

REPORTABLE (4)

Judgment No. SC 5/10
Civil Appeal No. 9/07

SMM HOLDINGS LIMITED v

THE MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY
AFFAIRS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ & SANDURA JA
HARARE, OCTOBER 5, 2009 & MAY 11, 2010

A P de Bourbon SC, for the appellant

E I Manikai, for the respondent

CHIDYAUSIKU CJ: The facts in this case are common cause. They are clearly set out in the applicant's founding affidavit and are aptly summarised by the Heads of Argument of the applicant. The facts are as follows.

The appellant is a company incorporated in the United Kingdom. It is the sole shareholder of SMM Holdings (Private) Limited (hereinafter called "SMMZ"), a company incorporated in Zimbabwe. On 6 September 2004 a reconstruction order was issued in respect of SMMZ by the respondent in terms of the Presidential Powers (Temporary Measures) (Reconstruction of State-Indebted Insolvent Companies) Regulations, 2004 (hereinafter referred to as "the Regulations"). On 25 February 2005

the Reconstruction of State-Indebted Insolvent Companies Act [*Cap 24:27*] (hereinafter referred to as “the Act”) was promulgated. In terms of s 38 of the Act, every order made and every action or decision taken or thing done by the present respondent or any administrator in terms of the Regulations was deemed to have been done in terms of the Act.

The present application was brought in the High Court challenging the issue of the reconstruction order on review and seeking to have it set aside. The founding affidavit was signed on behalf of the appellant by Mutumwa Dziva Mawere (hereinafter referred to as “Mawere”). At the time of the application being launched, Mawere was a citizen of, and resident in, South Africa. He was the beneficial shareholder of Africa Construction Limited and in turn of Africa Resources Limited, which company was the beneficial owner of the appellant. After an unsuccessful attempt to extradite Mawere from South Africa on exchange control charges, the respondent declared Mawere to be a specified person in terms of the Prevention of Corruption Act [*Cap 9:16*]. The legality of that specification is the subject of separate court proceedings, which are yet to be concluded.

A number of preliminary points were taken against the appellant in the court *a quo*. Firstly, the respondent took the point that the appellant was an associate company of SMMZ and therefore was itself a company under reconstruction. It was argued that the appellant cannot launch legal proceedings in its own name. Section 18(e) of the Act vests in the administrator, in my view, to the exclusion of everyone else, the

power to commence and defend legal proceedings on behalf of a company under reconstruction. The second preliminary point taken was that since Mawere was a specified person he was prohibited from swearing an affidavit on behalf of the appellant without the leave of his investigator. Thirdly, it was submitted that the application for review did not comply with r 259 of the High Court Rules, in that it was filed out of the time stipulated for the filing of a review.

All three preliminary points raised by the respondent were answered in favour of the respondent. Accordingly, the court *a quo* did not examine the merits of the application for review, but dismissed it on any one of the three preliminary points taken by the respondent.

The appellant now appeals against the finding of the court *a quo* on those three preliminary points. Thus the issues that fall for determination in this Court are – (1) whether or not the appellant has *locus standi* to commence these proceedings; (2) whether or not Mawere could depose to the founding affidavit without the leave of his investigator; and (3) whether the application for review was filed timeously and if not whether condonation should have been granted.

Dealing firstly with the competency of the appellant to bring this application, the learned Judge in the court *a quo* found that the appellant company is deemed to be a company under reconstruction. This is quite apparent from p 3 of her cyclostyled judgment. Having concluded that the appellant was deemed to be a

company under reconstruction, the learned Judge concluded that this application could not be brought by the appellant on its own behalf.

The relevant provision of the Act is s 4(3), which reads as follows:

“(3) A reconstruction order shall, in addition to the company named therein, be deemed to be issued in relation to every –

(a) associate company of that company; ...”.

The appellant, on its own admission, has stated that it is the sole shareholder of SMMZ. On that basis, the appellant is inevitably an associate company of SMMZ, a company under a reconstruction order. Indeed, Mr *de Bourbon*, for the appellant, did not in any way attempt to argue that the appellant is not an associate company of SMMZ. This is clearly understandable, given the clear and unambiguous language of s 4(3) of the Act and the direct shareholding link between the two companies.

