IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C. OF A. (CIV) NO. 21/2014
CCA/97/2013

In the matter between

THE POST (PTY) LTD	**1ST APPELLANT**
ABEL CHAPATARONGO	**2ND APPELLANT**
CASWELL TLALI	**3RD APPELLANT**
SHAKEMAN MUGARI	**4TH APPELLANT**

and

AFRICAN MEDIA HODLINGS (PTY) LTD	**1STRESPONDENT**
LESOTHO TIMES (PTY) LTD	**2ND RESPONDENT**
SUNDAY EXPRESS (PTY) LTD	**3RDRESPONDENT**

CORAM: SCOTT AP
FARLAM JA
CLEAVER AJA

HEARD: 14 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Application for interdictory relief based on unlawful competition – whether elements of unlawful competition established.

JUDGMENT

CLEAVER AJA

[1] This is an appeal against the confirmation of an interim order by the High Court on 5 March 2014. The relevant portion of the judgment reads as follows:

> "[49]Therefore the court considers that it will meet the justice of the matter to confirm the interim interdict and restrain all respondents from publishing any newspaper or engaging in the profession of journalism for a period of twelve months. The period to be counted from September 2013, when the interdict was granted.
>
> [50] The application is therefore granted to that extent only and costs of suit are awarded to the applicant."

[2] The proceedings in question were initiated by means of an urgent application lodged in the High Court on 11 September 2013 on which day the court granted an interim interdict restraining the appellants from publishing any newspaper or engaging in the publishing business within the Kingdom of Lesotho pending the return day of the rule. In terms of the rule the appellants (cited as respondents in the application) were also called upon to show cause on the return day

(1) Why the first respondent should not be restrained and interdicted from publishing any newspaper or engaging in the publishing business within the Kingdom of Lesotho for a period of twelve months.

(2) Why the second, third and fourth respondents should not be restrained and interdicted from carrying on the profession of journalism and engaging in the publishing business, for a period of thirty six months in the case of the first appellant, and twenty four months in the case of the second and fourth appellants,

within a radius of two hundred kilometres from the offices of the first respondent.

The order, which was returnable on 2 October 2013 contained other provisions which are not relevant. The matter was not heard on 2 October, but only on 5 November 2013. Judgment was not handed down until 5 March 2014, and to make matters worse, the second appellant avers that the judgment was not made available to the legal representatives of the appellants until 19 March 2014. By then it was too late to enrol an appeal for hearing in the April sitting of this court. The result is that by the time we heard the appeal the restraint period imposed by the High Court had already expired.

[3] The applicants in the High Court (the respondents in this court) are companies registered as such in Lesotho and are involved in publishing newspapers in Lesotho. The second and third respondents, both of which are subsidiaries of the first respondent, publish newspapers known as "The Lesotho Times" and "Sunday Express" respectively.

[4] As the period of restraint has by now expired, all that remains is the question of costs. Since the

appellants were, through no fault of their own, not able to have their appeal heard before the restraint period expired, I consider it only right and proper that they be afforded an opportunity to challenge the orders made against them by means of their appeal. Counsel for the parties were also in agreement that this should happen.

[5] The second appellant was employed by and was a director of both the second and third respondents. He was also the editor of the Lesotho Times and the deputy editor of the Sunday Express. The third appellant was the deputy news editor of the Lesotho Times and the Sunday Express. Although Mr Basildon Peta ("Peta"), the chief executive officer and director of all three respondents and deponent on behalf of the respondents, avers that the third appellant was, by virtue of his senior managerial position, a member of the boards of directors of second and third respondents, this allegation is denied. As we are concerned with motion proceedings, the third appellants' version must be accepted. The fourth appellant was the deputy editor of the Lesotho Times and was also deputy editor of the Sunday Express.

[6] Peta avers that during July 2013 while he was in Zimbabwe he received information of what he terms a "plot" at the offices of the second and third respondents to form a new company, to steal employees from the second and third respondents and to go into competition with the respondents unlawfully. The second, third and fourth appellants were said to be at the centre of this plot. Soon after he received the information, the second appellant, by means of an e-mail communication to him on 3 August 2013, gave notice of his resignation from the positions held by him in the respondents with effect from 31 August.

[7] After returning to Maseru on 5 August 2013 Peta ascertained from the Registrar of Companies that a company, the first appellant, had been registered. The third and fourth appellants, and two others were reflected as initial shareholders of the company. He says he was shocked at the discovery and that it then became clear that the second, third and fourth appellants had been conspiring behind his back to pave the way for a new publication or newspaper. He avers further that he ascertained

that the first appellant had opened an office at an address in Maseru, that it was fully operational in that it was marketing and promoting itself and intended to publish a newspaper in Lesotho in direct competition with the second and third respondents. In his view "these intentions of the four respondents involve wrongful interference with the rights of the applicants because the second, third and fourth respondents were preparing and planning this action in secrecy for a long period of time while they were supposed to look after the interests of the second and third applicants".

[8] On 31 August 2013 the third appellant resigned from the positions he held at the second and third respondents and on 10 September the fourth appellant did the same.

[9] The appellants list various reasons why they were not happy in their employment with the second and third respondents, which need not be examined at this stage. They aver that because of their unhappiness the three of them and one 'Mathabo Tsuinyane, the marketing manager for the second respondent, decided to join forces in order to

venture into a commercial enterprise. The first appellant was registered for this purpose on 7 May 2013, but a trading licence for the company was obtained only on 10 September 2013. The appellants deny that the first appellant was in operation as alleged by Peta.

