

**IN THE SUPREME COURT OF SWAZILAND**

**CIVIL APPEAL NO.7/07**

**In the matter between:**

**VINTAGE PUBLISHING (PTY) LTD t/a (1)**

**LIGOLI SPORTS NEWSPAPER (2) LWAZI**

**DLAMINI**

**APPELLANT**

**VS**

**AFRICA ECHO (PTY) LTD t/a**

**TIMES OF SWAZILAND**

**RESPONDENT**

**CORAM**

**STEYN JA**

**ZIETSMAN JA**

**RAMODIBEDI JA**

**FOR THE APPELLANT: FOR**

**MR. M. MABILA MR.**

**THE RESPONDENT**

**M. SIBANDZE**

**HEARD : 5 MAY 2007**

**JUDGMENT DELIVERED : 8 MAY 2007**

## **SUMMARY**

Application for leave to appeal against a decision of the High Court referring a matter to trial - Non joinder of 150 retail outlets raised as a point law - Such contention rightly rejected by the High Court - Nature of test to be applied when a matter in discretion of the High Court - Failure to file replying affidavit - Effect of - Balance of convenience of parties not such as to merit intervention - Held: Applicants had no reasonable prospect of success in an appeal - Application accordingly dismissed with costs.

## **JUDGMENT**

### **STEYN JA**

1. In this matter the applicants seek leave to appeal against an order of the High Court referring the matter to trial. On the papers before us such application is directed at the judgment of Maphalala J dated the 18<sup>th</sup> April 2007 in which he dismissed certain points of law and also extended a ***rule nisi*** granted by Mamba J. (See below)

The latter Judge had also directed that in view of the fact that there were factual disputes which could not be resolved without oral evidence the matter should be referred to trial for the hearing of such evidence.

The application is before us in two parts: the first is directed at the dismissal of the points of law. If leave to appeal is granted, it would authorise an appeal seeking to reverse the decision to refer the matter to trial on the ground that the Court exercised its discretion on a wrong principle.

I set out the facts. The Respondent is the publisher and distributor of a newspaper, the Times of Swaziland. The first Appellant is described in the papers "as an entity, the nature of which is unknown to the Applicant (in the original application) but is a newspaper printed by the 2<sup>nd</sup> Respondent (L. Dlamini) and others." The 2<sup>nd</sup> Appellant and one Sabelo Ndzinisa were both "until recently" employed by the Respondent (the Times). The

Times alleges that L. Dlamini "absconded" from 1 employment around the 31<sup>st</sup> of March 2007 and thi Ndzinisa, who is currently one of the publishers of Ligoh resigned with effect from the above date. The Times alleges that shortly prior to the departure of these two sports reporters, a file kept on computer containing sports photographs "disappeared" from the computer server. In view of recent events - so the Times alleges - the only reasonable conclusion was that the sports photographs in the file and the file itself "**had been intentionally removed and/or deleted**". A confirmatory affidavit from the Times' systems -administrator responsible for the maintenance of the computer system, one Bhembe, is annexed.

On the 12<sup>th</sup> April 2007 2<sup>nd</sup> Applicant (L. Dlamini) published for distribution a copy of Ligoli's newspaper dated 11<sup>th</sup> to 18<sup>th</sup> of April 2007, issue no.2, containing a number of photographs. According to the Times the pictures, or at least some of them, were taken by a

member of its staff, one Menzi Dlamini a sports repoi and photographer. The details of the photographs issue are set out fully in the papers and I cite th relevant passages which read as follows:

**"12. In particular Mr. Menzi Dlamini personally took all of the following photographs, on page 9 of the 1<sup>st</sup> Respondent newspaper; there are 2 photographs of one Ngwazi Nxumalo.**

**13. I am advised by Mr. Menzi Dlamini that the 2 photographs are a reproduction of one and the same picture personally taken by him except that the picture is transposed on one of the reproductions.**

**14. On pages 10 and 11 of the 1<sup>st</sup> Respondent newspaper all of the photographs were personally taken by Mr. Menzi Dlamini and then reproduced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**5. The centre picture on page 11 was fact partially published in t Applicant's publication of the 2 January 2007 on the back pag except that this photograph on\ showed one of the two players in the photograph in the 1<sup>st</sup> Respondent Newspaper and that this photograph had been transposed to make those represented appear to be facing the opposite direction.**

