IN THE HIGH COURT OF SWAZILAND

AFRICAN ECHO (PTY) LTD T/A

TIMES OF SWAZILAND

Applicant

And

LIGOLI SPORTS NEWSPAPER

1st Respondent

LWAZI DLAMINI

2nd Respondent Civil Case

No. 1271/2007

Coram

For the Applicant For

the Respondents

S.B. MAPHALALA - J

MR. M. SIBANDZE MR.

M. MABILA

JUDGMENT 18th

April 2007

[1] On the 13th April 2007, the Applicant obtained an interim order in the following terms:

1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.
2. Calling upon the Respondents to show cause on the 20th April 2007, why an order in the following terms should not be made final:

2.1 That the 1st and 2nd Respondents be and are hereby restrained and interdicted from distributing for sale or any other purposes Issue No. 2 of Ligoli Sports News, dated 11th to 18th April 2007.

2.2 That the Deputy Sheriff for the district of Hhohho, Manzini, Lubombo and Shiselweni be and are hereby authorized to remove from any retail outlet in their relevant districts and take into their possession any copies of the Ligoli Sports Newspaper Issue No. 2 dated 11th to 18th April 2007.

2.3 Directing that prayers 2.1 and 2.2 operate with immediate and interim effect pending the outcome of this application.

2.4 Costs shall be costs in the course.

[2] The rule was made returnable on the 20th April 2007. The Respondents were granted leave to anticipate the order within 24 hours notice to the Applicant. The matter appeared before me at 2.30pm on the 16 April 2007, where I heard arguments on points of law *in limine* raised by the Respondent. This judgment concerns this aspect of the matter.

[3] The points of law *in limine* by the Respondents are the following:

Non-joinder

2.5 The Respondents have a contractual obligation to deliver copies of Ligoli Sports Newspaper (the newspaper) to over 150 retail outlets throughout Swaziland. By the same token the outlets have a contractual obligation to receive the newspaper and sell it to consumers.

2.6 The orders sought by the Applicant cannot be effected without affecting the contractual rights of the retail outlets. Therefore the retail outlets ought to have been cited and joined in this application.

Dispute of fact

4.3 There is a substantial dispute on a material question of fact *viz* ownership of the photographs which cannot be resolved on the papers.

Wherefore I pray that the application be dismissed with costs.

[4] In argument before me Counsel for the Respondent took the court through the above points *in limine* and cited a number of decided cases in support of his arguments. These decisions included that of *Polo Dlamini vs Martha Siphiwe Nsibandze - Civil Case No. 1581/2000, Farmers (Pty) Ltd vs Moses Motsa - Civil Case No. 53/2004.* The court was also referred to the landmark judgment in the case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 T.P.D.* at *1163.* In this judgment Murray ATP stated the following remarks regarding disputes of fact in motion proceedings:

"It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as indicated infra) the court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling viva voce evidence under Rule 9, the parties may be sent to trial in the ordinary way either on the affidavits as constituting

> the pleadings, or with a direction that pleadings be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realized when launching his application that serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply Rule 9 to what is essentially the subject of an ordinary trial action".

[5] The gravamen of the Respondent's case is that Applicant ought to have cited retailers as they have a direct and substantial interest in the issue involved and in the order which the court might make. On the issue of the dispute of fact that the matter stands to be dismissed because it cannot be resolved as the papers stand.

[6] On the other hand Counsel for the Applicant argued otherwise. On the first point *in limine* that retailers be joined in the application it is submitted for the Applicant that this point of law *in limine* is bad in law in that the Respondents have not applied for the joinder of any particular party and neither have the Respondents named the parties that they wish to be joined or allege have not been joined, with effect that the court does not know who Respondents' wished to be joined and what is the nature of their interest. In this regard the court was referred to what is stated by the learned authors *Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa* at page *187.*

[7] On the point about the dispute of fact the Applicant concedes that there is a dispute of fact and applied that the court should refer the matter to oral evidence on the question of the ownership of the photographs. Again

the court was referred to the textbook by *Herbstein and van Winsen (supra)* at pages *385, 386* and *387.*

[8] I have considered the submissions by Counsel in respect of the above cited points of law *in limine* and my humble view is that *Mr. Sibandze* for the Applicant is correct in his arguments in respect of both points raised. On the first point i.e. that of non joinder it is my considered opinion that the interest of parties mentioned by the Respondents is not a direct and substantial interest and it is at best an indirect interest arising out of an unknown contractual arrangement between the Respondents and the unknown retailers. In these circumstances the interest of unnamed third parties who have an indirect interest which the Respondents have failed to show the court is substantial does not result in non-joinder.

[9] On the point about the dispute of facts I have considered the principles of law as stated by the learned authors *Herbstein (supra)* more importantly what the learned authors state at page 385 that **"the court's discretion to order that oral evidence should be heard, though extensive is not unlimited for the procedure must be confined to specified issues".** In the present case I agree in *toto* with the Applicant that the issue is narrow and specified. The proceedings before court are proceedings to stop a competitor from using the intellectual property of the Applicant on an urgent basis. In this regard I am in agreement with the Applicant's argument that urgent proceedings are always brought by way of motion (see page *387* of *Herbstein (supra).*

[10] In the result, for the afore-going reasons the points of law *in limine* ought to fail, and it is so ordered. Costs to be costs in the main application.

S.B. MAPHALALA

JUDGE