Judgment No. HB 113/2003
Case No. HC 2784/2002

SIBEKITHEMBA SIBANDA MAFENGU

Versus

CECIL MADONDO (NO)

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 MARCH & 6 NOVEMBER 2003

Applicant in person
E S Wolhuter for the respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

"**Terms of the order sought**

A. That you show cause to this honourable court why a final order should not be made in the following terms-

1. That the respondent be and is hereby ordered not to consider any other investor except for IDC before the applicant's are approved, so as to secure the applicant's legal voting right in any Merspin Creditors' meeting.
2. That the court declare all Merspin proceedings *null* and *void* in the event that IDC has no capacity to purchase Merspin Ltd. Creditors to be paid as per the respondent's schedule issued in June 2002.
3. That all employees dismissed unlawfully be reinstated with benefits.
4. That the respondent pay costs of this application.

Interim Relief Granted

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

1. The respondent be and is hereby ordered not to bid for both Merspin Ltd and Gloweave, a subsidiary company until the applicant's employment condition is determined and/or his claim is approved."

The respondent is being sued in his official capacity as the Judicial Manager of Merspin Limited, a company under judicial management. The applicant premises his legal standing, *locus standi*, on the fact that he was in the employ of Merspin Ltd at the time of provisional liquidation. He stated that he relied on the provisions of section 259(I) of the Companies Act [Chapter 24:03] and sections 65(1) and (2), section 103(1) and 2 of the Insolvency Act [Chapter 6:04]. I dismissed the application with costs on 27 March 2003 and this judgment gives my reasons for doing so.

Point *in limine*

The Judicial Management order granted on 9 August 2002, as read with the Provisional Management Order that was granted on 8 March 2002 provides in sub paragraph 2(e) that

> "all actions and applications and the execution of all writs, summonses and other process against the respondent company shall be stayed and not proceeded without the leave of this court."

It is common cause that the applicant launched these proceedings without obtaining the leave of this court. The respondent raised a point *in limine* on the applicant's right to be heard on account of his failure to comply with the said order. In the applicant's submission it is clear to me that he does not appreciate the procedural issue involved as he persistently dealt with the merits of the application. The failure to apply for leave seems to stem from ignorance as opposed to a flagrant disregard of the order in question. Although an application for an indulgence has not been properly articulated before me, I am prepared to exercise my discretion in favour of allowing the applicant being heard on the merits. I will grant him leave to be

heard. As rightly stated by DENNING LJ in *Hadkinson* v *Hadkinson* [1952]2 ALL ER 567 (CA).

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by a grave consideration of public policy". – see also *Jackman* v *Jackman* 1969(2) RLR 534 (GD). In the words of McNALLY JA in *Songore* v *Olivine Industries* 1988(2) ZLR 210(S) at 213A-B-
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> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence." See also *Saitis and Co* v *Fenlake* [2002] 4 ALL SA 50 and *Challenge Auto (Pvt) Ltd and Ors* v *Standard Chartered Bank of Zimbabwe Ltd* HH-221-02.

The Main Application on the Merits

The applicant seeks a prohibitory interdict. This is an order made by a court prohibiting a particular act for the purpose of enforcing a legally enforceable right which is threatened by the anticipated harm – *Bull* v *Minister of State Security & Ors* 1987(1) SA 422 (ZH); *Gosschalk* v *Roussow* 1966(2) SA 476 (C) and *Woods & Ors* v *Ondangwa Tribal Authority* 1975(2) SA 294 (A).

In order to succeed in obtaining a prohibitory interdict the applicant must establish first, a clear right, second, an injury actually committed or reasonably apprehended, and, third, the absence of similar protection by any other ordinary remedy – *Setlogelo* v *Setlogelo* 1914 AD 221; *Diesploot Residents* v *Landowners Association and Ors* 1993(3) SA 49 (T); *Knox D'Arcy Ltd & Ors* v *Jamieson & Ors* 1995(2) SA 579 (W) and *Sanachem (Pty) Ltd* v *Farmers Agri-Care (Pty) Ltd & Ors* 1995(2) SA 781(A).

