applicants. The applicants are being paid though not in full. They are involved in negotiations with the respondent. There is an agreement that they be paid in kind.

He further contended that the discretion to grant leave lies with the respondent. The applicants must go further than to show that they are not being paid. They are engaged in negotiations with the respondent. Their legal practitioners indicated that they represented both the managerial and non-managerial employees.

He further contended that it is impossible for the court to substitute its decision over that of the respondent.

The issue is whether the applicants have made out a case for the court to set aside the decision of the respondent refusing leave to sue the company and substitute it with its own decision.

The parties are agreed that the respondent, in his capacity as administrator of a company under reconstruction, is an administrative authority as defined in terms of s 2 of the Administration of Justice Act [*Chapter 10:28*]. In terms of s 4 any person who is aggrieved by the decision of an administrative authority can approach this court for relief. Section 6 of the Act provides as follows:

“6 Effect of reconstruction order

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

- (a) ...
- (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)

In *Movement for Democratic Change and Another v Chinamasa and Anor N.O* 2001

(1) ZLR 69 (S) it was stated:

“The right of full and unimpeded access to courts is adjudication of justifiable disputes. It ensures a mechanism by which such disputes are resolved in a peaceful, regulated and institutionalized manner.”

This is echoed in s 69 of the Constitution which confers upon every person, in determination of all rights and obligations, the right to a fair, speedy and public hearing within a reasonable time and before an independent and informed court, tribunal or other forum established by law. With regards to administrative functions, s 68 confers upon every person a right to administrative conduct that is lawful, prompt, reasonable, proportionate, improved and both procedurally and substantively fair. Section 68 (3) makes provision that an Act of Parliament must give effect and provide for these rights and provide for a review mechanism by the courts. The Administration of Justice Act [*Chapter 10:28*] affords such rights and review mechanisms. There are limited circumstances where the right to approach the courts for adjudication of justiciable disputes is subject to authorization. One such situation is of a company under reconstruction.

Once a reconstruction order is issued by a Minister of Justice, no action or proceedings can be proceeded with or commenced against the company except by leave of the administrator and subject to such terms as he may impose. The purpose of such a restriction is to avoid burdening the company with unnecessary litigation. At the same time s 6 of the Act is not meant to give companies under reconstruction amnesty from all actions under the scope of self-preservation.

The administrator is expected to exercise his discretion judiciously and in any case in accordance with s 3 (1) of the Administration of Justice Act [*Chapter 10:28*] which sets out the responsibilities of an administrative authority.

In casu the applicants initiated the whole process by their letter dated 18 June 2014 addressed to the respondent’s legal practitioners. In the penultimate paragraph, the letter summarises the applicant’s position as follows:

- “(a) That the Administrator urgently facilitates a meeting involving the relevant Minister and all the interested parties.
- (b) If the Administrator is against the idea of holding a meeting our clients are seeking the Administrator’s leave so that they are permitted to seek redress on their complaints of unfair labour practice in terms of the relevant provisions of the Labour Act, [*Chapter 28:01*].

- (c) If the Administrator withholds his leave, our clients intend to approach the Constitutional Court seeking approximate relief."

There was no response from the respondent's legal practitioners. This was followed by letter dated 27 January 2015 addressed to the respondent. The letter reads, in part,

"We have now been mandated by the employees to seek formal leave from you in terms of Section 6 (b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] so that our clients are able to commence proceedings against the Employer for the resolution of their complaint of unfair labour practice.

As you will appreciate that the dispute or complaint of unfair labour practice goes back to 2009, it is in the interest of the Employees that the matter be resolved urgently. We shall be grateful if you furnish us with your formal response within the next 30 days, advising us whether you have granted the disgruntled employees your leave or permission for them to refer the dispute to arbitration.

Should we fail to get your response within the next 30 days, our clients will approach the Constitutional Court seeking appropriate relief."

The respondent responded by letter dated 29 January where he raises the following pertinent points

- (i) That he had not received any previous correspondence concerning the issue of unfair labour practice and was not aware of the dispute, that were being referred to.
- (ii) He was not aware of which employees were represented by the legal practitioners
- (iii) Was prepared to enter into negotiations with employees and arrange to then to meet the relevant authorities.
- (iv) That at the meeting of 4 April 2014 proposals were put to pay the arrear wages either by the employees being issued shares in SMM or have the houses that they live in be sold to them.

He concluded the letter in the following terms.