**15. I attach copies of page 9 of the 1<sup>st</sup> Respondent Newspaper, pages 10 and 11 of the said Newspaper marked "SD.2" and «SD.3"respectively and I further attach a copy of the picture appearing on the 2<sup>nd</sup> January in the Times of Swaziland marked annexure "SD.4".**

**16. Furthermore the two top pictures on page 14 of the Newspaper were personally taken by Menzi Dlamini at the Prince of Wales Stadium.**

**18. The picture in the top right he corner of page 15 of the Publicati was also personally taken by h Menzi Dlamini at the Prince of WaU Stadium. I attach copies of th pictures I have referred to on pagei 14 and 15 of the 1<sup>st</sup> Respondent's Newspaper marked "SD.5" and "SD.6" respective ly."**

A confirmatory affidavit by Mr. Menzi Dlamini is annexed.

The Times is of the view that L. Dlamini (2<sup>nd</sup> applicant) and/or Mr. Sbelo Ndzinisa or persons acting on their behalf "unlawfully removed or stole the photographs referred to". It was on the strength of the averments set out above that the court granted the Times the following relief:

**"2.1 That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be are hereby restrained and interdicted f distributing for sale or any other purp< ISSUE NO.2 of LIGOLI SPOJ? JVEWSPAPER, dated 11<sup>th</sup> to 18<sup>th</sup> April 200**

**2.2 That the Deputy Sheriff for the Districts q 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 11\* to 18<sup>th</sup> April 2007.**

**3. Directing that prayers 2.1 and 2.2 operate with immediate and interim effect pending the outcome of this Application.'\***

On behalf of the applicants before us (respondents in the High Court) certain opposing affidavits were filed. As is stated above certain points were taken *in limine* and I will detail these below.

Mr. L. Dlamini denied that he "absconded" from his employment and said that he



"resigned" on the 31<sup>st</sup> of March 2007. What . importance is that he denies that he himself or other: his behalf acquired the photographs in question illegal. They were, so he alleges obtained from Mr. Luc Simelane, a photographer with a competitor of the Times the Swazi Observer. Mr. L. Dlamini reiterates that the photographs reproduced in the Ligoli Sports Newspaper were not a reproduction of photographs published in the Times. A confirmatory affidavit is filed by Mr. Lucky Simelane. In it he says that:

***"In particular I confirm that Lwazi Dlamini requested photographs of different sporting events taken by me for purposes of publication in his newspaper Liaolt. The photographs date back to the year 2000".***

These affidavits were filed on Saturday the 14<sup>th</sup> of April 2007 and at the same time the Respondents below applied for leave to anticipate the return day of the rule

nisi which had been issued on the previous day Friday the 13<sup>th</sup>-  
This application was granted and matter was duly heard on the  
16<sup>th</sup> of April and judgment given on the 18<sup>th</sup> April. No replying  
affidavit was filed the Times. It is not clear when the Notice to  
Anticipa dated Saturday the 14<sup>th</sup> April was served on the Times  
but in view of the fact that the matter was heard on the Monday  
the 16<sup>th</sup> it is not difficult to understand why it did not do so.  
However, I will deal with this issue below. On the 18<sup>th</sup> April 2007  
the High Court dismissed the points of law raised by the  
Respondents before it, and extended the rule.

I deal next with the points of law. There were the following:

***"8.1 The Respondents have a contractual obligation to deliver copies of LigoZi Sports Newspaper (the newspaper) to over 150 retail outlets throughout Swaziland. By the same token the outlets have a***

***contractual obligation to receive newspaper and sell it to consumers.***

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

**Dispute of fact**

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

The first question requires that a determination should be made as to whether the (150) retail outlets have a direct and substantial interest in the issue involved. There was no evidence tendered by the applicant who these retailers were and what precisely the nature and extent of their interest in these proceedings were. It is clear that in the absence of evidence to establish their

identity any order the Court should make would be force and effect. No substantive factual averments placed before the High Court which would have enabled it to determine whether these outlets had any financial or other interest in the resolution of these disputes. The High Court was clearly correct in dismissing this point of law and the applicants have no prospect of success in an appeal on this issue.