The second appellant avers that on an occasion when they were indicating their unhappiness about their work situations to Peta, he advised them to start their own newspaper. This is denied by Peta. The third appellant denies that he ever held a senior position as averred by Peta or that he was ever engaged in management meetings of any of the respondents. He says he was never a director of any of the respondents. The fourth appellant states that he was never a shareholder or director of any of the respondents.

[10] In support of their prayers for the restraint orders sought by the respondents, reliance was placed on a so called "Editorial Charter/Code of Ethics" of the first respondent with which Peta avers the second, third and fourth appellants were conversant. The charter is said to be for directors and employees of the subsidiary companies of the first respondent.

Peta avers further that the second appellant was aware of the contents of the charter as he had assisted him in drawing it up. As far as the third and fourth appellants are concerned, Peta says that on more than one occasion he discussed the contents of the charter, including each and every clause therein, with them. The charter contains restraint of trade provisions which apply upon the termination of employment of employees.

[11] The appellants deny all knowledge of the charter and the second appellant denies assisting Peta in compiling it.

[12] The orders sought in the court *a quo* were premised on the submissions that the respondents had established:

(1) That the appellants had embarked on a road of unlawful competition against which the respondents were entitled to be protected,

(2) That the respondents were entitled to enforce the restraint provisions of the charter, and

(3) That the respondents had breached their fiduciary duty to the second and third

respondents, by virtue of being directors and senior managerial employees of the companies.

[13] The court *a quo* found that the respondents were entitled to interdictory relief on the grounds that the appellants in question had breached their fiduciary duty towards the second and third respondents and also that their actions constituted unlawful competition with the business of the respondents.

[14] In reaching its conclusion the court, correctly in my view, did not find that the second, third and fourth appellants had bound themselves to the terms of the charter. Consequently nothing more need be said about it.

[15] The notice of appeal contains 13 different grounds of appeal. Two of the grounds are technical objections relating to the right of the first respondent to institute proceedings for unlawful competition (the appellants contend that it could not do so as it did not have a trading licence) and the alleged non-joinder of a shareholder in the first appellant. In my view both these objections were correctly dismissed by the court *a quo* and nothing more need be said

about them. The other grounds will came under consideration when assessing whether the requirements for the relief granted by the High Court were established.

[16] Before us counsel for the respondents sought to defend the judgment of the court below solely on the grounds that the respondents had made out a case of unlawful competition. He contended that this had been established by the following acts or omissions of the appellants:

(1) The secret registration by them of the first respondent as a company in May 2013 and the procurement of offices for it, in order to publish a newspaper in competition with the respondents,

(2) The failure of the second, third and fourth appellants to disclose to Peta their intention to operate a publishing company and in particular not to do so at a meeting with Peta on 29 June 2013.

(3) Their departure, virtually together, from the employ of the respondents, leaving the

respondents in a state wherein they were unable to function effectively.

[17] The principles applicable to the delict of unlawful or unfair competition are set out in *Schultz v Butt 1986 (3) 667 (AD)* and other cases which followed and in which the principles were expounded upon. For the purposes of this case we need only have regard to the basic principles involved. Every person is entitled to carry on his trade or business in competition with his rivals. In doing so, however, the trade or business should not be carried on unlawfully in the sense of wrongfully interfering with another's rights as a trader. The wrongfulness of a competitive act lies in the infringement of the goodwill of the rival's business. As to the yardstick to be applied in deciding whether an impeachment of a trader's rights is fair or not, Nicolas JA expressed himself as follows in *Schultz v Butt at 679:*

> *"While fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria. As pointed out in the Lorimar Productions case ubi cit, questions of public policy may be important in a particular*

case, e.g. the importance of a free market and of competition in our economic system."

Although specific acts of unlawful competition abound in the law reports, the principles set out in *Schultz v Butt* remain accepted law.

[18] It is clear that none of the acts or omissions chronicled above, viewed separately or collectively, constituted unlawful competition or established the threat of unlawful competition with the respondents. Neither the fact that the appellants, through the medium of the first appellant intended to compete with the respondents nor the sudden departure of the second, third and fourth appellants from the stable of the respondents was unlawful. For that matter, the holding of an interest by the second appellant in a company set up to compete with the respondents in the future while still a director of the respondents in question, was not a breach of his fiduciary duty owed to the second and third respondents.

[19] The court *a quo* also found that the appellants sought to lure key personnel of the respondents and

to steal clients as well. Suffice to say that in the evaluation of the evidence put before the court by way of affidavit, and the need to prefer the version of the appellants as respondents in the motion proceedings, that was not established. The interdicts and restraints should therefore not have been granted.

[20] Before concluding this judgment it is regrettably necessary to say something about the delay in the judicial process in this matter. Applications to prevent unlawful competition and for the enforcement of restraint of trade provisions are by their very nature urgent and should be treated as such by the courts. In this matter the livelihood of the appellants was at stake and because of the delay in the judicial process they were unable to challenge the orders made against them for over a year. There is no indication why the hearing of the urgent application was delayed for some two months. Then, when the matter was heard, a further delay of four months ensued before judgment was handed down. The delays did not end there, for according to the appellants, they were not able to obtain a copy of the judgment for another two weeks. Having regard

to the nature of the application and its urgency delays of this nature are simply not acceptable.

[21] The appeal succeeds with costs.

The order of the High Court is set aside and replaced by the following order:-

"The rule granted on 11 September 2013 is discharged with costs."

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R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree

_____

D.G. SCOTT
ACTING PRESIDENT

I agree

_____

I.G. FARLAM
JUSTICE OF APPEAL

For Appellants: M.S. Rasekoai
K.D. Ndebele

For Respondents: P.J. Loubser