IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 1350/13

In the matter between

ADRAIN INVESTMENTS (PTY) LTD t/a CELLTRONIX **APPLICANT**

And

BANELE ZWANE t/a SDEEZ SUPERMIX **RESPONDENT**

Neutral citation	***Adrain Investments (Pty) Ltd t/a Celltronix vs Banele Zwane t/a SDEEZ Supermix (1350/13) [2014] SZHC 83(16 April 2014)***
Coram:	**Ota J.**
Heard:	**9 April 2014**
Delivered:	**16 April 2014**
Summary:	**Civil procedure: specific performance; interdicts; principles thereof; non-disclosure of jurisdiction; non-joinder; new matters in reply and disputes of facts; guiding principles.**

JUDGMENT

OTA J.

[1] This application is commenced by way of Notice of Motion, wherein the Applicant claims, *inter alia*, the following reliefs:-

> **"1. That the Respondent be ordered to forthwith remove his advertising sign encroaching on the business space and premises of the Applicant at the leased premises, City Plaza Building in Manzini.**
> **2. That the Respondent is hereby restrained and interdicted from trading and doing the business of selling and repairing mobile phones, providing upgrades, software services and cellular accessories at the leased business premises which is the sole trade business of the Applicant.**
> **3. Costs of suit.**
> **4. Further and / or alternative relief".**

[2] The application is supported by the affidavit of Andy Exalto described therein as the Director of the Applicant company. There is also a replying affidavit sworn to by the same deponent, as well as, two supporting affidavits sworn to respectively by Leonard Twahirwa the landlord of the Applicant and Respondent at City Plaza building in Manzini and Maswane Phindile Dlamini who is a sole trader in Manzini and also a tenant at City Plaza Building in Manzini.

[3] The Respondent opposed the application with an answering affidavit sworn to by Banele Zwane. In the answering affidavit the Respondent raised some points of law seeking to defeat the application *in limine*, namely:-

1. Non - disclosure of jurisdiction.
2. Non - joinder.
3. New matters in reply.
4. Disputes of fact.

[4] These points *in limine* were argued wholistically with the merits of this application. It is convenient for me to address them in the context of the merits of the application and in the manner in which they were argued.

[5] **1. Non disclosure of jurisdiction.**

In this regard, Learned Counsel for the Respondent, Mr Ndlovu, argued, that there is absolutely no allegation in the Applicant's founding affidavit as to whether, and if so why, this court has the jurisdiction to entertain the matter. Counsel contended that this fact renders the application fatal in its entirety.

[6] For the above proposition Counsel urged the case of **Ben M Zwane v The Deputy Prime Minister and Another, Civil Case No 624/00 page 4,** where **Masuku J,** held as follows:-

> **"It is common cause that no facts or allegations have been made by the applicant to show that the court has jurisdiction... Must all this be left to the court to make an assumption that it has jurisdiction.**
>
> **Herbstein and Van Winsen (Supra) at page 364 state that the founding affidavit must contain averments and it is necessary to clearly state, amongst others that the court has jurisdiction.**
>
> **In any summons or founding affidavit, the necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction.**
>
> **Clearly this has not been done in this case neither factual nor legal conclusion of jurisdiction (sic) stated *in casu.* The allegations must appear in the affidavit and the court must not be left to deduce that it has jurisdiction. This point of law is accordingly upheld".**

[7] Counsel also referred the court to the case of **Ntiwane, Mamba & Partners vs Standard Bank of Swaziland Limited Civil Case No. 3319/2001 and 3320/2001**, and urged the court to dismiss the application in these circumstances.

[8] It was contended *replicando* by the Applicant's Counsel Mr Fakudze, that the alleged non – disclosure does not render the application entirely fatally defective. Counsel argued that the High Court has inherent jurisdiction to determine this matter by virtue of the fact that the cause of action between

the parties occurred wholly within the court's jurisdiction and the relief of specific performance sought by the Applicant can only be obtained in the High Court.

[9] Mr Fakudze further argued that, in any case, the standard set by **Herbstein et al (Supra)** has been met, in that the necessary factual allegations relating to the jurisdiction of the court are clearly stated in the founding affidavit.

[10] I am inclined to agree with Mr Fakudze on this issue.While I agree that it is more desirable that a party should expressly aver in his pleadings that the court has jurisdiction, it will however, in my view, amount to a derail of justice for the court to hold that the mere absence of such an express allegation should defeat the entire case. Such a course is in conflict with the current trend towards substantial justice. It appears to me that it is sufficient that there are factual allegations relating to and confirming the jurisdiction of the court in the founding affidavit.