It was common cause that disputes of fact were raised on the papers. However the applicants contend that the respondents should have appreciated that such disputes would have arisen and that therefore they have reasonable prospects of success that a different Court may be of the view that the application should have been dismissed. They also contended that such disputes as do arise should be resolved in their favour, because the applicants in the High Court did not file any reply in response to their opposing affidavits.

1. The decision to refer the matter to trial was one made by the learned trial Judge in the exercise of the discretion authority he had. It is common cause that an appeal court would not readily interfere with the exercise of a discretion unless it were exercised capriciously or on wrong principle of law. See in this regard **REX v ZACKY 1945 A.D. 511; EX PARTE NEETHLING 1951(4) SA 331 (A)** and **MAHOMED V KAZPS AGENCIES (PTY) LTD 1949(1) SA 1162 (N)**.

Whilst conceding that this principle was applicable in the evaluation of the propriety of the order made by the High Court, counsel submitted that the failure of the court to give due weight to the fact that no replying affidavits were filed by the applicant in the High Court application meant that the Judge a quo had exercised his discretion on a wrong principle.

In support of this argument Mr. Mabila cited a judgment of Masuku J in **POLO DLAMINI AND ANOTHER; IN RE: M.S. NSIBANDE AND OTHERS; CIVIL CASE**

**NO.1581/00 (UNREPORTED).** Counsel referred passage in the judgment which reads as follows:

***"It is my view, in view of the foregoing that, the absence of a replying affidavit, the applicant accepted the respondent's version he did not rebut the respondent's which were crucial to the applicant's case."***

It is however clear from a reading of the facts of the matter, that there were allegations in the opposing affidavits that cried out for a response from the applicant, and that these were facts not traversed in the founding affidavits. In any event there is no general rule to this effect. Each case will depend on its own facts. Whether the inference called for is justified will always depend on the circumstances of each case. In the matter before us there is clearly no basis for inferring that the applicants in the court below accepted the version of the respondents. As Mr. Sibandze for the

Times has pointed out, the two versions are c mutually destructive.

The need to refer the matter to trial became obvious o: the respondents denied that the photographs we illegally purloined from the Times newspaper. Neither could the Times reasonably have anticipated this denial in they had good grounds for believing that the applicants had acted unlawfully in doing so. In any event, as appears from the facts set out above, the time-constraints hardly gave the respondents (before us) (the Times) a reasonable opportunity to reply to the allegations made by the applicants (Legoli & L. Dlamini).


Mr. Mabila has also challenged the exercise of discretion by Maphalala J on the ground that the balance of convenience dictates that interdictory relief should not have been granted. He submitted that damages would adequately compensate the Times and the present applicants should not be penalized in circumstances

where it might ultimately be established that the) not breached the respondents' rights. In this regard referred us to a passage in the work **INTELLECT! PROPERTY** by **CORNISH, 3<sup>rd</sup> ED. 1996** at pages 56-i On the facts before us, I am of the view that there are 1 clear indicators as to where the balance of convenienc resorts. Moreover on these papers the Times has certainly established a clear ***prima facie*** case that their intellectual property rights have been infringed. An early trial date to be allocated by the Registrar has already been sought. Also the facts are within a narrow compass and the matter should be disposed of expeditiously. The applicants themselves could also readily be compensated by an award of damages should the Times fail to prove its case.


In the light of the concession rightly made by counsel for the appellant as to the test to be applied in discretionary matters, it is clear that there is no basis for contending that the ***court a quo*** erred in referring the matter to trial.



The applicants for leave to appeal have no reaso. prospects of success in disturbing the order of the , Court. Mr. Mabila urged us not to order his client: pay the costs. We see no reason on the facts before to depart from the conventional order. The applicatic for leave to appeal is refused with costs. These have to be be paid by the applicants jointly and severally, the one paying the other to be absolved. Such an award includes the costs of counsel.

  
J.H. -STEYN Judge  
of Appeal

I AGREE

  
Judge of Appeal

I AGREE

  
M.M. RAMODIBEDI  
Judge of Appeal

N.W. ZIETSMAN