IN THE HIGH COURT OF SWAZILAND

Civ, Case No. 1613/96

In the matter between:

SWAZILAND DEVELOPMENT & SAVINGS

BANK Applicant

Vs

THE TIMES OF SWAZILAND Respondent

CORAM: S.W. Sapire A.C.J.

FOR THE APPLICANT Mr. Flynn

FOR THE RESPONDENT Mr. Dunseith

Judgment

(6/8/96)

This application made by the Swaziland Development and Savings Bank has come as an urgent matter. The relief sought by the applicant is an order interdicting the Editor, its associated publications and the owner of the group, from publishing information contained in confidential documents referred to as a "Report and/or Board Minute" placed before the Board of Directors of the applicant on 28th June 1996.

At the initial hearing, the matter was postponed to afford the respondents an opportunity to prepare and file affidavits in answer to those attached to the Notice of Motion in support of the application. An undertaking by

the respondent not to publish any information, further to that which had already been published, obtained or extracted from the confidential document, was incorporated in the order so postponing the application for further hearing.

In the founding affidavit attested to by Michael McNie it was alleged, after describing the parties cited, that:-

The applicant, which is a registered financial institution in terms of the Financial Institutions Order and operating as a Development and Savings Bank in terms of the Kings Order-in-Council 49/1973, is in the process of being restructured under the supervision of the Central Bank of Swaziland and/or the Government through the Ministry of Finance.

The deponent who is the Managing Director of the applicant, prepared a strictly confidential report and board minute dealing with issues touching on the restructuring programme. The report was intended to be seen only by members of the Board of Directors and other individuals who by virtue of their offices in the supervising authorities would have to be appraised of the matters dealt with in the confidential document.

The document was tabled at a meeting of the Board of Directors for discussion purposes on Tuesday 18 June 1996.

Copies of the report were made available only to board members and no one else. Certainly the report was not intended for the information of the public in general or the press in particular.

On 4th July 1996 the respondents, in the issue of The Times of that day published four articles dealing with the affairs of the applicant. The articles do not purport to be extracts from the confidential report itself and no

mention is made in the articles as to where the information was obtained, other than by indicating that it came from "well informed sources".

The first article, appearing at the top left hand corner of page 11, under the heading, "Tucker may assume new position at Swazi Bank" deals with the possibility of Mr. Richard Tucker a former Acting Managing Director continuing to serve the bank until June 1997, and without commenting thereon describes the "rationale" behind this. The information is said to come "well informed sources".

The second article appearing alongside the first is headed "Swazi Bank run on customer funds", and describes the parlous financial position in which the bank finds itself through the extraordinary high rate of seemingly non performing and irrecoverable loans it has made. This is not news and has been a matter of public debate for some time. This information I observe need not have come from the confidential report. What probably did come from the report is the information regarding the tentative plans, or the possible strategy of the management to restore the applicant to a financial position in which it could achieve the objects envisaged when it was incorporated.

The third and fourth articles deal with other aspects of the proposed future administration of the applicant.

When the publication of these articles came to the knowledge of the deponent McNie, he wrote a letter in long hand, and delivered it to the Editor of the Times. In the letter he pointed out that the material contained in the articles appeared to have been extracted from the confidential board document. The attention of the Editor was drawn to the possibility of the publication being a contravention of Section 30 of Kings-Order-in-Council 49/73. In the absence of a reply to this letter, a further letter in the same vein was written and delivered

to the respondents on applicants' behalf by applicant's attorney. The respondents maintain that they may lawfully publish further articles which would disclose information contained in the confidential board documents now in their possession,

When the matter was argued it was common cause that the respondents had had access to the confidential document and that the information published had been obtained therefrom. The respondents while dissavowing present possession of any copy or copies of the document itself, persists in its assertion of its claim of the right to publish and comment on any information which it has obtained from its temporary access to the contents of the document. The interdict which the applicant seeks is to prevent the respondents from doing so.