In terms of s 18(1)(e) of the Act the power to bring and defend legal proceedings on behalf of a company under reconstruction is vested in the administrator. It provides as follows:

“18 General powers of administrator in relation to company under reconstruction

(1) The administrator in reconstruction shall have the following powers, which he or she may exercise without the authority of the directors or shareholders of the company under reconstruction –

(a) – (d) ...;

- (e) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding; ...”.

The effect of s 18(1)(e) as read with s 6(a) of the Act, which provides that the administrator shall assume the control and management of the company, is to vest in the administrator, to the exclusion of anyone else, the *locus standi* to bring an action on behalf of a company under reconstruction.

Mr *de Bourbon*, for the appellant, as I have already stated, never argued that the appellant is not an associate company of SMMZ and therefore by operation of the law a company under a reconstruction order. He, however, submitted that ss 4(3) and 18(1)(e) of the Act do not apply to the appellant because the appellant is a foreign registered company. He argued that the above sections, and indeed the whole of the Act, do not have extra-territorial application and accordingly do not apply to the appellant. I am not persuaded by this argument. In fact I do not think that this argument is worthy of any close examination.

The language of the Act is explicit and it applies to everybody, foreigner or not, who commences action in this jurisdiction. The probabilities are that the disability placed on the appellant and Mawere by the Act would not apply if they were suing in a British court, or in any court outside this country for that matter. To that extent, Mr *de Bourbon* may be correct in submitting that the Act does not have extra-territorial application.

I have no doubt in my mind that the Act applies to everybody, whether a foreigner or a citizen of Zimbabwe, who seeks to bring proceedings in this jurisdiction.

Accordingly, I agree with the learned Judge in the court *a quo* that the appellant lacks *locus standi* in terms of s 18(1)(e) as read with s 6(a) of the Act to launch these proceedings.

Turning to the issue of whether or not Mawere had the authority to sign the founding affidavit, for the purposes of this application, it is common cause that Mawere is a specified person. Mawere makes the following averment in para 1 of the founding affidavit:

“I MUTUMWA DZIVA MAWERE, do hereby make oath and swear that:

1. As I explain hereunder, I represent the applicant in this matter. The facts set out hereunder are within my personal knowledge and are true and correct.”

Mawere does not expressly say in what capacity he is making the affidavit. He, however, avers that he represents the appellant, which makes him an agent of the appellant, and is deposing to the affidavit as an agent of the appellant. He is not simply filing that affidavit as a witness in proceedings concerning the appellant. While it may be debatable whether Mawere can give evidence, either oral or in the form of an affidavit, as a witness in proceedings involving the appellant, he is prohibited in terms of

s 10(1) (e) and (f) of the Prevention of Corruption Act from acting on behalf of the appellant without the authority of his investigator. The section reads:

“10 Transactions by specified persons

- (1) Subject to this section, a specified person shall not –
- (a) – (d) ...;
- (e) perform any act as a director of a company or as a partner in a partnership or in any manner conduct or manage the business or affairs of a company or partnership;
- (f) perform any act as an agent of a company or partnership that is also a specified person without the approval of the investigator assigned to the specified person or otherwise than in accordance with any conditions imposed by the investigator;

without the approval of the investigator assigned to that specified person or otherwise than in accordance with any conditions imposed by the investigator.”

The conduct of Mawere in bringing this application as a representative or agent of the appellant amounts to conducting or managing the business of the appellant contrary to the provisions of the above sections. Clearly Mawere lacks capacity to do what he did without the approval of his investigator.

The conclusion of the court *a quo* on this issue cannot be faulted.

I have concluded that both the appellant, as the applicant in the court *a quo*, and Mawere, as deponent of the founding affidavit, lacked legal capacity for their actions. It follows that the application for review was not properly before the court *a quo*. As there was no proper application before the court *a quo*, the issue whether such

application was brought timeously or not does not arise. Accordingly the third issue falls away.

Before concluding, I wish to make the following observation. Mawere is the author of his own misfortune. The Act does not bar him from deposing to an affidavit. The Act requires him to obtain the leave of the investigator. Once he has obtained such leave, he can depose to the affidavit. It is clear on the papers that Mawere is dissatisfied with the Act and has challenged the constitutionality of the Act in other proceedings. But until that Act has been ruled unconstitutional, compliance with the provisions of the Act is mandatory.

In the result, the appeal is dismissed with costs.

MALABA DCJ: I agree

SANDURA JA: I agree

Costa & Madzonga, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners