IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1151/96

In the matter between

FUTURE INVESTMENTS (PTY) LTD	APPLICANT
and	
THE ACTING DEPUTY SHERIFF OF MANZINI	FIRST RESPONDENT
ON LINE DISTRIBUTORS (PTY) LTD	SECOND REPONDENT
CORAM :	DUNN J.
FOR THE APPLICANT :	MR L. MAMBA
FOR THE RESPONDENT:	MR L. KHUMALO

JUDGMENT

27TH SEPTEMBER 1996

The applicant approached this court under a certificate of urgency and obtained an order in the following terms-

1. That the sale in execution in case no 1626/95 advertised for the 15th may 1996 be and is hereby stayed pending further order of this court.

2. That a rule nisi do issue calling upon the respondents to show cause on the 31st May 1996 why-

a) the attachment of the goods under case no 1626/95 by the 1st respondent should not be set aside.
b) the respondents should not be ordered to pay the costs of this application.

The affidavit in support of the application is deposed to by-Abdul Ishmael who states that he is the Managing Director of the applicant. The applicant is stated to be a private company-registered in terms of the laws of Swaziland. It is stated that the second respondent obtained judgment against J & S Electronics (Pty Ltd t/a TV Masters, pursuant to which the first respondent attached various goods on the premises from which the applicant operates. The applicant claims ownership of the said goods.

The applicant sets out that its claim to ownership of the goods was brought to the attention of the first respondent. It is further stated by the applicant that the second respondent's attorneys were informed that " J & S Electronics (Pty) Ltd had sold the business in February 1995 to the applicant and the applicant has absolutely nothing to do with the said J & S Electronics (Pty) Ltd". A copy of the agreement of sale is annexed to the affidavit (annexure F). The agreement is dated 14th February 1995 and is stated to be between-

Seller: J & S Electronics (Pty) Ltd (represented herein by Justice Dlamini of Mbabane.) and Purchaser: Future Investments (Pty) Ltd, a company about to be formed (represented herein by

Zandile Dlamini)

In an answering affidavit filed on the 29th May 1996, the second respondent raised the preliminary point that " the applicant is not a juristic person in that no company in the name Future Investments (Pty) Ltd is registered In the records of the Registrar of Companies of Swaziland." It was argued on this

basis, that the applicant had no locus standi to institute the present proceedings. The preliminary point was abandoned after the filing by the applicant of a certificate reflecting that the applicant was incorporated on the 13th June 1995 (prior to the institution of the present application). On the merits, the submission on behalf of the second respondent is that the applicant could not enter into the contract of sale on the grounds that the applicant did not exist as a corporate entity at the relevant time.

In terms of the Companies Act No. 7/1912 a compay only comes into being, as a legal entity, with its own distinct rights and duties upon the issue of a certificate of incorporation (Section 18 of the Act).

The applicant only came into existence on the 13th June 1995 and could not have entered into the agreement of the 14th February 1995.

Under the common law, a contract by an agent for a non-existent principal is unenforceable. A company cannot ratify a contract concluded by someone professing to act as it's agent prior to the incorporation of such company. This is based on the common law principle that "there can be no ratification by a principal not in existence at the date of the transaction." McCULLOGH v. FERNWOOD ESTATE LTD 1920 A.D. 204 at 207, SENTRALE KUNSMIS KORP. v. N.K.P. KUNSMISVERSPREIDERS 1970 (3) SA 36 at 396.

There is no way around the statutory and the common law for the applicant. The position in Swaziland differs from that in South Africa where provision is made under section 35 of that Country's

Companies Act for the ratification or adoption of pre-incorporation contracts.

Mr. Mamba's submissions that the pre-incorporation contract in this application was in the form of a stipulatio alteri cannot stand. A contract in favour of a third party known as a stipulatio alteri is recognised under the common law. Under such a contract and in the context of this application an incorporator can contract in his own name for the benefit of an unincorporated company, there being no requirement that the third person already be in existence. See LAWSA vol.4 p34 and the authorities there cited. The requirements for this form of contract have not been met in the present case. The agreement was a nullity.

The decision on the validity of the agreement does not, however, dispose of the question of the ownership of the goods attached by the first respondent. The judgment against J & S Eletronics was obtained by the second respondent on the 3rd November 1995, well after the incorporation of the applicant. There is nothing in the papers before me to suggest that the goods attached by the first respondent were the property of J & S Electronics or that they were transferred to the applicant under the invalid sale agreement. These are matters which should have been canvassed by the second respondent in reply to the rule nisi issued on the 14th of May. The second respondent elected, instead, to latch onto the question of the validity of the sale agreement. In the absence of a reply to the applicant's claim to ownership, which claim the applicant did not specifically base on the invalid

agreement, the proper course would be to confirm the rule nisi.

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I will not, however, In the light of the accomodating attitude of the applicant follow that course.

The second respondent must, however, note the need and desirability to reply on the merits of an application even if certain points are being raised in limine. See BADER & ANOTHER v. WESTON & ANOTHER 1967(1)SA 134 at 136 where the following appears-

It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point.

The applicant's attitude is that the proper procedure would have been for the first respondent to issue an interpleader notice in terms of Rule 58. In that way the question of ownership of the goods would be determined by the court.

I accordingly order as follows-

1. That Order no.1 of the order of the 14th May 1996 be confirmed with costs.

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2. That the rule nisi issued on the 14th May be discharged.
3. That the first respondent issue an interpleader notice in terms of Rule 58 in respect of the attachment under case no. 1626/95.

B. DUNN

JUDGE