CCA/97/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the application of:

AFRICAN MEDIA HOLDINGS (PTY) LTD	**1ST APPLICANT**
LESOTHO TIMES (PTY) LTD	**2ND APPLICANT**
SUNDAY EXPRESS (PTY) LTD	**3RD APPLICANT**

AND

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

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 05th November, 2013
Date of Judgment : 05th March, 2014

SUMMARY

Unlawful competition – Breach of fiduciary duty – Applicants seeking to interdict Respondents from publishing a newspaper in completion with them – Points in limine raised – Whether unlawful competition proved and established – Whether breach of fiduciary duty established – Court at liberty to grant a lesser restraint of trade than the one claimed in exercise of discretion – Interdict confirmed.

ANNOTATIONS

CITED CASES

Shaanika and 13 Others v the Windhoek City Police and Others A249/2009

Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984(3) SA 623

Administrator, Transvaal v Theletsane 1991(2) SA 192

Excel Health (PTY) Ltd vs Dr Teboho Masia and Others C of A (CIV) 40/12

Meter Systems Holdings Ltd v Venter and Another 1993(1) SA 409 at 426

Sefikeng High School v Masupha CIV/APN/77/96

Makoala v Makoala C of A (CIV) 04/09

Concrete Roots (Pty) Ltd v Lebakeng Tigeli C of A No:10/2010 (CIV/APN/111/2009

Schultz v Butt (1986)2 All SA 403

Lanco Engineering CC v Aris Box Manufacturers Pty) Ltd (1993)1 All SA89

Grundlingh v Phumelela Gaming & Leisure Ltd (2005)4 All SA 1 (SCC A)

STATUTES

Company Act No:18 of 2011

BOOKS

[1] This is an Application brought by the Applicants on an urgent basis for the following relief:

1. That the non-compliance with the Court Rules relating to service and process be condoned.

2. That *a Rule Nisi* be issued returnable on Monday, 7 October 2013, calling upon the Respondents to show cause, if any, on such date why the following orders should not be granted:

2.1. That the First Respondent 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.

2.2. That the Second and Fourth Respondents be restrained and interdicted from carrying on the profession of journalism or engaging in the publishing business within a radius of two hundred kilometres from the offices of First Applicant for a period of thirty-six months.

2.3 That the Third Respondent be restrained and interdicted from carrying on the profession of journalism or engaging in the publishing business within a radius of two hundred kilometres from the offices of First Applicant for a period of twenty-four months.

2.4 That the First, Second and Third Respondents be restrained and interdicted for a period of twelve months from employing the services of staff members and other personnel in the employment of the Applicants, including members of the respective Boards of Directors, or from offering to them any form of employment or involvement of whatsoever nature.

2.5 That such Respondent opposing the application be ordered to pay the costs thereof.

3. That prayer 2.1 above be ordered to serve as an interim interdict with immediate effect pending the outcome of the main application.

4. That Applicants be granted leave to serve this Order on the First, Second and Third Respondents at the address of the First Respondent without delay.

[2] The interim order was obtained on the first date of hearing and counsel for all the parties were present. The papers were served prior to the hearing. The Respondents opposed the granting of the interim order and said there was no threat to applicants as alleged by them of a breach of the fiduciary duty and unlawful competition.

[3] After hearing brief argument from both sides, *albeit* unprepared and *impromptu* on the part of the Respondents who had been served with the papers the same day, the court granted the interim order.

[4] A time-table was then set for further filing of the answering and replying Affidavits as well as Heads of Argument for the hearing of the matter on the merits.

FACTUAL BACKGROUND

[5] The Applicants' Affidavit deposed to by one **Basildon Peta** a Zimbabwean born South African resident, The Chief Executive Officer and also Director of all the Applicants, stated that 2nd to 4th Respondents who were employees of the second and third Applicants had planned to

form a company, the first Respondent to be in competition with the Applicants in the business of publishing and retail sale of books, newspapers, journals and periodicals in Lesotho.

[6] All the Applicants are companies registered and incorporated in Lesotho and having their principal place of business and registered offices at NO.5C, Happy Villa, Maseru. The second and third Applicants publish newspapers in Lesotho. The first Applicant is the holding company of the 2nd and 3rd Applicants.

[7] The 2nd Respondent is a male Zimbabwean National residing in Maseru and until his resignation on 31st July 2013, was a director of both second and third Applicants. He was editor of second Applicant and Deputy Editor of third Applicant.

[8] Third Respondent is a Mosotho male, news editor of both publications. He had resigned with immediate effect from the Applicants employment on 31st August, 2013.

[9] The fourth Respondent, a Zimbabwean National, was employed by first Applicant as editor of the Lesotho Times (Pty) Ltd and was also Deputy Editor of the Sunday Express (Pty) Ltd. He was employed by Applicants in 2008 and subsequently got elevated to senior and key posts on both newspapers. He resigned from his positions on 9th September 2013.

[10] All the three Respondents had already incorporated a company called "The Post (Pty) Ltd," the 1st Respondent herein; jointly, (and apparently surreptitiously) on the 7th May 2013 in terms of the Companies Act 2011.

[11] Their resignation letters were addressed to the Chief Executive Officer of the Applicant companies, who is the deponent to the founding Affidavit. For convenience he will be referred as the Chief Executive Officer or CEO.

[12] The Chief Executive Officer in his Affidavit states that while he was in Zimbabwe during or about the third week of July 2013, he received information of a plot at the offices of the Applicants to form a new company; to steal the employees of the second and third Applicants and to go into unlawful competition with them. The second, third and fourth Respondents were at the centre of this plot. He says he was dumbfounded upon realisation that if the information was correct, it would be a hard blow to and would constitute a major disruption of the two newspapers.

[13] Soon after he received this information, the second Respondent resigned and that indicated to him that the information he received could be true. He then made arrangements to come to Maseru. He arrived on the 5th August 2013. On arrival in Maseru, his further investigations revealed the following;

(a) That the three Respondents had registered a company known as "The Post (Pty) Ltd".

(b) That the Respondents had been conspiring behind his back for some time already in order to publish their own newspaper, while they were still employed by the Applicants

(c) That the reason why the second and fourth Respondents had failed to produce a strategic plan for Applicant companies despite being

asked to do so by himself at the behest of his the financiers by the end of march was the loss of focus and interest in the Applicant companies as they were engaged in their own clandestine formation.

(d) That the company, "The Post (Pty) Ltd" had already opened offices at the address registered as 17, Arrival Centre, Maseru and it intended to be in direct completion with the Applicants.

[14] He considered the Respondents' actions to be wrongful and unlawful interference with Applicants. It seemed to have been planned deliberately and secretly for a long time by people who were supposed to look after the interests of Applicants. He decided to approach his attorneys and instructed than to write a letter to the three respondents warning them to desist from continuing with their plans and threatening legal action.

[15] The attorneys then wrote a detailed; lengthy and comprehensive letter dated 30 August 2013. It left nothing to the imagination. It was addressed to all three Respondents. The letter clearly stipulated that "failing to agree you will leave us with no alternative than to approach the courts for all the appropriate civil and criminal remedies available". It also the expressed the sentiment that "We trust and hope this matter can be amicably settled and hope to hear from you in this regard." It is common cause that the letters were hand delivered and received on the same day, 30th August 2013.

[16] In their answering affidavit regarding the letter the respondents say in the affidavit of 2nd Respondent;

> "As to the letters authored by the attorneys of the applicants, it is worthy of mention that the said letters did not have time frames upon which I was enjoined to answer. We had engaged our current legal representatives to answer the said letter and they were already seized with the matter only to be overtaken by the current litigation. The entire contents of the said letters are disputed in so far as they relate to the facts and in so far as it relates to the law".

[17] It is thus portrayed it as the fault of the Lawyers that there was unnecessary delay. In the eleven days that it took to launch the application the lawyers should have at least acknowledged the correspondence and stated that their instructions are to deny the facts set out, and the conclusions of law arrived at. They could then have indicated that they would take full instructions to respond.

[18] There were very serious allegations in the letters, and in addition it was clearly stated that "your employer recently learned that your new competing business wants to be in full operation as soon as 8 September 2013 or at least the following week". The interim order was obtained on the 11th September 2013. It is obvious that the matter needed immediate attention. There were serious allegations which had to be admitted or denied. To say that the letter had no time frames is untenable. An attorneys letter is not a court process and therefore does not have to have time frames. It is optional to impose time frames.

POINTS IN LIMINE

[19] In the answering Affidavit the Respondents took a number of *points in limine* relating to *locus standi,* non-joinder, material non disclosure; no cause of action and dispute of fact.

[20] It is sufficient to say they were fully replied to in the Applicants replying Affidavit. They also (i.e. *the points in limine*) were probably a result of the lack of understanding by deponent or counsel as to the purpose and meaning of *points in limine.*

[21] Regarding *locus standi,* it is common cause that all three Applications are companies registered in Lesotho and doing business of publication of newspapers in the country. They employed the three respondents. Respondents attacked Applicants for lacking a tax-clearance certificate and a trading licence.

In the replying affidavit the tax clearance certificate of 1st Applicant was attached to the replying Affidavit. An explanation was made as to why only the 1st Applicant had a tax clearance certificate.

A trading licence is neither a requirement nor a bar to institute an action or application nor to trading. It only carries penalties for non-compliance.

Respondents relied upon the case of **Shaanika and 13 Others v the Windhoek Police and Others**[1]**.** Where the judge said:

[1] A249/2009

"……. In my view there is no difference between a litigant who is in contempt of a court order and a litigant who is contempt of the law. The court will not grant relief to a litigant with dirty hands in the absence of good cause shown or until such defiance has been purged". (my underline)

[22] It is clear from the papers that the traders licence is renewed annually; and to suggest that the company must cease trading during the period of expiry of the last licence in order to restart after renewal of the licence would not make sense. Thus in this matter there is good cause shown for absence of the licence. In any event the companies have been trading for more than four years uninterrupted and if there was any threat of closure for trading without a licence the respondents would know it.

[23] On non-joinder and non-disclosure; It was contended that a certain **Mathabo Helena Tsuinyane** should have been joined because she is also a shareholder of **"The Post (Pty) Ltd"** ; The said **Mathabo Helen Tsuinyane** had not resigned and she remained employed by Applicants at date of hearing there was thus no need to join her as she could still be subject to disciplinary producers. Furthermore, there was no failure to disclose because the shareholders of "The Post (Pty) Ltd" actually appeared in the annexture to the founding affidavit. The Applicants probably realised that the said Tsuinyane refused to take the final and definitive step in the whole plot (i.e. to resign) and opted not to join her in the suit.

A company is distinct from its members and the Applicant has the prerogative to decide against whom they will institute proceedings, amongst the individuals.

[24] The "no cause of action" point raised matters of constitutional values and public policy. It was argued that the Respondents are prevented from engaging in their professions to earn a living. However, the question then becomes are they entitled to exercise their profession in a way that is directly in conflict with the very constitution and public policy? Should they be allowed to commit the *misdemeanours* and unlawful conduct that Applicants complain about?

[25] Finally, the dispute of fact point also falls away. It is established in law that not every dispute of fact is consequential. The dispute of fact must be a material dispute of fact to be able to deprive an Applicant of the relief sought. It is not so in this case as the essential averments are common cause or only denied to create an apparent dispute of fact.

[26] The authorities establish that the Court is required to examine the alleged dispute of fact and to decide whether the matter can or cannot be satisfactorily decided without oral evidence. The real issue is whether on the facts which constitute common cause, the Applicant would be entitled to the relief sought. If the answer is yes, the court will grant such relief.

PLASCON EVANS PAINTS LTD VS VAN RIEBECK PAINTS (PTY) LTD[2]

ADMINISTRATOR, TRANSVAAL VS THELETSANE[3]

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[2] 1984(3) SA 623

[3] 1991(2) SA 192

EXCEL HEALTH (PTY) LTD VS DR TEBOHO MASIA AND OTHERS[4]

[27] The only real and material dispute of fact in the matter is whether the three Respondents (i.e. second, third and fourth) were ever made aware of the editorial charter, and whether it was ever part of their employment agreement. The charter itself in its preamble conveys that;

> "Because of the status of this document in the life of the Lesotho Times and any subsequent publications, it is therefore the responsibility and obligation of directors and senior management to not only handover the document to staff……but to sit every new prospective staff member to explain its contents and extract their agreement to abide by it before they are hired. It must be ensured that they have understood and accepted this charter's terms as overriding any other written or verbal contractual terms that are in conflict with the charter."

[28] The three Respondents as Director, Deputy Editor, and the Deputy News Editor of the Applicants respectively; stated that they have no knowledge of the charter.

[29] The Chief Executive Officer on the other hand states in his Affidavit that at every discussion he had with the respondents on this issue he emphasised to them the importance of these clauses, referring to the restraint of trade clauses in sections 5.6 to 5.9 of the editorial charter. He goes on to say;

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[4] C OF A (CIV) 40 OF 2012

> "Both the second, third and fourth Respondents accepted the provisions contained in these clauses expressly; and therefore it became a valid and lawful agreement between the second, third and fourth Respondents on the one hard, and the Applicant on the other". (Para 18.6)

[30] The use "both" is obviously misplaced, inappropriate or erroneous. That notwithstanding; it means that if those individuals who are senior management deny any knowledge of this important document, they could not have imparted it to any of the staff members of the Applicants as required.

[31] The court could have called for viva voce evidence at that stage because of such dispute of fact; but because it is only relevant to the restraint of trade clause, which in any event can be varied by the court if it is too stringent, And can be altered or reduced in the discretion of the court. It would not affect any unlawful competition that Respondents may be found have committed or guilty of; nor any breach of a fiduciary relationship if found. The case quoted by Respondents counsel themselves become relevant here in the Judgment of **Stegmann J in Meter Systems Holdings Ltd v Venter and Another** [5].

> "….when the fiduciary relationship is not based on contract, it is necessary to look to the law of *delict*, and in particular to the principles of *Aguilian* liability; in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence".

It therefore became unnecessary to call for oral evidence.

[5] (1993(1) SA 409 at 426

[32] The points *in limine* raised in this case are what **Ramodibedi J** (as he then was) I referred to in the case of **Sefikeng High School v Masupha**[6] when he said;

> "I observe regrettably that it is becoming increasingly common for attorneys to file so-called points *in limine* that are completely devoid of substance and are nothing but total abuse of court process……which can only lead our justice system into disrepute. A proper point *in limine* is no doubt meant to curtail proceedings and save costs. It is thus a very useful procedure in our justice system. But where frivolous and vexatious points *in limine* are taken as in this case, the proper administration of justice must inevitably suffer in a number of ways, such as delay in administering justice, increased costs… and inconvenience to the court;"

In the case of **Makoala v Makoala**[7]**; Melunsky JA** dealing with the same point had this to say;

> "It is this procedure with which I am concerned. The persistent practice of taking inappropriate points *in limine* has bedevilled the procedure in the High Court for some time and it is a usage that shows no sign of coming to an end"

[6] CIV/APN/77/96
[7] C of A (CIV) 04/09

In this matter I should add had the Respondents attorney and/or counsel responded to the letter of the Applicants attorneys in time, these points *in limine* would have not arisen, and could have been cleared at that stage.

I find no merit in the points *in limine* and they are dismissed.

MERITS

[33] In their response to the merits of the Application, the Respondents deny the confidentiality of the information that they possessed and further listed a number of employees who had left the Applicant publications without similar action being taken. They also make numerous allegations intended to portray the employer in the person of the Chief Executive Officer to be a heartless person who exploits his employees and disregards their welfare. The alleged ill-treatment of the employees is not relevant to the present proceedings if it occurred at all it is a matter for the Labour Court.

[34] It is also not the resignation only that apparently caused the Applicants to take action; for in itself the resignation of any individual to join a rival company may be ignored. But the plotting and secretive planning over a long time to steal the employees, clients, and business of the Applicants at such a rate that was intended by Respondents must be a factor to take into consideration. It is the combination of these factors; plus losing key personnel within such a short time that probably led to this interdict. The Applicants were entitled to protect themselves.

UNLAWFUL COMPETITION AND FIDUCIARY DUTY

[35] It cannot be denied that second Respondent is Director and Shareholder of the second and third Applicants. He is listed in the Memorandum of Association as a Shareholder and there is evidence of him receiving an amount of M20,000-00 being directors fees. He also admits to being a director of both companies.

[36] Third Respondent denies that he was ever a director of the Applicants. The Chief Executive says it was ex-officio by virtue of his Senior Managerial Position. He does not specifically deny this. The second Respondent was not a Director. Whatever the case there is no doubt that both did hold senior positions in the two companies.

[37] The Applicants' Counsel submitted that a Director has a fiduciary duty towards his company; and that the duty at common law extends to Senior Managerial Employees. That argument seems to be logical to me, because the director does not have the duty by reason of the fact that he is a Director *per se,* but rather because in the position of Director he is privy to and has first hand knowledge of the confidential information of the company and therefore the duty is imposed. It would be irrational to say that another, who is not in a position of director even though he possess confidential information of and about the company does not have a similar duty.

