



**IN THE HIGH COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**CIVIL CASE NO: 57/2019**

In the matter between:

**CENTRAL BANK OF ESWATINI**

APPLICANT

And

**AFRICAN ECHO (PTY) LTD T/A TIMES SUNDAY**

1<sup>ST</sup> RESPONDENT

**SIFISO SIBANDZE**

2<sup>ND</sup> RESPONDENT

**WELCOME DLAMINI**

3<sup>RD</sup> RESPONDENT

**Neutral Citation:** *Central Bank of Eswatini v African Echo (Pty) Ltd t/a Times Sunday & 2 Others (57/2019) [2019] SZHC 69 (10<sup>th</sup> April 2019)*

**CORAM:** **NKOSINATHI MASEKO J**

**FOR APPLICANT:**

Z.D. JELE

(ROBINSON BERTRAM ATTORNEYS)

**FOR RESPONDENTS:**

B. NGCAMPHALALA

(SIMELANE MNTSHALI ATTORNEYS)

**DATE HEARD:**

30<sup>th</sup> January 2019

**DATE DELIVERD:**

10<sup>th</sup> April 2019

**PREAMBLE:** *Civil Law – interdicts – requirements for an interdict – whether publication of confidential material obtained unlawfully and in contravention of Section 20 of the Central Bank of Eswatini Order NO. 6 of 1974 can be authorized – Held that the intended publication of a confidential report obtained through unlawful intrusion cannot be authorized – Application for a prohibitory interdict thus granted.*

[1] On the 23/01/2019 the Applicant launched motion proceedings on urgency for an order in the following terms:

1. Dispensing with the requirements of the Rules of Court with relation to service of process and timeliness and permitting this matter to be heard as one of urgency.
2. That the Applicant's non-compliance with the Rules relating to the above said forms and service be condoned.
3. Interdicting and restraining the Respondents from publishing articles and information contained in a confidential report on Farmers Bank license application.
4. That Prayers 3 above operate with immediate and interim effect pending the finalization of the application.
5. Costs of suit.
6. Further and/or alternative relief.

[2] The deponent to the Founding Affidavit is the Governor Majozi Sithole. The matter appeared before me on the 25/01/2019 and by consent of the parties I issued a *rule nisi* in respect of prayers 3 and 4 which

operates with immediate and interim effect pending finalization of these proceedings.

[3] The Respondents filed their Answering Affidavit on the 28<sup>th</sup> January 2019, the deponent thereof being the Managing Editor, Mr. Martin Dlamini, and two points *in limine* were raised and these being *locus standi* and urgency.

[4] I must state that during arguments in this matter, the point in limine on urgency was dealt with first by Mr. Ngcamphalala who appeared for the Respondents and by Mr. Z.D. Jele for Applicant and I dismissed that point for reasons I will give in this judgment. However, the point on locus standi was argued by both Counsel simultaneously with the merits of the case.

### **APPLICANT'S CASE**

[5] The Governor of the Central Bank of Eswatini, Mr. Majozi Sithole states that the Respondents are in possession of a confidential report which was prepared by the Applicant's Financial Regulation Department in connection with the processing of an application by Farmers Bank for the grant of a banking license. He states further that the Applicant is the statutory body responsible for bank

supervision, which includes licensing, regulating and supervision of banks and other financial institutions in Eswatini.

[6] The Governor states further that the process of licensing banks is an intricate and confidential process, which includes the financial soundness, track record, international standing and reputation of the entity seeking a license and the screening of shareholders. In this connection, various submissions of a confidential nature are made by the entity that is seeking a license and likewise, confidential assessments and evaluations are undertaken by the Applicant in order to determine the suitability of granting the banking license.

[7] The Governor states further that, the Financial Regulation Department prepares a strictly confidential report for deliberation for purposes of determining whether or not to grant the banking license. This strictly confidential report, which is not to be disclosed to unauthorized persons or any other person outside of the Applicant, has apparently been unlawfully obtained by the Respondents. The 3<sup>rd</sup> Respondent has confirmed to the Applicant upon enquiry to be in possession of such report. The Governor utilizes this report whether to grant or not to grant a banking license, and this is on the advice of the Financial Regulation Department.