[11] *In casu,* it is common cause that the claim which is for specific performance falls within the purview of the original jurisdiction of the High Court to hear and determine all civil and criminal causes in the land in terms of section

151 (1) (a) of the Constitution Act, 2005. It is common cause that the dispute arose in Manzini which is within the jurisdiction of the High Court. These facts will suffice for the purposes of the jurisdiction of the court. This point *in limine* fails and is dismissed accordingly.

[12] **Non - joinder**

The Respondent's contention in this regard is that the Applicant failed to join the landlord Company **Twahirwa Investments (Pty) Ltd** as a party in these proceedings. Mr Ndlovu contended that the landlord has a direct, material and substantial interest in these proceedings as they relate to its property and various items placed for advertising purposes on the walls of the premises and which items have acceded to the property. Counsel further contended that the application places into dispute the competing rights and entitlements of the parties as tenants in the leased premises. That it should therefore rightly be the landlord in court and not the Applicant. The wrong Applicant is before court in the circumstances, so argued Learned Counsel.

[13] In reply, Mr Fakudze argued that no order is sought against the landlord who is aware of the proceedings and who had tried to intervene in the dispute between the parties and failed. The Respondent refused to comply with the

agreements and undertaking made by the landlord in settling this matter. Thereafter, the landlord advised the Applicant to seek redress in court. It is thus the Applicant that continues to suffer prejudice and be affected by the prevailing unbearable situation created by the Respondent and not the landlord. Counsel further submitted that, in any case, the Respondent is fully aware of the fact that the issues *in casu* tend to the Applicant and not the landlord. This fact was acknowledged by the Respondent in annexure CJ4 exhibited to the Respondents affidavit, Mr Fakudze further contended.

[14] It appears to me that there is much force in Mr Fakudze's argument. The history of this case clearly shows that the landlord had tried to settle the dispute between the parties culminating in a Deed of Settlement which the Respondent refused to sign. Annexure CJ4 which is a letter written by the Respondent's attorneys to the landlord in the wake of the Deed of Settlement speaks for itself on the attitude of the Respondent to the involvement of the landlord in the dispute between the parties. For the avoidance of doubts annexure CJ4, which appears on page 52 of the book, states as follows:-

> **"RE: <u>TWAHIRWA PROPERTIES / BANELE ZWANE t/a SDEEZ SUPERMIX</u>**
>
> **1. Your purported 'agreement' has been forwarded to us by client for advise.**
>
> **2. We advice that, as per our previous correspondence to you relating to the same, a valid lease agreement still exists between you and client. The same was never ever legally cancelled. Client will therefore hold you to such agreement and will not be signing any amendments to it.**
>
> **3. <u>We advise that the issues pertaining to ADRIANA Investments can best be pursued directly by the said company and without drawing you as landlord into the dispute (s). This is seemingly calculated by the company only for the sole reason of intimidating our client. The company is free to approach court if it is of the view that ours is causing it unfair competition".</u>** (underlining my own)

[15] Having strenuously decried the involvement of the landlord in this dispute, and having called upon the Applicant to proceed in its own right to court, it does not lie in the mouth of the Respondent to now cry foul in the face of the non-joinder of the landlord. By so doing the Respondent is clearly approbating and reprobating at the same time.

[16] In any case, quite apart from the fact that the issues *in casu* tend principally to the Applicant and Respondent as acknowledged by the Respondent in para 3 of annexure CJ4, the landlord has since filed a supporting affidavit to the Applicant's affidavit in which it clearly states that it will abide by the decision of the court. I do not think that the landlord's supporting affidavit

on this issue should be treated as new matter or new evidence as urged by the Respondent.

[17] I say this in appreciation of the fact that the question of the non - joinder of the landlord arose in the Respondent's answering affidavit. The Applicant was quite entitled in the circumstances to reply to it and to elicite the said evidence from the landlord in support of its position.

[18] The joinder of the landlord is therefore not necessary in these circumstances.

[19] For the above stated reasons, the point taken on non - joinder fails and is accordingly dismissed.

[20] I will deal with the rest of Respondent's objection regarding the supporting affidavits as well as the issue of disputes of fact, when considering the reliefs sought herein *ad seriatim*.

[21] I will commence this exercise with prayer (1) of the Notice of Motion which bears repetition at this juncture:-

"1 That the Respondent be ordered to forthwith remove his advertising sign encroaching on the business space and premises of the Applicant at the leased premises, City Plaza Building in Manzini".