"2.6 At this stage, therefore, I will not grant leave for the employees to take legal action against SMM, as I believe that we are in agreement as to the processes we need in order to sort out their problems, as well as those of SMM. I will, therefore, advise that if the employees wish to meet with the relevant authorities, they need to let me know, so that, if necessary, I can arrange for the meetings."

The applicants' legal practitioners responded by letter dated 3 March 2015 the last four paragraphs of which read

“Our clients are now of the view that it is not in their interest for now to start another round of “talks”. They see your concession to facilitate dialogue at this stage as just another delaying tactic.

Our clients disassociate themselves from the alleged agreement set out in the letter dated 25th August, 2014 addressed to you by Messrs Calderwood, Bryce Hendrie & Partners. The group we represent is not aware of any formal offer being made to it to exchange houses in place of the arrear salaried and wages. May we be supplied with a copy of the minutes of the meeting of the 4th April, 2014 to enable us to seek further clarification from our clients.

We note when everything has been said and done that your concerns seems to be more with plight of the employer and ono efforts seem to have been taken to address the employees’ plight. While our clients do appreciate the current economic problems, they have to think of how and when they are getting the next meal let alone school fees for their children and legal dependants. It is on this basis that they have instructed us to approach the Constitutional Court for appropriate relief as you seem to have shut all doors by refusing to grant your leave.

We are therefore working on the Constitutional Court application unless you grant the employees leave to approach the Arbitrator. We have not taken the trouble to copy our response to all the Honourable Ministers and officials whom you copied in your letter of the 29th January, 2015. We trust that you will update them on these developments. So accordingly, our instructions are that we should proceed to Court unless leave is granted within the next 14 working days.”

In para 17 and 18 of the applicants founding affidavit, the deponents states

“17. The 14 working days within which respondent was requested to make his official position open on whether or not to grant leave expired and up to this date respondent has not bothered to respond to the letter (Annexure H) though he acknowledged having received it when he telephoned our lawyers on the 4th Marc, 2015 at 4.35 pm complaining about the insinuation he draw from the contents of Annexure H. Up to this date the respondent has not replied to Annexure G.

18 As a result of respondent’s failure to respond to Annexure H applicants have been adversely and materially affected in that their right to seek redress of their complaint of unfair labour practice as provided for by section 8 as read with Section 2 A 1 (a) (f) and Section 2 A (3) of the Labour Act [*Chapter 28:06*] and as provided for in terms of Section 65 of the Constitution of Zimbabwe has been curtailed and in fact taken away from them.”

As was correctly pointed out by Mr *Mpofu*, the applicants contradict themselves. On one hand they say the respondent did not respond to their letter and in another they seek the setting aside of the respondent’s decision in the draft order.

If there is no decision made by the respondent then the remedy is to seek an order that the decision be made in terms of s 4 of the Administrate Act. It appears the applicants are operating on the premise that the fact that the respondent did not respond to their letter means he had denied them leave.

From the papers, one cannot say the respondent has denied the applicants leave. In his letter, the respondent advised of the measures that he has taken to address the concerns of the

applicants. He referred to a meeting which was attended by representatives of both managerial and non-managerial staff and their erstwhile legal practitioners Messrs Calderwood, Bryce Hendrie & Partners. This is confirmed in a letter addressed to the respondent by the employees' said erstwhile legal practitioners. The letter makes reference to the meeting held between the respondent and SMM Holdings Workers Leadership which included non-managerial employees. In it the employees accept a proposal made to offset the arrear wages with offers to purchase the houses the employees are living in. The respondent further undertook to set up a meeting between the employees and government authorities. His position is that whilst he is pursuing these efforts, he does not see the wisdom of granting the leave.

My view is that the position adopted by the respondent is reasonable in the circumstances. He exercised his discretion properly as he is empowered to do in terms of s 6 of the Act. If his current efforts do not yield results, then the matter can be referred for arbitration. Doing so at this stage would defeat the protection offered to companies under reconstruction against unnecessary litigation. In any event even if the applicants were to obtain leave to sue and successfully obtain an order against SMM, they will not be in a position to execute the judgment as s 6 (c) of the Act protects the property of a company under reconstruction against attachment or execution. The applicants have not made out a case for the relief that they seek.

In the result it is hereby ordered that

1. The application be and is hereby dismissed.
2. There is no order as to costs.

Jumo Mashoko & Partners, applicants' legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners