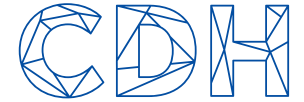


Dispute Resolution

ALERT | 10 December 2024



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**DISPUTE RESOLUTION
ALERT**

Is non-verbal communication in the public interest and deserving of protection under the right to freedom of expression?

Interdicting a media house from publishing something is a difficult court order to obtain. Our courts have held that attempts to restrain media houses from publishing must be done with caution and that a court must try and remain “as close to the preservation of the freedom of expression”.

In the case of *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 113/11) [2012] ZACC 22, the Constitutional Court held that interdicting a media house before a publication has been made must be “approached with circumspection and should be permitted in narrow circumstances only”. In *Midi Television (Pty) Limited v Directorate of Public Prosecutions* (Western Cape) (SCA Case No. 100/06), the Supreme Court of Appeal (SCA) explained that a publication will be unlawful and thus susceptible to being prohibited only if “prejudice that the publication might cause...is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place”.

In *Midi Television* the SCA went on to explain that the allegation that a publication is defamatory but yet to be declared unlawful by a court will not be considered prejudicial as “an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed”.

In the recent case of *Els and Another v eMedia Investments (Pty) Ltd* (25902/2021) [2024] ZAGPJHC 1164 (19 November 2024), the High Court reiterated the principles above and was required to determine whether footage of Gregory Els, a businessman, walking away from an “ambushed interview” justified protection from being published on the *Devi Show*.

In this matter, Els was lured to a coffee shop under false pretences to advise on a sale of business transaction. Upon his arrival he was fronted by Devi Govender and asked a series of questions relating to allegations of misappropriating money. Els left the coffee shop, walked back to his car and then drove off. During this interaction, Els remained silent.

Els argued that the footage contained no information that concerned press freedom and, if aired, would be “performative and not informative”. Furthermore, he argued that there was no public interest in his business affairs as he was not a prominent public figure.

**DISPUTE RESOLUTION
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Is non-verbal communication in the public interest and deserving of protection under the right to freedom of expression?

CONTINUED

The court's findings

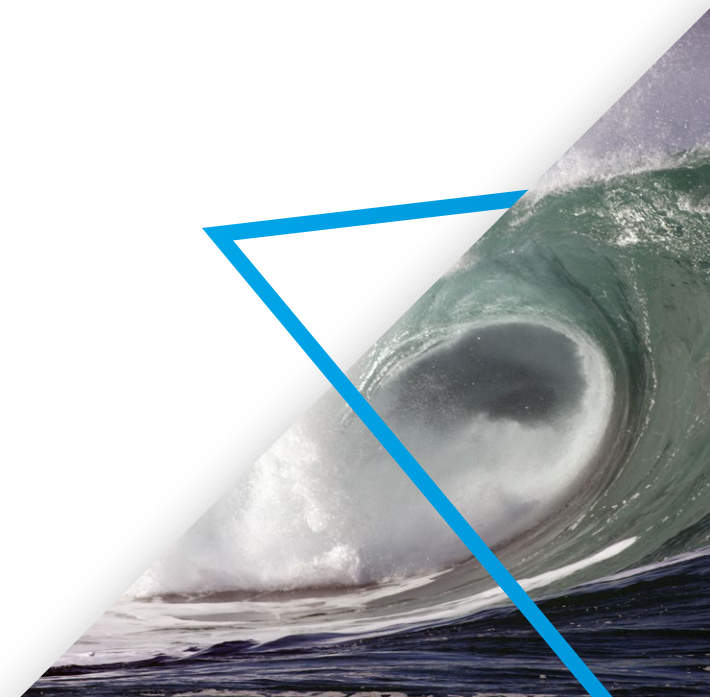
In analysing the first argument, the court held that the fact that the footage may have contained no communication did not detract from its claim to expression. Whether the Devi Show should be interdicted from publishing the footage of Els had to be considered in the context of the overall report. The court held that Els walking away was a form of non-verbal communication.

In analysing the second argument, the court held that the allegations of impropriety made against Els were not trivial. The allegations related to misappropriating substantial sums of money. If the allegations were true, the public was at financial risk of dealing with Els' firm. The court accordingly held that the allegations were indeed in the public interest.

In balancing the right to freedom of expression against the right to privacy, the court found that Els did not prove that he had a clear right that warranted protection. Furthermore, the court held that Els had an alternative remedy, which was a claim for damages flowing from an invasion of privacy. Accordingly, the requirements of an interdict were not met.

In conclusion, our courts have taken a very strict approach in protecting knowledge that affects the public, and upholding transparency and accountability. As such, even non-verbal communication that plays a part in informing the public of issues that may affect it will be protected by a court of law.

Neha Dhana and Dipuo Titipana



Lender's victory: Essential strategies for effective security enforcement

On 11 November 2024, the *High Court in East African Cables PLC v Equity Bank (Kenya) Limited* [2024] KEHC 14009 (KLR) delivered a ruling that reaffirmed the strong position of secured creditors in enforcing security. When East African Cables PLC (the borrower) defaulted on a KES 1.7 billion loan that was granted to it by Equity Bank (the bank), the court upheld the bank's right to exercise its statutory power of sale over the charged properties despite the borrower's attempts to block the process. This ruling reinforces key legal principles regarding the enforceability of different types of security and offers valuable lessons for lenders on how to navigate borrower disputes and ensure smooth enforcement of their rights.

The bank had advanced a substantial facility of KES 1.7 billion to the borrower, secured by an all-asset debenture and charges over multiple properties. When the borrower defaulted on its repayment obligations, the bank appointed joint administrators pursuant to the debenture.

This prompted the borrower to apply for interim orders restraining the appointment of the joint administrators. Undeterred, the bank sought to exercise its statutory power of sale over the charged properties. In a bid to block the sale of the charged properties, the borrower filed a suit against the bank, arguing that the interim orders granted in the insolvency proceedings and other factors precluded the bank from exercising statutory power of sale.

Contemporaneous with filing the suit, the borrower filed an application for an interim injunction, contending that it had a *prima facie* case with a probability of success since the debt amount was in dispute, the statutory notices were irregular, and the charged properties held unique commercial and sentimental value for the borrower, which loss could not be compensated through an award of damages.

In dismissing the borrower's injunction application, the court reinforced the protection accorded to secured creditors by reaffirming the fact that the appointment of an administrator under a debenture is a separate and distinct remedy available to a debenture holder and that the suspension of the appointment of an administrator does not prevent the exercise of statutory power of sale of charged properties, thereby setting a precedent for smoother enforcement in similar future cases. The court's decision emphasises several crucial aspects of security enforcement, including upholding the priority of a secured creditor's various rights, the principles for granting an injunction and the significance of proper statutory procedures.

Lender's victory: Essential strategies for effective security enforcement

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Key takeaways from the ruling

Varied rights of secured creditors

One of the borrower's primary arguments was that the order of status quo that was granted in the insolvency proceedings challenging the appointment of the joint administrators had preserved the charged properties, thereby preventing the bank from exercising statutory power of sale. The court decisively rejected this argument, clarifying that a secured creditor's rights under a charge over immovable property are distinct and independent from a secured creditor's rights under a debenture. It further found that the interim order suspending the appointment of an administrator does not preclude a lender from exercising any other remedies provided for by law.

This clarification is a significant win for lenders, as it affirms their ability to exercise statutory power of sale, notwithstanding any challenge to the exercising of their power to appoint an administrator as provided in the Insolvency Act, 2015 and as particularly provided in the debenture. For banks and other lenders as secured creditors, this means fewer delays and a more straightforward pathway to recovering debts.

Principles for grant of an interlocutory injunction reiterated

1. Disputes over debt quantum

The court reiterated that disputes over the exact amount owed do not, on their own, justify the granting of an injunction restraining a statutory power of sale. This principle strengthens lenders' positions in cases where borrowers attempt to use minor disputes over figures to delay enforcement actions.

2. Charged properties as commodities

The court also reiterated the fact that unique commercial and sentimental value of charged property does not preclude the exercise of statutory power of sale since once properties are offered as security, they become tradable commodities. Borrowers cannot rely on sentimental value or claims of irreplaceability to block enforcement. For lenders, this ruling underscores the finality of charging property as security – it confirms their ability to realise assets without facing undue resistance.

3. Courts and contractual autonomy

In seeking to block the sale, the borrower proposed alternative repayment arrangements, asking the court to compel the bank to accept its proposals. The court firmly rejected this request, reiterating that it is not the role of courts to rewrite contracts between parties or to impose repayment terms on lenders. This principle is crucial for lenders as it reaffirms their autonomy in enforcing contractual agreements without judicial interference.



Lender's victory: Essential strategies for effective security enforcement

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Proper enforcement procedures and the role of statutory notices

The borrower also argued that the statutory notices issued by the bank were irregular and premature. However, the court upheld the validity of the notices finding that the bank had followed all procedural requirements under the Land Act, 2012 and reiterated that the power of sale had crystallised following the serving of the statutory notices. This reinforces the importance of compliance with statutory timelines and notice requirements for lenders as it protects their enforcement actions from legal challenges.

Impact on lenders

This case has several significant implications for lenders. It reinforces the robust rights of secured creditors, affirming their ability to enforce their rights in respect of security created independently of debentures. Borrowers can no longer rely on minor disputes over debt amounts or claims of sentimental property value to block enforcement, as the court emphasised that such arguments are insufficient to restrain exercise of statutory power of sale. Additionally, the court highlighted the importance of statutory compliance as lenders must ensure that all procedural requirements, such as issuing statutory notices, are followed to the letter to avoid legal challenges.

The decision also underscores the finality of charging property as security, confirming that such assets are commodities that lenders can realise when borrowers default. Importantly, the court's respect for contractual autonomy provides lenders with the confidence that their agreements will be enforced as written without interference from repayment proposals or attempts to alter the terms.

Lessons for lenders

For lenders, this case emphasises the importance of protection of secured lenders' rights and the courts' recognition of various robust processes in security enforcement. Maintaining accurate records of agreements and repayments and following laid down security enforcement processes including issuing statutory notices is critical. Lenders should also engage legal counsel to ensure compliance with procedural requirements and proactively manage borrower disputes.

The ruling is a powerful reminder that clear, enforceable contracts and adherence to legal requirements remain the cornerstone of effective lending practices.

Stella Situma and Christine Mugenyu



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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