[22] It appears from the papers that originally the Respondent leased the premises in question whilst the Applicant sub-leased from him. At that time, which was around 2003, the Respondent had placed the signage of his business which is the subject matter of the relief sought in prayer (1) at the front entrance of the leased premises. This was all done during the tenure of a previous landlord who is not named in these proceedings.

[23] It is common cause evidence that in 2009 the present landlord **Twahirwa Investments,** took over the premises. The Respondent was moved to a smaller shop space on the same floor and hardly a few feet away from the previous. This was when the Applicant also took occupation of a newly allocated shop-space directly opposite the Respondent's shop. This new arrangement means that the Applicant and Respondent are practically neighbours, separated by an approximately 2 metre passage way.

[24] It is common cause, and as clearly shown by the photographs tendered in these proceedings by each side of this context, that the Respondent's signage which he placed over the leased premises at around 2003 continues to hang

over the business premises. From the photographs the said signage now encroaches directly over the Applicants leased business premises in the wake of the present lease dispensation.

[25] It appears that being desirous of putting up its own signage directly over its leased premises, the Applicant through its attorneys addressed a letter dated 28 April 2013 to the Respondent (annexure C1 page 10 of the book). The letter states as follows:-

> **"RE <u>CELLTRONIX / SDEEZ SUPER-MIX</u>**
>
> **1. We act herein for and on behalf of our client Celltronix.**
>
> **2. Our client has instructed us that you are tenants with them at the City Plaza Building in Manzini.**
>
> **3. Client further instructs that you have placed a sign of your shop at the main entrance and encroaching over his space and premises, where he is desirous of planning his own signage for advertising. Due to your unlawful and wrongful encroachment, client's rights to advertise are being violated.**
>
> **4. Our instructions are to demand, as we hereby do, that you accordingly remove your sign on our client's space and premises immediately. We advise that our instructions are that your failure to do so, we are to institute litigation against you to protect client's rights and interest.**
>
> **5. We believe there will be no need for litigation and the unnecessary cost as cooperation and sense together with reasonableness shall prevail".**

[26] In response to this letter the Respondent's attorneys fired off a letter dated 15 July 2013, (annexure C2 page 11 of the book) which demonstrates the following:-

> **"RE <u>CELLTRONIX / BANELE ZWANE t/a SDEES SUPER-MIX</u>**
>
> **1. We act on behalf of Sdeez Super-Mix who have referred to us your demand dated the 28th April 2013 for response.**
>
> **2. Client instructs that yours has been very economical with facts in his instructions to you for one or more of the following reasons;**
>
> **2.1 the sign complained of has been at the exact spot it was prior to your clients tenancy. This is over a period of 6 (six) years back; and even dating back to when both clients shared the same shop space. This is a sign and brand which at a point in time, and even to this day, brought numerous customers for your client as well. He really ought to be thankful to our and his sign as opposed to fighting him over it.**
>
> **2.2 <u>Client put up the sign, in its present form, location and size, with the landlords express consent. This has not been revoked by the landlord.</u>**
>
> **3. Ours therefore dispute any liability towards yours in the manner alleged or at all. Any process issued will vigorously be opposed".** (emphasis added)

[27] It appears to me that as a reaction to the Respondent's assertions in para 2.2 of annexure C2 above, and in a bid to resolve the dispute between the parties, the landlord wrote annexure C3 (page 13 of the book), dated 20 July 2013 which says the following:-

> **"RE: <u>CELLTRONIX / BANELE ZWANE t/a SDEEZ SUPER – MIX (SIGNAGE)</u>**
>
> **It has come to my attention that Sdeez Super-Mix is claiming to have got permission to erect his signage by the entrance of my building City**

> **Plaza. <u>No such permission was requested nor granted. I hereby request that Sdeez super-Mix remove his signage since it is covering Celltronix space for signage"</u>** (emphasis added)

[28] It is also an established fact, that still in a bid to resolve the dispute the landlord prepared the Deed of Settlement which addresses the issue of the signage amongst others. The Respondent refused to sign the Deed of Settlement.

[29] In paras 16.3 and 16.4 of its answering affidavit, the Respondent took issue with annexure C3 condemning it for the following reasons, namely, Respondent was not aware of the said letter; the letter is not addressed to anyone; no supporting affidavit was filed by the author admitting its content; the Applicant has not stated whether the content of annexure C3 are believed by him to be true and that C3 is an ingenious innovation by the Applicant.

