Judgment No. HB 37/05
Case No. HC 385/05

MERSPIN LIMITED

Versus

SIKHOLIWE BURUKAI AND 41 OTHERS

And

ZIMBABWE TEXTILE WORKERS UNION

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 MARCH & 21 APRIL 2005

Ms H M Moyo for the applicant
K Phulu for all the respondents

Urgent Application

NDOU J: The applicant seeks an order in the following terms:

"**Terms of the 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 1st to 42nd respondents (inclusive) jointly and severally be and are hereby interdicted and prohibited from in any way entering or intruding upon, the premises of the applicant or coming within a distance of 30 metres of applicant's offices at Ironbridge Road, Belmont, Bulawayo or contracting by any meant any member of applicant's staff or carrying on any activity of a nature likely to cause a breach of the peace or intervene with the applicant's business operations.

2. The respondents jointly and severally, the one paying the other being absolved pay the applicant's costs of suit on an attorney and client scale.

Interim Relief Granted

Pending the determination of this matter the applicant is granted the following relief:

1. The 1st to 42nd respondents (inclusive) jointly and severally be and are hereby interdicted and prohibited from in any way entering or intruding upon, the premises of the applicant or coming within a distance of 30 metres of applicant's offices at Ironbridge Road, Belmont, Bulawayo or contracting by any meant any member of applicant's staff or carrying on any activity of a nature likely to cause a breach of the peace or intervene with the applicant's business operations.
2. The respondents jointly and severally, the one paying the other being absolved pay the applicant's costs of suit on an attorney and client scale.

The background facts leading to this application are the following. The 1st to 41st respondents are employees (ex-employees according to the applicant) of the applicant. In this application I will not determine the issue of whether they are employees or ex-employees. The 42 respondent is the chosen registered trade union representing the other respondents. On 11 November 2004, the 1st to 41st respondents embarked on strike action. The strike action was called soon after the applicant company was taken over by the current management. The respondents were particularly unhappy when the current management announced that they would not be paid annual bonuses for year 2004. The 1st and 41st respondent downed tools and

took part of the management hostage. All this characterised the level of distrust existing between the employees and the new management. The language used by the employees is indicative of their disgruntlement about the take-over by the new management. Industrial harmony seems to be lacking. From the papers it is evident that this particular issue was not managed to the satisfaction of the employees at the time of the take-over resulting in this element of trust. From the founding affidavit of the applicant the employees are suspicious that the new management authored their labour problems inclusive of the non-payment of the year-end bonuses for 2004. The above-mentioned management were later force marched out of the company premises. The said management contacted the police who then came to their rescue. The management (using a formula not apparent in the papers) identified 1st to 41st respondents as the "main culprits" from the workers who participated in the strike. Hearings were conducted in terms of the company's code of conduct leading in their dismissal. The respondents appealed to the Managing Director but their appeal was unsuccessful. After that they did not appeal to the Labour Court as provided for in the applicant's code of conduct.

The 1st to 41st respondents sought the assistance of the 42nd respondent at that juncture. The respondents then decided to have the code of conduct used in the hearing and subsequent dismissal nullified on the grounds that it had been superseded by the National Employment Council Code of Conduct. In short they were saying that the company code of conduct used at their hearing should not have been used. As a result, the Labour Officer for Bulawayo wrote to the applicant essentially agreeing with the case of the respondents. She opined that the applicant's code of conduct was null and void at the time of the hearing. This view was supported by the Registrar of

Labour in a letter written to the 42nd respondent and copied to the applicant. In view of this, the respondents took their matter to the National Employment Council for the Textile Industry (NEC). The latter directed that applicant reinstate 1st to 41st respondents. From the papers, the applicant did not accept that determination and insisted that the hearing was properly conducted under applicant's code of conduct.

It is the respondent's case that upon receipt of the letter from the NEC directing their re-instatement they went to the applicant's premises on 22 February 2005. They went there because this concerned their welfare. Only three (3) of their group represented them at the reception area of the applicant. There was no violence. Since that day to date of this application on 3 March 2005 they never went back to the applicant. Their mission at the applicant was in connection with reinstatement. Their understanding was that because the NEC has determined that they be reinstated, whether the determination was right or wrong the applicant was bound by it. They rely on the provisions of section 97(3) of the Labour Act [Chapter 28:01] which provides:

An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against." (This has to be read with section 101). Mr *Phulu*, for the respondents submitted that by failing to comply with the determination of the NEC the applicant was approaching this court with dirty hands. On this basis he argued the court should refuse to entertain the application until such time as the applicant had submitted itself to the law – *Associated Newspapers of Zimbabwe (Pty) Ltd* v *The Minister of State for Information and Publicity & Ors* SC-

20-03; *Associated Newspapers of Zimbabwe (Pty) Ltd* v *The Minister of State for Information and Publicity & Ors* SC-111-04 and *Macheka* v *Moyo* 78-03.