[8] The Governor states further that, on the 18<sup>th</sup> January 2019, the 3<sup>rd</sup> Respondent sent a questionnaire to the Applicant's Communications Office requesting responses to various questions on the matter. He states further that it was apparent to him from the questionnaire that the 3<sup>rd</sup> Respondent was in possession of confidential information.

[9] At paragraph 13-17 papers 11-13 of the Book of Pleadings, the Governor states as follows:

***'13. The Third Respondent called me on Saturday, 19<sup>th</sup> January 2019 and made further enquiries about the same questionnaire. I then brought the following to the Third Respondent's attention:***

***13.1 that the report was confidential in nature and that the Applicant had a right to protect its privacy, including confidential documents and that possession by the Third Respondent was therefore unlawful and wholly improper.***

***13.2 That by its nature, it was apparent that the report had been obtained unlawfully and that such acquisition and disclosure of the report was in violation of Section 20 of the Central Bank of Eswatini Order as well as the Oath of Secrecy that all employees of the Bank are required to adhere to.***

***13.3 That in terms of Section 20 (3) of the Central Bank of Order, it was a criminal offence for him to disclose, reveal or publish any confidential material and/or any material that falls within the ambit of the secrecy provisions that are applicable at the Applicant's undertaking.***

- 13.4 The Applicant has not waived its rights of privilege or right to confidentiality of the information, contained in the report neither expressly nor implicitly.**
- 14. In view of the foregoing, we requested the Third Respondent to provide us with an undertaking that he would not publish the report. Up until the signing of this affidavit, the Respondents have failed to provide the undertaking.**
- 15. The Applicant has a right to the relief sought, particularly because the information sought to be published was obtained by means of unlawful intrusion upon the privacy of the Applicant. The nature of the information sought to be published is confidential and would cause irreparable harm to the Applicant, Farmers Bank and to the integrity of the financial systems of the country. It is in the interests of banking regulation, that confidentiality be preserved at all costs, given its potential consequences on the regulation of banking services within the country and beyond. A disclosure of such information, has the potential of upsetting the banking sector and create an adverse risk with corresponding Central Banks world-wide.**
- 16. Whilst the Respondents have a right to freedom of speech and to publish material in the public interest, it is submitted that the information contained in the report, whilst may be interesting to the public is in essence not in the public interest. Furthermore, and in respect of the competing rights that exist, the balance of convenience must favour the Applicant, given the fact that the information -----by means of an unlawful intrusion, it is of a sensitive and confidential nature and there is no substantive reason why the public ought to be informed**

***about the issue. There is therefore no public interest justification for the publication of the material.***

***17. The Applicant seeks therefore to interdict the Respondents from the publication of the report, to prevent future harm which may be occasioned by the publication. The Applicant has no alternative relief other than to approach this Court for an interdictory order owing to the failure of the Respondents to provide a written undertaking that they would not publish the material.'***

[10] The Governor states further that the Applicant has a right to the protection of its confidentiality and privacy as well as that of prospective entities that apply for banking licenses. Further that the harm that would be occasioned to the Applicant and Farmers Bank, which included reputational damage, publication of confidential information and disclosure of Applicant's internal assessment processes, would have far reaching adverse consequences for the Applicant.

[11] The Governor states further that the Applicant is also a bank and in accordance with banking principles and laws, it has a duty to keep its client's information confidential at all times, and that this duty extends to the regulatory component of the Applicant's functions. It is both a statutory and contractual duty, which may not be compromised.

[12] The Governor states further that there is a reasonable apprehension that the Respondents will proceed with publication of the harmful material and thus occasion it serious harm to its business efficacy, its international good standing as a regulator of banks and integrity. He states also that there is no other remedy available, on account of the fact that a claim for damages would not be adequate for purposes of protecting the Applicant, as the report contains opinions, which are subject of debate even internally, and as such once published, they may give rise to improper conclusions as to the bank licensing process and thereby jeopardise the banking sector in the country.