[30] In reply to the foregoing assertions, the Applicant annexed the landlord's supporting affidavit wherein in para 5.5 the landlord attests as follows:-

> **"5.5 The Applicant gave me the letter to which I responded too by letter dated the 20th July 2013 advising whoever was concerned that I have not given the Respondent such permission and in fact I had ordered that the Respondent removes the said signage. This is the letter annexed to the founding affidavit and marked 'C3'"**

[31] As earlier stated in this judgment the Respondent decries the supporting affidavit as new matter in reply. Mr Ndlovu urged the court to shut its eyes to this supporting affidavit because the Applicant must stand or fall by his founding affidavit.

[32] A classical statement on this issue is by **Herbstein and Van Winsen** in the **Civil Practice of the Supreme Court of South Africa (4th ed) at page 366,** where the following appears:-

> **"The general rule which has been laid down repeatedly is that an applicant must stand or fall by his Founding Affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts, that the respondent is called upon either to affirm or to deny".**

[33 It appears to me that even though the Respondent contends that a party must stand or fall by its founding affidavit and that the failure of the Applicant to urge the landlord's supporting affidavit in its founding papers defeats the foregoing evidence, I am disinclined to agree with the Respondent.

[34] I say this because in its founding papers the Applicant clearly made out a case that the landlord wrote the said letter C3 and that same was forwarded to the Respondent for its reaction as per annexure C4. These facts exude from paras 7.3 and 7.4 of the founding affidavit as follows:-

> **"7.3 I wish to state that upon receipt of the letter from the Respondent's attorneys, I caused same to be shown the landlord for his response. To which he responded that, as the landlord no such permission was granted to the Respondent and as such should remove the sign.**
>
> **Copy of letter is attached herein and marked "C3".**
>
> **7.4 I wish to state that the Applicant's attorneys forwarded the letter from the landlord to the Respondent's attorneys and sought for their attitude however, they were no (sic) favoured with a response thereto.**
>
> **Copy of letter from Applicant's attorneys hereto and marked "C4".**

[35] It is obvious to me that in the face of the denial and challenge launched at annexure C3 by the Respondent which I recited in para [30] above, it became necessary for the Applicant to clarify and rectify this issue in its replying affidavit. I see nothing wrong with the course adopted by the Applicant which had clearly made out a case in this regard in its founding papers.

[36] This is in line with the current trend of courts towards substantial justice. To achieve this, the law enjoins the courts to approach the issue of new mattes in replying affidavit **"with a fair measure of common sense"** in order not to defeat the ends of justice. It follows that the rule that an Applicant in motion proceedings must stand or fall by his founding affidavit is not an absolute rule.

[37] The pronouncement of the court in the celebrated case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors, Appeal Case No. 23/2006, paras [28] – [32],** is germane to these circumstances. The court declared as follows:-

> **"[28] Although he admitted into the papers the replying and supplementary affidavits, the learned Judge refused to give effect to their contents. He stated that an applicant must stand or fall by the founding affidavit; citing in this regard the case of POUNTA'S TRUSTEE V LAHAMAS 1924 WLD 67 and other cases following it. He found that Nkabinde's statement as to his authority in the founding affidavit was not supported by an appropriate resolution. He added:**
>
> > **'The applicant belatedly and too late tried to meet this aspect in the replying and supplementary affidavit but did not cure the defect and more doubt as to the structure of the applicant was created rather than resolved'**
>
> **[29] It is now well established that when a factual issue which appears in the founding affidavit is challenged or denied by the respondent in the answering affidavit, the courts will allow the applicant to clarify or rectify the issue in a replying affidavit. In BAECK AND CO (SA) (PTY) v VAN ZUMMEREN AND ANOTHER 1982(2) SA 112(W), the headnote to the report of that case reads:**
>
> > **'Where in an application the applicant does not state in his founding affidavit all the facts within his knowledge but seeks to do so in his replying affidavit the approach of the court should nevertheless always be to attempt to consider substance rather than form in the absence of prejudice to the other party'.**
>
> **[30] Goldstone J who gave the judgment in the Baeck case was following a long line of cases in which the courts of South Africa have allowed applicants to supplement their founding affidavit in replying affidavits. In SHEPARD vs TUCKERS AND LAND DEVELOPMENT CORPORATION (PTY) LTD 1978 (1) SA 173 (W) AT 177G – 178A, Nestadt J, as he then was, was dealing with the requirement that the applicant is obliged to include in his founding**

affidavit all the pertinent facts on which he relies. The learned Judge said:

> **'This is not, however, an absolute rule. It is not a law of the Medes and Persians. The court has a discretion to allow new matter to remain in replying affidavits, giving the respondent the opportunity to deal with it in a set of answering affidavits'**

[31] In Shepard's case and other more recent cases on the topic, including Baeck's case, supra, the decision in POUNTA'S TRUSTEE vs LAHAMAS has been referred to but the courts have declined to slavishly adhere to it.