The applicant's case is based on two contentions. The first is that the publication of the information is

prohibited in terms of Section 30 of the Kings-Order-in-Council which reads as follows:

Secrecy

30. (1) No person -

a) employed for the purposes of this Order, shall publish or communicate to any other person without lawful authority any information acquired by him in the course of his employment:
b) who possesses any information which to his knowledge has been disclosed in contravention of this
Order shall publish or communicate such information to any other person."

The second contention is based on the applicant's right to protection of its privacy. In advancing this contention,

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Mr Flynn for the applicant relied on the judgments in : Financial Mail (Pty) Ltd and Others vs Sage Holdings Ltd and Another 1993(2) SA 451 (A). Sage Holdings Ltd and Another vs Financial Mail (Pty) Ltd and Others 1991(2) SA 117 (W) to illustrate and support the applicant's claim to protection of such a right.

When the matter first came before me, as an urgent application for an interdict, it was applicant's second contention only which was relied on. As respondents conceded interim relief pending the outcome of the application, no argument was' heard on the applicability of the section.

When the matter was eventually argued Mr. Flynn seemed to devote more attention to the second contention.

Mr. Dunseith, in his argument for the respondents, dealt with the applicability of the section briefly, and like Mr. Flynn directed the emphasis of his argument to the freedom of the press and the right of the respondent's readers to be informed on matters of public interest.

In dealing with the section Mr. Dunseith argued that the provisions of Section 30(1) apply only to persons "employed", and that the word "employ", signified a servant rather than an officer of the applicant. The argument ran, that as a director of the applicant was not by virtue of that office alone, an employee of the applicant, such a director was not included among the persons prohibited in terms of Section 30(1)(a) from publishing or communicating to other persons any information acquired by him in the course of his employment. If therefore the respondents had obtained access to the contents of the sensitive document from a director, the information so possessed by the respondents, would not have been disclosed to the respondent contrary to the provisions of the Order. In these circumstances,

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Mr. Dunseith claimed, the respondents were free to communicate such information to other persons.

In other words Section 30(1)(b) did not apply to the information possessed by the respondents because it had not been shown to have come from any person other than a director.

Paragraphs 8 and 9 of McNie's affidavit make it clear that only directors were given copies of the report. It was, so it was argued, therefore a matter of overwhelming probability that the information in the report was leaked to the respondents by one of applicant's directors, who was not an employee of

the applicant.

The fallacy in this argument lies in interpreting the word "employed" too narrowly, without regard to the context of the section, Even if it were correct that, as argued by Mr. Dunseith, that where the word is capable of more than one meaning, it must be understood, in a sense which favours freedom of speech, this would only be true if such an interpretation could be applied without doing violence to the ordinary meaning of the word in the context it was used.

The phrase "No person employed for the purposes of this Order ..." cannot, however be equated with "No person employed by the bank ...".

One must look to the purpose of the section. The purpose of the section is clearly to prevent the leaking of any information, (irrespective of whether such information is sensitive or not), and whether or not the leaking of the information would be prejudicial to the bank. It would be more than curious if the legislator had intended that only employees of the bank were not to divulge information concerning the bank, but that others employed for the purposes of the Order such as the bank's directors, its auditors, or government officials who were not even servants or officers of the bank, but who were engaged in

furthering the purposes of the order were to be free so to do. It is the directors, auditors, and Government officials who would be more likely to come into possession of sensitive information. It is for this reason that the phrase is to be interpreted as meaning that any person, whether an employee of the bank or not, engaged in the furtherance of the purposes of the order, is not to part with information obtained in the course of his duties.

It follows that the publication of the four articles was a contravention of the provisions of Section 30 and that any further publication would be unlawful.

Having come to this conclusion, it is not strictly necessary for me to further consider the first contention relied on by the applicant and the counter arguments advanced on behalf of the respondent. Having regard to the strongly differing views advanced by the contending parties, this judgment would be incomplete without making observations on the applicability in the present instance of the principles on which the Sage Holdings case decided.