[13] I have deliberately quoted verbatim extracts from the Governor's affidavit to enable the reader to fully understand the extent of the Applicant's case which the Respondents have to meet, and I now herein below deal with the Respondents' case.

### **RESPONDENTS' CASE**

[14] In his Answering Affidavit the Managing Editor states that the Applicant is vested with a number of objectives which it ought to carry out with utmost transparency. These objectives are set-out in Section 4 of the Order and they include the following:

- to formulate and implement monetary policy to the end of promoting monetary stability
- to promote, regulate and supervise the efficient and secure operation of payment system.
- to supervise banks, credit institutions and other financial institutions to the end of promoting a sound financial structure.

[15] The Managing Editor states further that, in essence the Applicant's objectives and duties are meant to promote monetary stability, secure operation of payment systems and, by supervising financial institutions, protect the general Eswatini populace from unscrupulous business people who intend to set up shop in the Kingdom.

[16] He states further that, it is primal for the Applicant to vet all persons who wish to establish a bank within the Kingdom of Eswatini. The Applicant will not only be promoting a sound financial structure but will also be protecting Emaswati from disreputable institutions.

[17] The Managing Editor states further that Section 6 of The Financial Institutions Act of 2005 provides that the Applicant has the power to issue licenses for purposes of engaging into banking business. He

narrates further that Section 6 (5) provides the Applicant with the power to conduct such investigations as may be necessary to ascertain the following:-

- The validity of the documents submitted under Subsection 2;
- The financial status and history of the Applicant;
- The character and experience of the Applicant's managers;
- The adequacy of its capital structure;
- The convenience and needs of the community it intends to serve;
- The earning prospects afforded by the area primarily to be served; and
- The public interest.

[18] The Managing Editor continues to state that, the investigations to the above cannot be considered to be merely interesting to the public, instead he asserts that it is of utmost public interest. He states further that, the economy of the Kingdom is both fragile and unstable. It is therefore crucial for the Applicant to be seen to be executing its duties with transparency and in the interest of the Swazi Nation.

[19] He states further that it is imperative that the public is made aware of the type of institution that has been granted the license to operate as a bank within the country.

[20] On the point *in limine of locus standi*, the Managing Editor states that it is only the bank that has been granted the license that can approach this Court to apply for an interdict and not the Applicant. He argues further that the bank can only interdict its Directors, Employees, Officers and/or its auditors from disclosing information to third parties.

[21] On the point *in limine* on urgency, he states that the High Court Rules provides that an applicant who has instituted an urgent application must set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he could be afforded substantial redress in due course. He states further that the Applicant has failed to explicitly set out the circumstances which it believes renders the matter urgent and that is insufficient for purposes of the rule.

## **ANALYSIS OF THE EVIDENCE**

[22] I have in the main stated the respective cases of the Applicant and Respondents in the above paragraphs. It is important at this stage to consider the Central Bank of Eswatini Order NO. 6 of 1974 and The Financial Institutions Act NO. 6 of 2005 respectively.

[23] For ease of reference I will refer to Section 3-4 of the Order which provides as follows:

3. (1) There is hereby established the Central Bank of Eswatini which shall have the functions provided for in this Order and which shall be administered, managed and controlled in accordance with this Order.

(2) The Bank shall be a body corporate and shall be capable of performing all such acts as are necessary for or incidental to the carrying out of its objects and the performance of its functions under this Order, and of doing or performing such acts and things as bodies corporate may by law do and perform, and without derogating from the generality of the foregoing –

(a) Shall have perpetual succession

(b) may have a common seal

(c) shall be capable of suing or being sued in its own name

- (d) shall, subject to this order, be capable of entering into contracts and of purchasing and otherwise acquiring and of alienating any movable or immovable property and any real rights in or to such property; and
- (e) May incur such expenditure as it deems necessary for the proper discharge of its functions.