[32] The learned Judge *a quo* also referred to the decision in SOUTH AFRICAN MILLING CO LTD vs REDDY 1980 (3) SA 431 (SEC) for the proposition that the founding affidavit must contain all essential averments and that these cannot be supplemented in a replying affidavit. That decision has been criticized in a number of subsequent cases where it has either been distinguished or not followed, including one of the most recent cases on the subject viz SMITH vs KWANONQUBELA TOWN COUNCIL 1994(4) SA 947 (SCA). In that case the Supreme Court of Appeal in South Africa (per Harms JA) held that a party to litigation does not have the right to prevent the other party from rectifying a procedural defect. Referring to the South African Milling Case, Supra, the court stated that there the court had approached the matter from a procedural point of view viz that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes that rule. The Appeal court held that this was not a correct approach. It again stated that the rule against new matter in reply is not absolute but 'should be applied with a fair measure of common sense'. As Ebersohn J stated, the law in Swaziland is the same as that in South Africa. The court in this country should therefore also follow that approach".

[38] On these premises, I find the landlord's supporting affidavit competent in this regard.

[39] It is an established fact that the lease of the parties is regulated by the landlord of the leased premises. This fact is abundantly acknowledged by the Respondent in its papers. I am thus guided by the expressed position of the

landlord in annexure C3 above, wherein it denied that the Respondent ever sought permission from it to put up the controversial signage and that it granted such. The landlord went on to request that the Respondent removes its signage since it is covering Applicant's space for signage. It follows that pursuant to its regulatory powers in the leased premises that the landlord had requested the Respondent to remove its signage since it is covering the Applicant's space for signage.

[40] In the light of the totality of the foregoing, the Applicant is entitled to the specific performance sought in prayer 1 of the application. I say this because the Plaintiff has shown that the Defendant is committing a breach of the lease agreement. One way of breaching a contract is by doing something expressly or impliedly forbidden by the contract or inconsistent with the obligation imposed by it. A plaintiff who asks for an interdict to prohibit such a breach is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure performance of the contract. Its entitlement to an interdict is unquestionable as in the case of a plaintiff who seeks specific performance in the positive form.

[41] The grant of such an order is subject to the court's discretion. The plaintiff is not required to prove that he would suffer injury or loss if the interdict were not granted, merely that the defendant is committing or threatening to commit a breach of the contract, or intentionally assisting another person to

breach that other person's contract. See **Genwest Batteries (Pty) Ltd v Van der Heyden 1991 1 SA 727 (T).**

[42] The plaintiff is not also required to prove that he has no other ordinary remedy, although the inadequacy of damages as a remedy is relevant in persuading the court to exercise its discretion in favour of granting an interdict. The court may however have to apply the undue hardship principle depending on the circumstances of the case. See **Klimax Manufacturing Ltd v Van Rensburg [2004] 2 ALL SA 301 (0).**

[43] *In casu*, the mere fact that the Respondent has had the signage at the front entrance of the leased premises along side other signage belonging to other businesses, does not derogate from the right of the Applicant to have his signage directly over his own leased premises in terms of the new lease dispensation as regulated by the new landlord. Nor does the mere fact that the Applicant has his signage displayed in other parts of the premises derogate from this right.

[44] I see no undue hardship that the Respondent will suffer if he removes his signage which is presently also encroaching on the front entrance of the Applicant's leased premises and none is urged in these proceeding. Rather, it is the Applicant that stands to suffer obvious prejudice by being prevented from utilizing the advertising space directly over its leased premises, as regulated by the new landlord.

[45] In these circumstances, the Applicant is entitled to prayer 1 as sought in the notice of application.

[46] I now turn to prayer 2 of the application to wit.

> **"That the Respondent is hereby restrained and interdicted from trading or doing the business of selling, and repairing mobile phones, providing upgrades, software services and cellular accessories at the leased business premises which is the sole trade business of the Applicant".**

[47] Let me state it clearly from the outset that the question of restraint of trade does not arise here. This is because there is no underlying agreement between the parties as to what will happen if they part ways. This is simply a case of a dispute between two businesses located in the same leased premises. The principles that guide the court in ordering a final interdict as elucidated in the case of **Setlogelo v Setlogelo 1914 AD 221 at 227,** would hold sway in these proceedings.