[38] Even assuming such a duty does not exist because the other Applicants are not Directors, they as Senior Employees of the Applicants have put themselves in the position where they are seen to be in concert with the 2nd Respondent. Conniving, plotting and deliberately undermining their

employer in a manner that could be described as treacherous and mala fide. In such a case, they should be treated no differently from the Director, and any interdict or restraint that may be imposed by the Court must include them as well.

[39] The **Companies Act NO18 of 2011**[8]**,** stipulates that a Director, who has an interest in a transaction or proposed transaction with a company shall cause the nature and full extent of his interest to be entered in the register of directors; and shall also disclose it to the Board. Failure on his part will constitute an offence punishable by a fine of M50,000-00 or a term of ten years or both.

[40] Section 76(1) of the same Act provides that where a company or director proposes to engage in conduct that contravenes the articles of incorporation of the company or the Act, a Director or Shareholder of the company may apply to court for an order interdicting the company or director from so acting.

[41] It should be obvious to any reasonable person that the plan of the Respondents was carefully conceived, planned and was finally ready to be implemented. The initial stages must have been conceived long before the incorporation of the company and the resignations. They had to first approached and persuade the people who would be part of the conspiracy. Choose carefully the likely candidates and be convinced that they will keep the secret and not hesitate to resign from the employment of the Applicants when called upon to do so.

[42] In other words the resignations would be the final step before actual publication of their newspaper. Indeed there is independent confirmation

[8] Section 65(1)

of one **Ronnie Tichareva Zibani** of the Production Team who said that he was asked to do production work for a corporate magazine for Telecom Econet by 4th Respondent and received M10,000-00 for the project. This was as long ago as December 2012. This was work privately sourced by 4th Respondent. He did not know how much the 4th Respondent was paid. 4th Respondent was doing private work for the Econet company; which is a client of the Applicants. It is clear that he was competing with his employer.

[43] In addition, one **Mordekai Msundire** confirmed that he was approached by 2nd Respondent to assist in designing a newspaper, but he finally declined because of a conflict of interest and the risk of joining a new company or publication whose future and fortunes were unclear.

[44] The Respondents also attended a meeting at Lesotho Sun on the 29th June 2013, but failed to inform Applicants or the Chief Executive that they had registered a company to publish newspapers in direct competition with the Applicants their employer.

[45] The Respondents not only used the time of the Applicants to plot their sinister motives, they sought to lure the key personnel of the Applicants, and to steal the clients as well. This surely constitutes unlawful competition. In the appeal case of **Concrete Roots (Pty) Lt d v Lebakeng Tigeli**[9]; Howie J.A. made the following remarks in a case comparable to this one before me;

> "[11] The problem for the appellant is that once those are the facts the conclusion has to be that Lehobo and Pitso practised an intentional deception on pile. The inevitable

[9] C of A No10/2010 (CIV/APN/111/2009)

inference is that the appellants competition with pile was unfair and so constituted an actionable wrong"

[46] In the case of **Schultz v Burt** [10] it was held that the misuse of confidential information in order to advance one's own interests and activities at the expense of a competitor is wrongful.

It is also the position in our law that inducement of a breach of contract will in appropriate cases result in an interdict against the person who intentionally and without justification induced or procured another to breach a contract with another person[11].

The test for wrongfulness is one of fairness and honesty; having regard to the *boni mores* and general sense of justice in the community. Public policy, the significance of a free market and of competition are important[12].

[47] In the result the Applicants were entitled to the interim relief sought, and are further entitled to the relief claimed on the basis of breach of fiduciary duties and unfair or unlawful competition. However the court has to balance the interests of all the parties carefully to come a just conclusion and a fair one.

[48] It seems that the harm was averted by the Applicants in approaching the court timeously. They continue to trade. The possible damage that could have been inflicted by the Respondents had they succeeded has

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[10] (1986) z All SA 403
[11] Lanco Engineering CC vs Aris Box Manufacturers (Pty) Ltd (1993)1 All SA 89
[12] Grundlingh v Phumelela Gaming & Leisure Ltd (2005)4 All S.A. 1(SCA)

been avoided. The Respondents should also not be saddled with an unduly burdensome restriction on their rights and freedom.

[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 in Lesotho 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 applicants

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L.A. MOLETE
JUDGE

For the Applicant : Advocate P. Loubser
For Respondents : Advocates K Ndebele and M. Rasekoai