(4) The objects of the Bank shall be to-

- (a) formulate and implement monetary policy to the end of promoting monetary stability;
- (b) issue and redeem currency which is legal tender within Eswatini under Section 23;
- (c) issue securities in its own account
- (d) formulate and implement appropriate intervention policies in the foreign exchange market
- (e) hold and manage the official foreign reserves of Eswatini
- (f) promote, regulate and supervise the efficient and secure operation of payment systems; and

- (g) supervise banks, credit institutions and other financial institutions to the end of promoting a sound financial structure.

[24] Sections 9 and 10 of the Order provides as follows:

- 9. (1) The powers of the Bank shall be vested in the Board of Directors which shall be responsible for the policy and general administration of the Bank.
- (2) The Board may make by-laws and issue directions to regulate the conduct of the business of the Bank.
- 10. (1) The Board shall consist of nine directors, as follows:
  - (a) a governor
  - (b) a deputy governor
  - (c) seven other directors, one of whom shall be a public officer of the Ministry responsible for Public Finance

[25] I must state therefore that Sections 3 and 4 of the Order deals with the establishment of the Applicant and its principal objects whilst

Sections 9 and 10 deals with powers of the board and the composition of the board respectively.

[26] Owing to the sensitivity and apparent need to maintain secrecy and confidentiality in the conduct of the Applicant's business, Section 20 of the Order deals with secrecy of its operations as follows:

20. (1) Except for the purposes of his duties or the exercise of his functions or when lawfully required to do so by any Court or under any law, no director, officer or employee of the Bank or auditor appointed under Section 5 (2) shall disclose to any person any information relating to the affairs of the Bank, or any financial institution or other person which he has acquired in the performance of his duties or the exercise of his functions.

(2) Every person referred to in Subsection (1) shall, before acting under this Order take and subscribe before a Commissioner of Oaths or a Justice of the Peace, such oath of fidelity or secrecy as may be required.

(3) Every such person who, in contravention of the true intent of the oath of fidelity or secrecy taken by him and without lawful excuse, reveals any matter or

thing which has come to his knowledge in the performance of his duties or exercise of his functions shall be guilty of an offence and shall be liable on conviction to a fine of E5000 or imprisonment for two years or both.

- (4) If any person acts in the execution of his office before he has taken the prescribed oath, he shall be guilty of an offence and shall be liable on conviction to a fine of E500.

[27] I must state therefore that Section 20 makes it a criminal offence for employees, directors and officers of the Applicant to disclose to any person information relating to the affairs of the Applicant without a Court Order.

[28] Section 20 is very important in the operation and stability of the Applicant because by its nature and mandate, the Applicant conducts its operations in an atmosphere that dictates and demands utmost secrecy and confidentiality. Infact the business of banking in general conducts its business in strict confidentiality. Financial institutions in general deal with private information for and on behalf of their clients and it is for this reason that these institutions administer the oath of secrecy on their employees not to disclose information which

they have by virtue of their duties or through the exercise of their functions.

[29] It is Section 20 that was contravened when the report that is currently in the possession of the Respondents, in particular, the 3<sup>rd</sup> Respondent was leaked and or disseminated to the Respondents. It is common cause that a questionnaire was sent to the Governor as per his affidavit on the 18<sup>th</sup> January 2019 followed by a telephone call on the 20<sup>th</sup> January 2019 by the 3<sup>rd</sup> Respondent.

[30] As stated above, the Governor advised the 3<sup>rd</sup> Respondent not to publish the report because:

- (i) it was confidential in nature
- (ii) it was obtained unlawfully by the Respondent in violation of Section 20 of the Order
- (iii) publication of confidential material obtained in violation of Section 20 attracts criminal sanctions
- (iv) the Applicant had not waived its rights to confidentiality of the information contained in the report neither expressly or implicitly
- (v) the Applicant has a right to the protection of its confidential information.