[48] These principles are that for an Applicant for a final interdict to suceeed, he must show the following factors:-

1. A clear right.
2. Injury actually committed or reasonably apprehended.
3. Absence of a similar protection by another remedy.

[49] The Respondent contends that there is a material dispute between the parties on the two issues of the existence or not of a protectable interest and whether such protectable interest (if it exists) has been infringed. Therefore, so goes the argument, the application is not suited for motion proceedings and must be dismissed.

[50] The Applicant for its part argues, that no such disputes of fact enure in these proceedings.

[51] It is an accepted position of our law that legal disputes are best resolved by way of motion proceedings. However, motion proceedings are not appropriate for the purposes of resolving real and substantial disputes of fact, which properly fall for decision by action.

[52] The guiding principle in deciding whether real disputes of fact exist was elucidated in **Thebe Ya Bophela Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another 2009 (3) SA 187 (W) para 19,** where the court said the following:-

> **"The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules ---- are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denial in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected".**

[53] What then are the facts of this case?

[54] In its founding affidavit, the Applicant contends that it has from the onset operated the business of selling and repairing mobile phones (cellular

phones), providing upgrades, software services and accessories for mobile phones. The Respondent on the other hand had at all material times operated the business of selling and repairing audio, sound, music and audio systems and recording to its clients and customers per its business trade. The Respondent had however commenced an unfair business practice in that it now seeks to provide the same services of the Applicant, be in unfair competition and is wrongfully pouching the clients and customers of the Applicant in its trade.

[55] The Applicant further alleged that when the Respondent engaged in this unfair practice, it engaged the Respondent and demanded that he stops this malpractice and unfair competition as this is not his business trade and the Respondent made an undertaking to stop.

[56] However, the Respondent went against his undertaking and continued with the unfair practice and unfair competition.

[57] In the face of this, the Applicant reported the matter to the landlord, who intervened. The Respondent again undertook to stop the unfair competition and malpractice.

[58] The landlord then prepared a memorandum of understanding between the parties to settle the issues, however, the Respondent refused to sign the agreement.

[59] The Applicant has a clear right to trade exclusively in its business trade without the unlawful and wrongful competition by the Respondent, as the Applicant is lawfully licenced for its trade and the Respondent is not.

[60] Furthermore, the landlord leased the premises to the Respondent solely for its intended trade and business of audio, sound, music and audio systems and recording, and not for the trade of the Applicant.

[61] The continued wrongful conduct of the Respondent is causing serious prejudice and irreparable harm to the business of the Applicant in that the Respondent is damaging the goodwill and name of the Applicant as he pouches Applicant's clients and customers and renders to them substandard services under the misrepresentation that the Applicant is giving them services when it is not.

[62] The Respondent is acting wrongfully and unlawfully as he does not have the permit to trade in cellular phones in the current premises. It is only the Applicant that is lawfully entitled to so trade in the business. The landlord leased the said premises to the parties for their different trade and business.

[63] In his answering affidavit the Respondent averred as follows in paras 18 to 21:-

> **"18 The applicants founding affidavit is rather sparse where it comes to making out the required case to substantiate the issues of the existence of a protectable interest and the infringement thereof. This I say on the following basis;**
>
> **18.1 "The** SDEES SUPERMIX BRAND", **on take-off begun as a brand that catered for music, music retail, electronic gadgets – sound systems and DSTV installation. Most importantly**

under the brand was too a cell-phone division dealing in sales of cell-phones and airtime vending and installation and upgrades of associated soft-wear. Indeed during its formative years (and years to come), those were its key functions. This was allowed, I should point out by my lease and trading licence.

18.2 From it's said formative years the cell phone division was fully operational and functional within the "SDEEZ SUPERMIX BRAND" **and within my business premises within the building. The Brand grew, with God's Grace within Manzini as a whole and a great measure of public awareness over the services we provided was achieved within Manzini and other towns as well. This, it should be vitally recalled encompassed the cell-phone division of the brand and within our shop.**

18.3 I wish to state that from the inception of the Business and SDEEZ SUPERMIX **Brand in 2002, I placed a sign for advertising purposes, slightly above the door, at the entrance to the building. I wish to point out clearly as well that this was alongside numerous other signs that had been placed by other tenants to the building. To this day my signage still exists alongside numerous other signs that have been pinned up for advertising purposes by various tenants. I beg leave to refer to annexure CJ1 attached hereto being a visual aid or picture of the signage that is to date to be found at the entrance to the building. The Applicants present shop and that of myself are presently housed on the 1st floor of the building:**

18.4 Around the year 2008, I delegated the operation of the Cell-phone Division, still under my same shop premises and under the SDEEZ SUPERMIX BRAND, to the Deponent to the Applicants affidavit, Andy Exalto. I should mention that.

