

**IN THE HIGH COURT OF SWAZILAND**

Civil Case No. 5/2007

SWAZILAND POSTS AND TELECOMMUNICATIONS Applicant CORPORATION

And

THEMBISILE DI AMINI

1<sup>st</sup> Respondent

IRENE SHONGWE

2<sup>nd</sup> Respondent

TRAI AHIHURI INVESTMENTS (PTY) LIMITED

3<sup>rd</sup> Respondent

MATSAMO FRUIT AND VEGETABLE (PTY) LIMITED 4<sup>th</sup> Respondent

Coram

S.B. MAPHALALA - J MR.

For the Applicant For

Z. JELE MR. L. MAMBA

the Respondents

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JUDGMENT 15\*

June 2007

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[1] The Applicant obtained an interim order on 8<sup>th</sup> January 2007, which was returnable on 26<sup>th</sup> January 2007. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents have filed a Notice to raise points of law and have given the Applicant less than fifteen (15) minutes notice of their intention.

[2] The point of law raised is that the Applicant has failed to join Swaziland Building Society, Stanlib, Swaziland, Standard Bank and Nedbank in the application in which in law the money in question vests. The application is therefore fatally defective.

[3] The Applicant has sought an order in the following terms:

1. Dispensing with the normal and usual requirements of the rules of court relating to urgency and permitting this matter to be heard as one of urgency.

2. Cocdoning any of the non compliance with the rules of court in relation to serve and time limits;

5. IThai a rule *nisi* do hereby issue calling upon the Respondents to show on or before the 26<sup>th</sup> day of January 2007 why an order in the following terms should act be made final;

3.: Trial the funds currendy held in all the 1<sup>B</sup>. 2\* 3<sup>rd</sup> and 4\* Respondents bank accounts at Standard Bank Swaziland Limited and Stanlib Swaziland and in any other bank or Building Society in Swaziland including but not limited to account no. 012060040501 held in favour of tie 4<sup>th</sup> Respondent at Standard Bank Swaziland Limited, be and are hereby frozen pending finalizarion of the action proceedings to be instituted by -he Applicant agamst the 1<sup>E</sup> and 2<sup>nd</sup> Respondents who are directors and major shareholders of the 3<sup>ri</sup> and 4<sup>th</sup> Respondents in which the Applicant will seek the following relief:

3.1.1 The payzieci of the sum of E11, 319 826-88 (Eleven Million Three Hundred and Nineteen Thousand Eight Hundred and Twerxy-Six Enafanagem and Eighty-Eight Cents):

3. Interest on the afore-said amount at the rate of 9% per annum from date of summons to date of final payment;
4. Costs of suit;
5. Further and/or alternative relief.
6. That the order sought in paragraph 3.1 above operate with interim and immediate effect pending the finalization of this application:
7. That the Respondents be ordered to pay costs of this application in the event that they oppose this application or upon the confirmation of the interim order;
8. That the Applicant cause to be served on the Respondents, this application, together with the order of court that may be issued within two (2) days of granting of such order,
9. That the Applicant institutes the proceedings referred to in paragraph 3.1 above within seven (7) days of the granting of the order.
10. Further and/or alternative relief.

[4] In support of the application the founding affidavit of the Applicant's Corporate Affairs Manager/Legal Advisor Ms Tebogo Fruhwirth is filed where she details at great length the factual issues in this dispute.

[5] In turn the Respondents have filed a Notice of Intention to Oppose followed by a Notice to Raise Points of Law as stated in paragraph [2] *supra*.

[6] In argument before me a point was raised by the Applicant and also in the Heads of Argument that the Respondents have elected not to file any Answering affidavits and accordingly have elected not to dispute any of the factual allegations contained in the Founding affidavit. The court must therefore accept that the allegations contained in the Founding affidavit stand correct and are not in dispute. The argument in this regard is that where a party to an urgent application and where an interim order has been

granted elects not to file any answering affidavits, and seeks to anticipate the return date, then the court may deal with the matter as if it were dealing with it on the return date i.e. if the points of law are dismissed, then the court may grant a final order.

[7] In the present matter, the Respondents have chosen not to file Answering affidavits but have anticipated the return date. The Applicant contends that the court must therefore deal with the matter as if it were now dealing with it on the return date. In this regard the court was referred to the South African case of *Peacock Television Company (Pty) Limited vs Transkei Development Corporation 1998 (2) S.A. 259*. That in the present case, the Applicant failed to set out any averments whatsoever for anticipating the return date and accordingly the point of law must be dismissed with costs.

[8] In argument before me Counsel for the Respondents argued that this application is *lis pendens* that as far as the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are concerned under Case No. 5/2007, the Applicant seeks to interdict (freeze accounts) the operation of her account held with Standard Bank, Stanlib Swaziland "**any other** Bank or Building Society in Swaziland including but not limited to account no. paragraph 3.1 of annexure "A"). Under the present case Applicant seeks (paragraph 3.2) an order to "freeze" the accounts of the 3<sup>rd</sup> Respondent or the account in the name of Thembisile Dlamini trading as Teinahlabi held at Standard Bank (Manzini) and account held at Stanlib.

of the above-cited position Counsel for the Respondents decided cases in South Africa including the cases of *Cook* 2) S.A. 240, *Mtshali vs Mtambo* 1962 (3) S.A. 469 (G), 1976 (4) S.A. 567, *Loaders vs Dursot Bros (Pty) Ltd* 1948 mt of *Geldenuys vs Kotze* 1964 (2) S.A. 176. The general forth is that once the requirements have been established tion that the latter proceedings are vexatious and the court d punitive costs. That being so the present application be its on a scale between attorney and own client.

lerefore to first deal with the question of *lis pendens* and if nciple does not apply in the present case then I ought to ivit of Tebogo Frutwirth and whether the rule *nisi* ought to

principle of our law that if an action is already pending ind the Plaintiff brings another action against the same same cause of action and in respect of the same subject-in the same or in a different court, it is open to the : the objection of *lis pendens*, that is, that another action dential subject matter has already been instituted, □it in its discretion may stay the second action pending the irst. Objection is usually taken by way of a plea in *lerbstein et al, The Civil Practice of the Supreme Court of Edition* at page 249 and the cases cited thereat).

[12] It appears to me on the facts of the matter that the arguments for the Respondents are correct that the matter is *lis pendens*. I say so because on the 8<sup>th</sup> January 2007, the Applicant instituted proceedings in this court under Case No. 5 of 2007 for the orders set out in annexure "A". That matter has not been finalized. On the 12<sup>th</sup> January 2007, Applicant again instituted action proceedings under the present case number being Civil Case No. 25 of 2007 for the relief set out in the notice filed of record in this matter. The Respondents under case No. 5/2007 are Thembisile Dlamini, Irene Shongwe, Temahlubi Investments (Fry) Ltd and Matsamo Fruit and Vegetables (Pty) Ltd. The Respondents under the present case are Thembisile Dlamini, Lomasiko Dlamini, Temahlubi Investments (Pty), Swaziland Building Society, Standard Bank Swaziland Limited and Nedbank (Swaziland) Limited. .

[13] In sum, therefore on the basis of the above-cited facts in paragraph [12] *supra* I have come to the considered view that the matter is *lis pendens* and therefore the rule *nisi* operating in the present case ought to be discharged with costs on the ordinary scale and so it is ordered.



S.B. MAPHALALA

**JUDGE**