[31] I must state that the confidentiality and secrecy in the affairs of the Applicant is provided for by statute, it is not a practice directive that is derived from Applicant's policies. Not only is the confidentiality or secrecy sanctioned by this statutory provision, it has a criminal sanction for those violating the statute.

[32] The intention of the legislature is very clear that the confidentiality and secrecy of information is highly guarded except where there is a Court Order authorizing the release of the information or where there is legislation authorizing such release of the information.

[33] It is the provisions of Section 20 which the Governor was trying to highlight to the 3<sup>rd</sup> Respondent, in particular the act of obtaining the report through unlawful intrusion upon the statutory protected privacy and confidentiality of Applicant's information.

[34] The Managing Editor addressed the unlawful intrusion upon the privacy of the Applicant, as an act of investigative journalism which resulted in the Respondents having possession of the confidential report. At paragraph 15 pages 25-26 of the Book Mr. Dlamini states as follows:

***'We live in a democratic society which require accountability from those in positions of authority. These include natural***

**persons and institutions that are meant to supervise other body corporates.**

**The purpose of investigative journalism is therefore to expose wrongdoing in these institutions and to give the public a sense of awareness about certain people and/or institutions and to give the public a sense of awareness about certain people and/or institutions that are not following the law or procedure.**

**Over and above that, the investigative journalists are guided on how to acquire information. It is therefore denied that the information was acquired unlawfully and wholly improper.**

**The Respondents have informants. I aver that the acquisition of information from an informant is not unlawful, in particular where such information is in the interest of the public.**

**I have been advised that Section 20 of the Order only applies to the Authority's directors, employees, officers and auditors. That is, precisely, why the penalty only applies to these officers.'**

[35] The Governor replied in this manner to the above allegations by the Managing Editor. In paragraph 25 pages 49-50 he states as follows:

**'Whilst it is accepted that the world of investigative journalism entails digging for information (in the public interest), it does not however extend to unlawful behaviour. The procuring of confidential documents in contravention of a statute, constitutes a criminal conduct and cannot be countenanced under the umbrella of investigative journalism.**

**I reiterate that the information was obtained unlawfully, irrespective of whether it was obtained from a current or former employee of the Bank. The information could only have left the Bank through one of its current or former employees and as such, I affirm that it was unlawfully disseminated to the Respondents.**

**I reiterate that Section 20 relates to confidential information emanating from the bank.'**

[36] I have no doubt from the evidence filed of record that the Respondents did not obtain a Court Order authorizing them to be in possession of the Applicant's confidential report, nor is there any law that authorizes them to be in possession of the confidential report. In the premises they are in possession of the said confidential report unlawfully and by extension they cannot publish the confidential report which they obtained unlawfully through the unlawful actions (i.e. leaking of the report) by a current employee or former employee of the Applicant.

[37] The argument by the Managing Director that the Applicant can only interdict its employees, officers and directors does not have a basis in law in light of the instructive judgment of Sapire ACJ (as he then was) in the case of the then *Swaziland Development and Savings Bank vs The Times of Swaziland Civil Case NO. 1613/1996* where he stated the following at page 6:

***“The fallacy in this argument lies in interpreting the word “employed” and too narrowly, without regard to the context of the section. Even if it were correct that as argued by Mr. Dunseith 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 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 cause 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.'***

- [38] In *casu*, the confidential report was prepared by the employees of the Applicant who are based in the Financial Regulation Department, and who are bound by the provisions of Section 20 not to disclose to any person any information relating to the affairs of the Applicant, or any financial institution or other person, which they have acquired in the performance of their duties or exercise of their functions.

[39] As alleged by the Governor in his Founding and Replying Affidavits respectively, the confidential report concerning the Farmers Bank was leaked and or disseminated to the Respondents unlawfully and surely the Respondents cannot be allowed at law to publish a confidential report they obtained unlawfully from the employees of the Applicant in contravention of Section 20 of the Order.