The headnote to the report in Financial Mail (Pty) Ltd and Others vs Sage Holdings Ltd and Another 1993 (2)SA 451 (A) reads - Headnote: Kopnota

As a matter of general policy the courts have, in the sphere of personality rights, tended to equate the respective positions of natural and artificial (or legal) persons where it is possible and appropriate for this to be done. This is possible in the sphere of defamation for, although a corporation has 'no feelings to outrage or offend', it has a reputation (or fama) in respect of the business or other activities in which it is engaged which may be damaged by defamatory statements, and it is only proper that it should be afforded the usual legal process of vindicating that reputation. Similarly, a corporation is theoretically entitled to protection from invasion of its right to privacy and its right to identity.

The invasion of the right to privacy may take two forms:

i. an unlawful intrusion upon the personal privacy of another
ii. the unlawful publication of private facts about a person.

Not all such intrusions or publications are unlawful, and in demarcating the boundary between lawfulness and unlawfulness in this field, the court must have regard to the particular facts of the case and judge them in the light of contemporary boni mores and the general sense of justice of the community as perceived by the court. A decision on the issue of unlawfulness will often involve a consideration and a weighing of competing interests In a case of the publication in the press of private facts about a person, for example, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the public, if any, to be informed about such facts.

Where the information sought to be published was obtained by means of an unlawful intrusion upon privacy then, generally, any publication of such information would be unlawful. There might well be exceptions to the aforesaid general proposition: if in the case of information obtained by means of an unlawful intrusion the nature of the information is such that there are overriding grounds in favour of the public being informed thereof, the court would conclude that publication of that information should be permitted, despite its source or the manner in which it it was obtained, In this regard it is important to note that:

a) there is a wide difference between what is interesting to the public and what it is in the public interest to make known;

b) the media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest; and;
c) there is a public interest of a high order in preserving confidentiality in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media and others".

The facts of the case and the conclusions of the court were as follows:

The respondents, a public company quoted on the Johannesburg Stock Exchange and its chairman, had obtained an interdict preventing the appellants from publishing in the Financial Mail, a weekly financial magazine, an article which respondents alleged was based on information obtained unlawfully and which was defamatory of the respondents. Among the issues dealt with in the proposed article were the relationship between the first respondent and the Allied Group Ltd (in which the first respondent hald a 'strategic investment') and the disposal of a business venture in the United States of America in which the first respondent was engaged. It was common cause that those parts of the article were based in part on (1) information derived from a memorandum marked 'strictly private and confidential', critical of the relationship between the Allied Group and the first respondent, which had been prepared by a group within Allied but rejected by its executive committee and in respect of which permission to disclose it to third parties had never been given; and (2) tape recordings of telephone conversations between one of the first respondent's directors and various third parties, obtained by means of an unauthorised

eavesdropping device (the appellants had not been party to the unauthorised eavesdropping). One of the issues in the appeal against the grant of the interdict was whether the use by the appellants of information derived from the tape recordings and the Allied document ('the confidential sources') in an article published in the Financial Mail would have been unlawful.

Held, as to the tape recordings, that the fact that the information in question had been obtained by

means of an unlawful intrusion upon privacy was a factor of major significance.

Held, further, assuming in favour of the appellants that in a case where the information sought to be published had been obtained by means of an unlawful intrusion there might nevertheless still be overriding considerations of public interest which would permit of its publication, that it appeared that such a case would be a rara avis and that the public interest in favour of publication would have to be very cogent indeed.

Held, further, that this was not the case in this instance: the information in question related to sensitive and confidential information concerning the first respondent's internal affairs and delicate business negotiations being conducted by it and no good reason had been advanced by the appellants as to why the public should be informed about it or why indeed the appellants should have been permitted to use that information as a springboard for what was generally a fairly hostile article concerning the first respondent and its financial affairs.

Held, further, that the Allied document appeared to stand on the same footing as the tape recordings:

It was a confidential internal document belonging to Allied, it dealt with confidential and sensitive issues concerning

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the relationship between Allied and the first respondent and, since permission had never been given for the document to be disclosed to third parties, the appellants' possession thereof was unlawful.

Held, further, that there was no overriding consideration of public interest justifying publication.

Held, accordingly, that publication by the appellants of those parts of the article derived from the tape recordings and the Allied documents would have infringed the first respondent's right to privacy.