In his detailed founding affidavit the applicant raised a number of irrelevant and historical facts which have been dealt with and finalised in previous proceedings and determined with regard to Merspin Limited. In case number 2207/00 a

Provisional Winding Up Order was granted and such provisional winding up order was discharged on 8 March 2002 under case number 650/02 when the company was then placed under Provisional Judicial Management. Thereafter although the applicant opposed the Judicial management application his opposition was withdrawn on 9 August 2002 when he as legally represented by Cheda & Partners Legal Practitioners and the Provisional Judicial Management order was confirmed.

The applicant's claim that he was unlawfully retrenched and that he should be re-instated was dealt with in an application which he made to this court against the respondent under case number 3127/01, and his application was dismissed and as the applicant did not appeal against that order, consequently this aspect of the matter is *res judicata*.

The suggestion that the applicant was retrenched and that his claims should be dealt with in terms of the Labour Relations (Retrenchment) Regulations Statutory Instrument 404/90 (as amended by Statutory Instrument 252/92) has no substance or basis in law. The applicant was not retrenched as such but his employment was determined upon the granting of a Provisional Winding Up Order as covered by section 103 of the Insolvency Act [Chapter 6:04] which provides that "his contract shall be determined, unless he is required by the legal practitioner of the estate to remain longer in the service of the estate."

The applicant is seeking an interim relief that "The respondent be and is hereby ordered not to bid for both Merspin Limited and Gloweave, a subsidiary company, until the applicant's employment condition is determined and/or his claim approved". The order sought seems to assume that the applicant's claim takes precedence over other claims against the estate. In his founding affidavit the

applicant did not suggest or allege that the respondent is to make a bid for either Merspin Limited and/or Gloweave (Pvt) Ltd and no foundation has been set out for this interim relief in his papers. Consequently there is no basis upon which such relief should be granted.

In any event, the applicant does not meet the requisites for an interdict as set out in the cases stated above – see also *Ericson Motors Welkom Limited* v *Protea* 1973(3) SA 685 at 691. On the first requisite of a clear right is seems that the application is intended to protect the applicant's labour rights. On the second requisite there is no allegation or averment of irreparable harm. Looking at the facts of the cases it is obvious that the applicant can simply prove his claim and recover from insolvent estate. There is, therefore, no basis for a well grounded fear of irreparable injury. Part of his claims i.e. the pension claims will have to be directed to Old Mutual Pension Fund and not the respondent. On the third requisite there is no averment in the founding affidavit on the absence of any other remedy. There is indeed another remedy which I have just alluded to that is lodging such claims against the estate at appropriate for a created by the enabling Act i.e. the Insolvency Act.

Terms of the final order sought have not been supported by facts. There is no basis or foundation for suggesting that the respondent should not considered any investor except the IDC. This would be contrary to the provisions of the Insolvency Act. In any event the IDC has no capacity to purchase Merspin Limited. There is no foundation laid down for the prayer sought that I declare all Merspin's proceedings *null* and *void*. The respondent's role is facilitative. He is simply facilitating offers for consideration by the shareholders and creditors and it is obviously in their interests (the applicant included) to consider all offers and not only that of the IDC.

A consideration of the bids to acquire control of Merspin Limited is only to be considered by creditors and members at a subsequent meeting and thereafter it will be necessary for an application to be submitted to this court in terms of section 191 of the Companies Act [Chapter 24:03] for formal meetings of shareholders and creditors to be called. At the latter meetings a majority in number representing three quarters in value of the creditors or members is required before such scheme of arrangement can be sanctioned by the court.

According to papers before me the total amount of creditors' claims against Merspin Limited is of the order of $192 million and consequently even if the applicant was able to establish a claim of $5 295 709,83 (as averred in his papers) his claim would only represent approximately 0.02% of the total amount of the claims and therefore, his voting power in that extent is negligible. Moreover it is really up to him to establish his claim in the same way as any other creditor and he is not entitled to any special consideration until he does so. In a nutshell this is a regime created by the provisions of a combination of the Insolvency Act and the Companies Act.

The prayer for re-instatement of other employees is devoid of merit. The applicant has no *locus standi* to represent them. I will disregard it.

In light of the above it is clear that the applicant jumped the gun. He was premature in instituting these proceedings and has not established a prima facie case and the relief sought is not merited. It is for these reasons that I dismissed the applications with costs.

Joel Pincus, Konson & Wolhuter respondent's legal practitioners