[40] I have not been referred to any authority which allows investigative journalists to contravene and flout the law in order to access confidential information which is otherwise clearly protected by statutory legislation from being disseminated to any person and this includes investigative journalists.

[41] The Managing Editor referred to informants who provided such confidential information to the investigative journalists and alleged that the confidential information was sourced from the informants and therefore such sourcing of the confidential report was not unlawful.

[42] I do not agree with this proposition for the simple reason that informants referred to are obviously employees or former employees of the Applicant, in particular those based in the Financial Regulation Department, where this confidential report on the licensing of the

Farmers Bank was prepared for onward transmission to the Governor in order for him (Governor) to consider the issues of the licence. These employees or former employees are prohibited by Section 20 from disclosing or being informants to any person regarding information relating to the affairs of the Applicant which they acquired in the performance of their duties or the exercise of their functions.

[43] In the case of *Patel v Mirza* Trinity Term [2016] UKSC 42 Lord Toulson stated as follows at paragraph 1:

***“No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act” so spoke Lord Mansfield in Holman v Johnson (1775) 1 COWP 341, 343, ushering in two centuries and more of case law about the extent and effect of this maxim. He stated that the reason was one of public policy:***

***“If, from the Plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court says he has no right to be assisted. Is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their hand to such a plaintiff ----”***

***Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances.”*** (my emphasis)

[44] I have considered the case of FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd & Another [2008] JOL 21236 (C) decided by Traverso DJP and have found it to be distinguishable from the case in *casu* because in that case FirstRand (*supra*) was seeking an interdict against the Noseweek Magazine not to publish information that the bank (FirstRand) had allegedly devised an illegal and fraudulent scheme and offering it to its clients for a fee. This was deemed to be a criminal conspiracy between FirstRand and its clients and thus improper conduct on the part of the bank and the suit itself was classified by the Court as a class action which is based on invasion of constitutional rights to privacy, requiring FirstRand to comply with certain prerequisites.

[45] In the FirstRand case *supra* there was no statutory provision which prohibited the publication of confidential information, such is the case in *casu* where Section 20 clearly prohibits unlawful disclosure of the Applicant's confidential information to any person.

[46] Further the FirstRand case *supra* dealt with issue of *locus standi* where it was held that FirstRand had failed to establish *locus standi* because it was seeking relief on behalf of itself and its clients. Its action was akin to a class action and the Court found that FirstRand did not have *locus standi* to bring such an action at common law.

[47] In *casu*, the Applicant is seeing an interdict against the Respondents from publishing a confidential report prepared by its officers in the Financial Regulation Department for the consideration of the Farmers Bank licence. This report belongs to the Applicant, and the Applicant is entitled at law to enforce its rights to confidentiality as are protected by Section 20 of the Order. The Applicant is not seeking any relief on behalf of Farmers Bank because the confidential report about the Farmers Bank does not belong to the Farmers Bank but to the Applicant. The difference is that it refers to Farmers Bank but prepared and compiled by the Applicant's employees, so it belongs to the Applicant and thus the Applicant has a direct and substantial interest in protection of its confidential report as sanctioned by Section 20 of the Order. The Applicant therefore has locus standi to institute these proceedings to protect its confidential report.

[48] The Respondents also raised the point *in limine* on lack of urgency. I am of the considered view that the matter is urgent owing to the fact that a questionnaire was sent to the Governor on the 18<sup>th</sup> January 2019 and a follow up was made on the following day. This was in preparation to carry out the intended publication of the confidential report which had been obtained unlawfully by the Respondents. It certainly would not serve any meaningful purpose for the Applicant to launch these proceedings as per the normal time limits as prescribed by the Rules of Court since the Governor alleges that the 3<sup>rd</sup>

Respondent actually intimated to him that he wanted to publish the story and further that in absence of an undertaking by the Respondents not to do so, the matter was then obviously urgent.

[49] In the case of *Sithole N.O. and Others v The Prime Minister and Others Civil Case NO. 2792/2006* S.B. Maphalala J (as he then was) stated the following at paragraph 10:

‘The principles which governs the above-cited Rule was stated with absolute clarity in the judgment of Chief Justice Sapire in *HP Enterprises v Nedbank Swaziland Limited Civil Case NO. 788/1999* at page 2-3 as follows:

**“A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate that the observance of the normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The fact alleged must not be contrived of fanciful but must give rise to a reasonable fear that if immediate relief is not afforded irreparable harm will follow.”**

[50] I must state that when the matter came before me on the 25<sup>th</sup> January 2019, it was enrolled on urgency and a consent order in the form of a *rule nisi* was issued through the consent of the parties. This was after I had also satisfied myself from the specific allegations of

facts by the Governor which demonstrated urgency in the matter hence I heard it on urgency.

[51] The Managing Editor also placed reliance on the The Financial Institutions Act NO.6/2005 and the impression given is that the Applicant did not perform its functions diligently in considering the Farmers Bank licence. The Governor pointed out that from the manner in which the questionnaire was framed it was clear to him that the Respondent was in possession of a first draft of the confidential report and not the current one. The Governor also emphasized that the duty to prepare the report in such application for the banking licence was vested with the Financial Regulation Department of the Applicant. The point is that, whatever report that is in possession of the Respondent was obtained through unlawful intrusion of the protected privacy of the Applicant, and in contravention of Section 20 of the Order and therefore this Court would not come to the aid of the Respondents to authorize publication of the confidential report on Farmers Bank because it was obtained and or disseminated to the Respondents unlawfully.

[52] I must state that there is no conflict between the Financial Institutions Act NO. 6/2005 and the Central Bank of Eswatini Order NO. 6/1974. These two pieces of legislation compliment each other.

Infact Section 66 of the 2005 Act repealed The Financial Institutions (consolidation) Order NO. 23 of 1975.

[53] The promulgation of section 20 of the Order is a clear intention that the legislature intended that deliberations, considerations and analysis of any information by the Applicant of whatever nature be it application for banking licence or any other activity of the Applicant is not meant for public consumption unless there is a Court Order authorizing such dissemination of the information to any person or where there is a specific law authorizing such dissemination of the information. All Applicant's information remains confidential and secret.

[54] These proceedings are in the form of a prohibitory final interdict. It is my considered view that the Applicant has fulfilled all the requirments for the grant of a final interdict.

[55] Herbstein and Van Winsen in their master work titled ***THE CIVIL PRACTICE OF THE HIGH COURT OF SOUTH AFRICQA 5<sup>TH</sup> EDITION JUTA 2012 at page 1454-1455*** in dealing with interdicts states as follows:

Interdicts are orders of Court which normally prohibit (prohibitory interdicts) or compel (mandatory interdicts) the doing of a particular act to avoid injustice and hardships -----

The procedure is usually resorted to when other remedies are not available or when the delays associated with the use of other remedies could cause irreparable harm.

[56] At page 1456 the Learned Authors state that:

‘In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an Applicant must establish;

(a) a clear right

(b) an injury actually committed or reasonably apprehended, and

(c) the absence of similar or adequate protection by any other ordinary remedy”

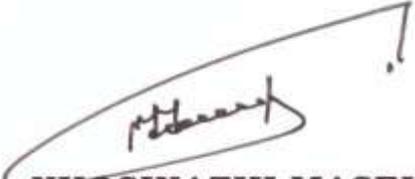
*See Setlogelo v Setlogelo 1914 AD 221 at 227.*

[57] I am of the considered view that the Applicant has established these requirements as listed above and consequently I hereby hand down the following judgment:

1. The point in limine on locus standi is hereby dismissed.
2. The point in limine on urgency is hereby dismissed.

3. The Respondents are hereby interdicted and restrained from publishing articles and information contained in a confidential report on Farmers Bank licence application.
4. The Respondents are ordered to pay costs of suit on the ordinary scale.

So ordered.



**NKOSINATHI MASEKO**  
**JUDGE OF THE HIGH COURT**