IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 2717/07**

In the matter between:

WIZ TECH INVESTMENTS (PTY) LTD **APPLICANT**

AND

IAN NXUMALO t/a WIZ TECH GENERATIONS **RESPONDENT**

CORAM **MAMBA J**

FOR APPLICANT **MR NGCAMPHALALA**

FOR RESPONDENT **MR MABUZA**

JUDGEMENT

9th NOVEMBER, 2007

[1] The apparent applicant is a company duly registered in terms of the company laws of Swaziland and has its principal place of business at Shop No. A2, Apex House, Sheffield Road in Mbabane. It claims it is the sole distributor and or seller of Wiz Tech Satellite Decoders and receivers and accessories thereto in Swaziland.

[2] The respondent is Ian Nxumalo. He is described as an adult male business operator trading as Wiz Tech Generations and has his principal place of business at office No. 1 Manzini Heights in Manzini.

[3] The applicant was established in or about January 2007.

[4] The respondent started his business operations four months later in the same line of goods sold by the applicant. He also claims that he holds the sole dealership license in the products he sells. Both parties derive their names from the Wiz Tech products they claim to sell. As a result of the use of the trading name by the respondent, the applicant complains that the respondent has stolen its name, clientele or business and income. The applicant has thus applied for an interdict restraining and prohibiting the respondent from:

"(i)... using, adopting or imitating applicant's trade name

or get-up of applicant's products.

(ii) ... passing-off his goods as those of the applicant or as being connected in the course of trade with the applicant by using in regard thereto an "offending get-up" or any get-up which is confusingly or deceptively similar to applicant's distinctive get-up."

[5] The application has been filed or launched by Nkosinathi Nhlamba Jabulani Ndlovu, (hereinafter referred to as Mr Ndlovu) one of the Directors of the Applicant. He claims in the founding affidavit (in support of the application) that he is ... duly authorized to make this affidavit." One immediately notes that Mr Ndlovu does not say that he is authorized or empowered to bring this application on behalf of or in the name of the applicant.

[6] In his opposing affidavit, the respondent has ***inter alia*** denied that Mr Ndlovu is a Director of the applicant or that he is authorized to bring this application on behalf of the applicant. In response to the first point herein, Mr Ndlovu has in his replying affidavit filed a form J which is a copy of the applicant's register of Directors filed with the Registrar of

Companies. It bears the said registrar's date stamp for the 12th day of January 2007 and Mr Ndlovu is listed as one of the directors of the applicant. This information, in my view, disposes of that objection, at least for purposes of this application. Mr Ndlovu is prima facie a Director of the applicant.

[7] The mere fact that Mr Ndlovu is a director of the Applicant does not, however, cloth him with the necessary authority or mandate to bring this application on behalf of the applicant.

[8] As an artificial person, a company litigates or carries out its business operations through its Directors and other servants. These servants or Directors must be duly authorized to do whatever they do on behalf of the company. It would, for instance, be chaotic (for a company) if any of its many Directors were to, and at any time, and without authorization file a suit on behalf of the company whenever such Director thought the company had a legitimate grievance to bring before the court. This would lead to unbridled actions being filed on behalf of the Company.

[9] In casu, Mr Ndlovu does not address the issue of his authority to bring this application. He is happy just to allege and prove that he is a director of the applicant. That is, however, not enough. The fact that he has not seen it fit for him to address this point head-on, seems to indicate to me that the company directors did not authorize him to file this application. The onus to establish that the application has been duly authorized rests on Mr Ndlovu herein.

[10] In the case of Mall (Cape) (Ptv) Ltd v Merino Ko-operasie BPK,

1957 (2) SA 347 at 351-352 Watermever J, writing for the Court stated the position in the following terms;

"I proceed now to consider the case of an artificial person, like a company or cooperative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorized the institution of notice of motion proceedings (see for example Royal Worcester Corset Co v Kesler's Stores, 1927 CPD 143; Langeberg Ko-operasie Beperk v Folscher and another 1950 (2) SA 618 (C)). Unlike an individual an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the Secretary or General Manager of a company would not necessarily know whether the Company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the court or that proceedings which purport to be brought in its name have in fact been authorized by it.

There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized by the company to do so (for example Lurie Brother Limited v Archache, 1927 NPD 139, and the other cases mentioned .... This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed

before the court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized would be provided by an affidavit by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court then I consider that a minimum of evidence will be required from the applicant...."

[11] And in Pretoria City Council v Meerlust Investments Ltd, 1962 (1) SA 321 (AD) at 325 Ogilvie Thompson JA stated as follows;

"The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this court has been duly authorized by the council; that it is the Council which is prosecuting the appeal, and not some unauthorized person on its behalf.... As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorized by the artificial person

concerned. In order to discharge the above mentioned onus, the petitioner ought to have placed before this court an appropriately worded resolution of the council."

[12] The above two cases were quoted with approval by Corbbet J (as he then was) in Griffiths and Inglis v Southern Cape Blasters fptv) Ltd, 1972 (4) SA 249 fC).

[13] In the result, the objection in limine must be upheld and the application is dismissed with costs. Having found that Mr Ndlovu was acting on a frolic of his own in prosecuting this application, it is only logical, I think, that he should bear the costs of suit and it is so ordered.

[14] As a result of this conclusion, it is not necessary for me to deal with or consider the other points raised in this application.

MAMBA J