18.5 The deponent to the Applicants affidavit did not at any time, change the naming of the Brand dealing with the (sic) My Cell-Phone division. It continued under the same SDEEX SUPERMIX BRAND- **and in particular being called** SDEEZ CELLULAR.

18.6. To further drive the point home, even the applicants personal motor vehicle at such time, a yellow Opel Corsa, had been labeled, and in very Huge Stickers along both its sides, "SDEEZ CELLULAR" **by the applicant personally. The point being driven home is that, from inception, the** SDEEZ

BRAND **has always had a cell-phone division prior, during and after Mr Exalto's involvement within my shop. In 2009, and as a result of the economic recession, and as a result of the new landlord who had since acquired ownership of the premise,** TWAHIRWA INVESTMENTS**, I was moved to a smaller shop-space on the same floor and hardly a few feet away from the previous. Seeing this as an opportunity to grow, which aspect I admired from a young man of his age, the said Mr Exalto also now took up his own personal occupation of a shop space directly opposite mine.**

18.7 This for the landlord obviously meant more income. This now in actual fact meant the Applicant and I were practically neighours and were only separated by an approximately 2 meter passage way demarcating us. I beg leave of court to refer to annexure CJ2 attached hereto being a visual aid and or picture of our shops as they stand side by side today.

18.8 Nonetheless, though the scale of our business had obviously now toned down as a result of the now smaller office shop space, the SDEEZ BRAND **continued to provide all its services as known to its customers and most importantly that relating to its Cell-Phone Division. By the same token the said Applicant also continued to now independently provide its own cell-phone services to such customers as would approach it. Though in the strictest sense, this was now obviously in direct competition with me, I have nonetheless always accepted that I was not the only person licensed to provide a particular type of service, to the exclusion of all others.**

18.9 I therefore accepted the competition in a positive light and in this present day of society. By way of example and within the very same floor are housed 3 (three) different hair dressing salons and 2 (two) Professional Dress-Makers. I have therefore never really taken issue with the applicants provision of cell-phone services right across my doorstep since, in any case, it is business provided, with respect, by every Asian Shop at every street corner within Manzini.

18.10 I wish to state further and the avoidance of doubt that the SDEEZ BRAND cell-phone division has always provided repairs, sales accessories, installation of phone programs and upgrades of soft-wares. I should also state that technology is forever evolving. Now, we being primarily a Music based company, music at this day, time and age is one of those aspects that technology has mainly characterized to cell-phone,

bearing the age target group that at date bears interest. It is therefore to me simply outrageous as to how someone would want to monopolize technology in these circumstances

18.11 It would definitely as well not be within the public interest and or general economic interest to allow the Applicant the form of restraint of trade that he seeks. A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by enforcing an unreasonable restraint of trade.

Ad Paragraph 16

19 Contents thereof are denied as being devoid of truth and Applicant is put to strict proof. I have never made any undertaking of the sought. In fact as I related above herein, the Applicant has been seeking to use his financial influence over the landlord to rid everyone that stands in his way.

19.1 Indeed the landlord approached me bearing a draft agreement that he personally related to me had been prepared by the applicants present attorneys. I was not in agreement with it or the idea of being constantly bullied by the Applicant to dance to its music and we did by correspondence dated 20th July 2013 attached hereto and marked CJ3 make our stance known to the landlord. There is nothing we have hidden in the said regard.

19.2 I have never made any undertaking to the Applicant or anyone else concerning anything.

Ad Paragraph 17

20 Contents thereof are denied and the applicant is put to strict proof. I restate that technology is forever evolving. Now being primarily a music based company, music at this day and time is one of those aspect that technology has mainly characterized to cell-phone and related accessories, bearing the age target group that at date bears interest.

20.1 It is therefore to me simply outrageous as to how someone would want to monopolize technology in such circumstances, it would definitely as well not be within the public interest and or

general economic interest to allow the Applicant the form of restraint of trade that he seeks. These are as well as I stated above, services that are provided at nearly every Asian Shop around every corner in Manzini. I humbly invite the court to conduct an inspection in loco regarding this aspect. I state that, as shown clearly above, the restraint of trade sought against me is very much unreasonable and not enforceable.

20.2 I further bear a very strong inclination that all that the Applicant is trying to do is to stifle competition from one of its principle competitors. The Applicant actually realises my value and wishes to deprive me as its competitor of such value. This is not what is envisaged as a protectable interest in a restraint of trade.

20.3 It is not in the public interest – interpreted in the light of the Constitution – to enforce a restraint of trade in the manner sought by the Applicant. It would serve merely to stifle competition and not to protect any real interest worthy of protection. It would, instead, be in the public interest to allow me to exercise my constitutional right to exercise my trade and occupation freely.

<u>Ad Paragraph 19 to 21</u>

21 Contents thereof are denied. I wish to point out the following;

21.1 I have never poached on any of the Applicants clients. It is not stated how I go about this poaching. The Applicant and I share a corridor. It is up to a client to walk through which ever door he chooses. The SDEEZ BRAND has obviously been there for longer together (sic) the associated services it provides. It is therefore unsurprising that its loyal clients will walk through its door.

21.2 Notwithstanding that I take great exception to the allegation that I offer substandard services, an allegation whose striking out will duly be applied for, I fail to understand how the manner of my services affects the Applicant. If anything the Applicant would have to find pleasure in my offering of the alleged substandard services for it would in logic mean it would be advantageous to him as provider of "higher standard:. I fail to see why people would choose a low standard provider over a high standard provider.

21.3 I deny that I am not licensed to trade in cell-phone. This amounts to hearsay and formal application for its striking out

will be made. I am full legally entitled to engage in the business I am engaging in. The Applicant has further not himself exhibited the source of his own authority to engage in the said business (to the exclusion of all others). He has further not annexed his current lease to exhibit if he indeed is allowed the exclusive engagement in the said business by not expressly or impliedly excluding it. I humbly beg leave to refer to annexure CJ4 attached hereto being a copy of my lease. I challenge the Applicant to bring his own forth.

21.4 I state that Applicant has clearly not made out a case for the restraint of trade interdict that he seeks. If anything from the applicants own papers, it is apparent that an alternative remedy exists in that applicant can be adequately compensated by way of damages. A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order. Full legal argument will be advanced further on my behalf at hearing hereof.

21.5 At the worst I state that the matter is very much fatally riddled with factual disputes incapable of resolution from the papers alone. From the chequered history bore (sic) by the correspondence, this was apparent to the Applicant from inception of the proceedings but he chose to reconcile himself with this fact. There is a material factual dispute between the parties on the two issues of the existence or not of a protectable interest and whether such protectable interest (if it exists) has been infringed".

[64] It is on record that the Applicant filed a replying affidavit denying the material facts alleged by the Respondent in his answering affidavit. The Applicant also annexed thereto supporting affidavits from both the landlord and one Maswane Phindile Dlamini a co-tenant of both the Applicant and Respondent in the leased premises.

[65] From the totality of the facts urged, it is clear to me that there is a factual dispute as to the respective businesses of the parties which cannot be

resolved on the papers filed of record. The Respondent has annexed to his affidavit his lease agreement which does not tell the court anything on the issue. The Applicant for its part failed to urge its own lease agreement to substantiate its stance that its lease authorizes or gives it exclusivity in trading in cellular phones and its antecedents. The Deed of Agreement which was not signed by the Respondent cannot be relied on by the court to deduce this fact. The Respondent denies any participation in the Deed of Agreement.

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[67] It is my opinion that in these circumstances, the landlord's supporting affidavit does not take the matter any further.

[68] In the same vien, I will not countenance the supporting affidavit of Maswane Phindile Dlamini, which clearly constitutes new evidence in reply.

[69] The justice of the matter, in my view, would be for the issue in prayer 2 hereof as to whether or not the Applicant has the exclusive right to trade in cellularphones and its antecedents and whether or not the Respondent is encroaching on the Applicant's business and poaching its clients, to be referred to oral evidence to resolve the dispute.

[70] This is in line with the discretion conferred on the court pursuant to Rule 6 (17) and (18) of the High Court rules which provide as follows:-

> **"(17) Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.**

(18) Without prejudice to the generality of sub-rule (17), the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise".

[71] CONCLUSION

In conclusion, the application succeeds in part. I order as follows:-

1. The relief sought in prayer 1 succeeds. The Respondent be and is hereby ordered to forthwith remove his advertising sign encroaching on the business space and premises of the Applicant at the leased premises, City Plaza Building in Manzini.

2. That the relief sought in prayer 2 of the application be and is hereby referred to oral evidence.

3. The affidavit filed of record by the parties be and are hereby ordered to stand as pleadings at the trial action.

4. Each party to bear its own costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF …….2014

OTA J.

JUDGE OF THE HIGH COURT

For the Applicant:	**N. Fakudze**
For the Respondent:	**T.M. Ndlovu**