Further Mr *Phulu* submitted that it was not proper for an applicant to make a chamber application for an interim interdict giving relief that is substantially the same as the final order sought as is the case here. I agree with this statement of law because this gives the applicant an improper advantage in that he may obtain the benefits of a final order without having to establish his case with degree of proof normally required. In such cases, the proper approach is to proceed by way of court application – *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188(H) and *Rowland Electro Engineering (Pvt) Ltd* v *Zimbabwe Banking Corp* Ltd HH-36-03.

Coming back to the issue of dirty hands, there is no doubt that the applicant is convinced that the NEC code of conduct is not applicable. Even if they, (applicant) believe that its case is very strong it is trite that it still has to abide by the provisions of the Act. In this regard the Supreme Court in *ANZ* case *supra* (SC20-03) had this to say:-

> "This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination of this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do
> is to submit itself to the law and approach this court with clean hands on the same papers."

In this matter, once I decide that the applicant's code of conduct applies then the dirty hands argument automatically falls away. If, however, I find in favour of the

use of the NEC's code of conduct, then the applicant is bound by the determination of the NEC.

From the facts, there has been an alienation of the undertaking i.e. the applicant changed hands. In the circumstances, section 16 of the Act protects the rights of the employees on such transfer of the undertaking. Section 16 does not apply to the code of conduct. The overriding provisions in respect of the code of conduct are contained in Labour Relations (Employment Codes of Conduct) Regulations, 1990 (SI 379 of 1990). In dealing with a similar situation SMITH J, in *Chinowaita & Anor* v *Air Zimbabwe (Pty) Ltd* HH-54-03, held that there was no legal basis for holding that employees transferred from one undertaking to another continue to be bound by the code of conduct applicable to their former undertaking. I agree.

Further the Registrar of labour, confirmed in writing that by agreement between the applicant and the workers' committee (the works' council) at a meeting held on 12 March 2004 and the operation of the law i.e. amendment of section 101 of the Act, the applicant's code of conduct is no longer functional. The Registrar may be wrong but his decision has not been subjected to review. It is against this background the NEC for the textile Industry assumed jurisdiction and used its code of conduct. The NEC may be wrong in doing so, but the decision has not been subjected to review. Instead, the applicant adopted a very defiant and contemptuous stance towards the Registrar of Labour and the NEC for the Textile Industry as evinced by the letter authored to by a Ms R Moyo the Chief Human Resources Officer. I propose to quote parts of the letters to capture the applicant's defiant mood-

> "The position of Merspin Management is that our Works Council Code of Conduct is still valid and in force to date. Subsequently, we shall continue to use it for any disciplinary action that may arise. The order from Mrs Nyandoro, the Labour Relations Officer, is simply not worth the paper it was

> written on. … Finally, may I point out that the NEC exists to foster harmonious and fair working conditions in the industry. … this undue meddling in our affairs should cease forthwith."

From the foregoing, it is clear that the applicant is bound by the determination of NEC until and unless that determination is set aside on review or an appeal. Whilst the determination stands, the applicant is bound by it irrespective of their (applicant's) interpretation – sections 97(1)(d) and (3) of the Act. There are many courses open to the applicant to "clean" its hands before being considered properly before this court. It may reinstate the 1st to 41st respondents as determined by the NEC. Or it may apply for the stay of execution of the order of the NEC pending review or appeal. The applicant cannot ignore the provisions of the law or a determination by an NEC registered in terms of the Act because it disagrees with its interpretation of the law. The issue is one of compliance with the law. Nobody is above the law. Once the applicant complies with the law it will be accorded the same protection that is accorded to all law abiding citizens. The ball is in the applicant'' court to submit itself to the law and approach the court with clean hands.

On this basis alone I refuse to entertain the court application. Accordingly, the application is dismissed with costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Coghlan & Welsh, respondents' legal practitioners