The headnote accurately reflects the judgment. There are significant similarities between the facts of that case and those in the present instance".

It was argued that because the sensitive information, the publication of which the applicant seeks to interdict had not been obtained by the employment of illegal electronic eavesdropping in the present case, a distinction should be drawn favourable to the respondents, and that on this account the respondents, should not be interdicted from publishing the information.

The distinction is illusory. A director is in a position of trust vis a vis the company in the administration of the business of which he participates. That trust includes a duty not to make disclosures of sensitive information obtained by him in the confidence of the boardroom. A breach of this duty is unlawful: see METER SYSTEMS HOLDINGS LTD VS VENTER AND ANOTHER* 1993 (1) SA 409 (W) the headnote of which reads -

"Our law recognises fiduciary relationship which, as a matter of law, give rise to an obligation to respect the confidentiality of information imparted or received in confidence, and to refrain from using or disclosing such

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information otherwise than as permitted by law or by contract, The fiduciary relationships that give rise to such legal duties are in some instances based on contract (such as a contract of employment or one between principal and agent). In such cases the obligation respect the confidentiality of the

information is generally regarded as an implied term of the contract. In other cases the relationships are based on the law of delict and the principles of Aquilian liability (for example the relationship between a tutor and his pupil or between a company director and his company). These aspects of the law are still in a process of development, and it appears that they are developing in parallel in the sense that the emerging definition of the legal duty relating to confidential information for the purpose of the law of delict is not materially different from the emerging definition of the implied contractual term where the relationship is based on contract. As far as English law on the subject is concerned, it is based on principles, there can be no question of an uncritical or slavish adoption of English precedents in South Africa. In principle, there can be no limit to the number of potential categories of information which may qualify as 'confidential' under our law, either in delict or in contract, but it is nevertheless useful to group together such categories of information as have already been recognised as qualifying, or failing to qualify, for such protection. The following list, which is not exclusive, refers to categories which have already been recognised in our case law:

1. .....
2. Information received by an employee (or anyone else bound by a fiduciary duty) about business opportunities available to an employer (or anyone else to whom a fiduciary duty is owed), even if such information could be obtained from a source other than the employer or employee (or from the parties to the fiduciary relationship).

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3. Information received in confidence by whilst in employment with a particular emp information is protected by a legal duty, in contract of employment, which continues disclosures of such information after the the relationship of employer and employee.
4. Information contained in stolen document.

Clearly the information possessed by the respondents, which they wish to publish falls within one or other or all of these categories.

It is difficult to imagine a newspaper turning away a company Director who comes for whatever motive to impart information of boardroom discussions to the newspaper. For a news paper to publish such information obtained from a renegade director would however amount to an invasion of the company's right to confidentiality in its deliberations.

There are no overriding considerations of public interest which would make the publication of material contained in the report so desirable so as to outweigh the bank's right to work out a solution to its present difficulties out of the public gaze. The information in the report or minute, a copy of which was by agreement between the parties placed in my custody relates mainly to plans or strategy which the directors contemplate using to extricate the bank for the general benefit. The. plans or some of them may never be adopted. It may be prejudicial not only to the interests of the bank, but also to the interest of the country as a whole to have the thinking of the directors prematurely made known publicly. It is difficult to see how it would benefit anyone for this type of information now to be printed in the newspaper.

For these reasons there will be judgment in favour of the applicant and the following order is made -

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1. The respondents are hereby interdicted from disseminating, publishing, or printing any information obtained from access to confidential Board Documents of the applicant dated 18 June 1996 a copy of which has been placed before the court and identified by the signature of the Registrar thereon.

2. The respondent is ordered to deliver to the registrar any copies of the confidential board documents in its possession, together with an affidavit on the path of one of one or other of the directors of a respondent who has the necessary knowledge that the copies so surrendered are the only copies in the possession of the respondents or any one of them. If the respondents maintain that they do not have any copy of the document in the possession of any one of them, it must be so stated in the affidavit.
3. The respondents, jointly and severally are to pay the applicant's costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE