IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civil Case No. 174/04

In the matter between

USUTHU CREDIT & SAVINGS COOPERATIVE SOCIETY

Applicant

And

NEDBANK (SWAZILAND) LIMITED

1st Respondent

SAPPI USUTHU (PTY) LTD

2nd Respondent

MHLAMBANYATSI GENERAL DEALER (PTY) LTD

3rd Respondent

In re:

NEDBANK (SWAZILAND) LIMITED Plaintiff

And

MHLAMBANYATSI GENERAL DEALER (PTY) LTD

lst Defendant

USUTHU CREDIT & SAVINGS COOPERATIVE SOCIETY

2nd Defendant

For the Applicant: Advocate P.E. Flynn, Instructed by Rodrigues and Associates, Manzini

For the 1st Respondent: Advocate J.M. van Der Walt, instructed By Cloete, Henwood, Dlamini Associates, Mbabane

For the 2nd and 3rd Respondents: No Appearance

JUDGMENT

31 August, 2005

[1] The applicant and the third respondent herein had a summary judgment against them, obtained by the first respondent bank, which the applicant now seeks to have rescinded. The third respondent has not sought to join forces with the applicant.

[2] Initially, the third respondent, Mhlambanyatsi General Dealer (Pty) Ltd (the "shop") was the first defendant in an action instituted by Nedbank (Swaziland) Limited (the "bank"). The bank sued for an amount of E243 357-32 (plus costs, interest and an order to declare goods hypothecated to be executable) on the basis that the bank provided a loan to the shop for working capital and purchase of a

truck, with the shop failing to service the loan as agreed. The second defendant was sued on the basis of a suretyship and co-principal debtor *in solidum* with the shop for repayment in an unlimited amount to the bank in the event the shop could not meet its obligations.

[3] A notice of intention to defend was filed by "the defendants" (being the shop and Usuthu Credit and Savings Cooperative Society (the "Co-op") on the 12th February 2004, by Zonke Magagula & Co., "defendants attorneys." The following day, a further notice of intention to defend was filed with the registrar by "the 1st respondent" (sic), this time by Mzamo M. Nxumalo & Associates, attorneys for the "respondent", which obviously could not be correct at that stage of events. It should have read to refer to the first defendant, not respondent.

[4] From these two notices, it is *prima facie* the position that both defendants wanted to defend the matter.

[5] The particulars of claim as set out in the combined summons are comprehensive and detailed, enumerating the cause of action and the foundation of liability of each defendant, the latter due to a deed of suretyship annexed to the summons. The second defendant co-op

stood surety for the first, the shop, for the latter to obtain credit from the bank.

[6] The plaintiff bank issued a notice of application for summary judgment against "the defendants", to be heard on the 12th March 2004. This notice was timeously served on the attorneys of both defendants. No papers to oppose the application for summary judgment seem to have been filed and on the due date, judgment was entered against the first defendant, the same to be done regarding the second defendant a week later.

[7] It was only after the deputy sheriff attached goods of the shop in the execution process, that the (new) attorneys of the erstwhile second defendant, the Co-op, moved the present application. The first and second respondents filed notices to oppose, separately but through the same firm of attorneys. Only the bank thereafter filed an answering affidavit. The second respondent did nothing further.

[8] The application was brought on an urgent basis late in June 2004 but urgency has become academic by the time the matter was eventually heard almost a year later. At the first appearance in court the parties agreed to let the matter take its normal course and the

bank undertook not to execute applicant's property, pending finalisation of the application.

[9] The main thrust of the application is that the Co-op is unable to stand as surety, both under statute and its own objects, wherefore it is *ultra vires* and unenforceable against it. Had this impediment been made known to the court when the summary judgment application was granted, it is contended, the judgment would have been refused. As secondary issues, the applicant has it that the Co-op was not represented, calling the authority to instruct the attorneys who filed a notice to oppose the action into issue. Further, that service of the summons was defective. The secondary issues are tied in with the composition of a former and an interim committee in charge of the affairs of the Co-op, and their powers to act on behalf of the society.

[10] In turn, the bank takes the view that the secondary aspects of the standing of the committees, past and interim, is a new defence not raised before, estopping it from now being brought to the fore. On the main question of the unlimited deed of suretyship being *ultra vires,* it is also a new issue not raised before, which should not result in a rescission but in the applicant holding committee responsible

for the mess to be liable for its deeds. Also, that an unlimited suretyship is not null and void, as contended by the applicant.

[11] These issues were argued together with points raised *in limine* by the first respondent bank and it is with the latter aspects that I shall deal with now, intertwined as they are with the merits.

[12] Three different points are raised by the first respondent, namely, the authority of the deponent to depose to the founding affidavit of the applicants and the ability of the "interim committee" to bring the matter to court, that the summary judgment was not in fact entered in the absence of the applicant and also that the parties who signed the deed of suretyship which gave rise to the action against the Co-op society were not cited as necessary respondents whereby their account of affairs remain unknown to the court.

[13] In the founding affidavit of the applicant the deponent, Sabelo Simelane, states that:

"*1.1 am the Secretary General in an Interim Committee elected on the 2nd November 2003 to run the affairs of the applicant...*

2. *As the Secretary General I am duly authorised to depose hereto by virtue of my position.*

3. *The applicant is Usuthu Credit and Savings Cooperative Society, duly established in accordance with the Co-operative Societies Proclamation of 1964 and specifically for the benefit of employees of Sappi Usuthu, the 2nd respondent of the aforesaid Society.*"

He continues to state that:

"*7. In November 2003, an interim committee was elected by members of the applicant to run the affairs of the applicant upon a vote of no confidence having been passed against the office bearers at the time which included George Ginindza and Sipho Khumalo, signatories to the Society's account and executive members. I was made secretary to the interim committee.*

8. In short, the vote of no confidence and the appointment of the interim committee meant that the previous office bearers' powers to act for the applicant were removed from them and transferred to the members of the interim committee."

[15] It is this stated authority of Sabelo Simelane to bring the application on behalf of the Co-operative Society, that is subject to challenge by the bank.

[16] The collections manager of the bank bases it on two considerations: the first that Simelane "*...has not produced a resolution of the applicant authorising him to bring these proceedings and in particular to challenge the actions of members of the executive committee of the applicant which held office prior to Sabelo Simelane taking office*" *(para 6.2 of the answering affidavit).*

[17] The applicant rises to the challenge by filing an "Extract of Minutes of Usuthu Credit & Savings Co-operatives Society, held at Bhunya on the 22nd November 2003" with its replying affidavit. (Annexure "USC 1" page 58 of record).

[18] *Ex facie* this "extract of minutes", it seems that the "general membership" in attendance at the meeting resolved to suspend their previous executive committee (including the two who signed the deed of suretyship) and appointed "an interim committee in their stead." Part of their task was set out as follows:

"*2.3 To institute legal proceedings if necessary to recover any monies owed to the society and generally where necessary to protect the interests of the society.*

2.4 That any member of the interim committee namely the chairperson, vice chairperson, treasurer and secretary be and are hereby authorised to institute proceedings, defend, prosecute the interests of the society and to sign all necessary documents in this regard."

[19] Following the filing of this extract of minutes, a legal challenge was raised by respondent's counsel. Relying on Section 34 of the Co-operative Societies Act, 1964 (Act 28 of 1964), it is said that it is mandatory that members of the committee shall only be appointed or removed by majority vote of members at a general meeting. Further, that Regulation 26 under the Act vests the ability to convene the annual general meeting in the committee, while Regulation 27 vests the chairman of the committee with the sole authority to convene a special general meeting. Pursuant hereto, the by-laws of the society provide that the committee shall convene an annual general meeting, that members of the management committee can be suspended or removed by the general annual meeting, at which meeting a committee for the coming year is to be elected.

[20] The "committee" is defined in the By-Law as "...the governing body of a registered society to whom the management of its affairs is entrusted" (Annexure "UCS2", page 59 *et seq.* of record).

[21] However, the by-laws also provide for "general meetings", separate from the "annual general meeting" and the duties of the latter, as correctly argued by the first respondent's counsel. The further provision for "general meetings" (para 5 of the By-Laws, page 63 of the record) has it that:

"*5.1.1 The supreme authority of the society is vested in the General Meeting of the members which shall be held from time to time and at least once a year.*"

[22] It further stipulates a quorum and how such meeting may be convened by the Registrar, at written request of not less than ten members, etcetera. Such general or special general meeting differs in this respect to the annual general meeting, to be called by the committee with its stipulated duties, such as the election of a committee for the coming year.

[23] "All business decided at a general meeting shall be recorded in a Minute Book which shall be signed by the chairman of the meeting and Secretary." (para 5.1.6.1).

[24] Advocate van der Walt argues that from the aforegoing, Simelane could not be found to be in a position where he may bring the present application on behalf of the Society.

[25] One such aspect is that neither the by laws or Act with its regulations provide for an "interim committee". The fact remains that it also does not exclude such a body. Another aspect canvassed by both counsel at the hearing of the matter, at request of the court since it was contended that neither a committee or "interim committee" could exist for years on end, is the lifespan of such committee.

[26] From the papers, it seems that the "interim committee" came into being on the 22nd November 2003. Summons commencing action was issued on the 26th January,
2004, with a notice of intention to defend filed by attorneys Zonke Magagula & Co. on the 12th February. The present application was

filed with the Registrar on the 22nd June 2004. I cannot from this chronology find that the "interim committee" was or is due for a semi perpetual duration.

[27] The further attack is based on non-provision for an "interim committee", which as pointed out above, is also not excluded as such.

[28] Apart from a management committee, the by laws of the society has two sub-committees at minimum. There can also be more. Removal or suspension of members of the Managing Committee and other office holders including cheque signatories is part of duties and functions of the annual general meeting. Under the determination of a quorum for general meetings, the by laws refer to both the annual or special general meeting loosely. Bearing in mind that the "General Meeting" is defined as the "supreme authority of the society", which has to meet at least once annually, but can also be convened more frequently or *ad hoc,* it cannot in my judgment be found that it is only at an "annual" general meeting that the management committee or members thereof can be removed or suspended.

Provided that the other domestic requirements of a special general meeting, such as a quorum, proper notice and so on, has been complied with, a management committee can properly be removed at such a meeting. None of the domestic requirements are alleged to be absent, it is only the ability of a "general meeting" instead of an "annual general meeting," that was put to the challenge, which challenge stands to fail for the abovementioned reasons. Logically too, it does not make sense to wait for an annual general meeting to be convened, which has to follow receipt of the audit report of the accounts, should the need arise to consider the removal of a management committee.

As a last leg of attack on the ability of Simelane, as member of the "interim committee" to depose to the applicant's affidavit and bring the application to court, the bank fires a final salvo at annexure "UCS 1" - the extract of minutes.

As noted above, all business of a general meeting (including "annual" or "special" general meeting) has to be recorded in a minute book, signed by both the chairman and the secretary.

[32] Annexure "UCS 1" is confirmed to be a true extract under signature of the chairperson. It seems *ex facie* the document that

the general membership was in attendance. It further records what was resolved by the general membership, *inter alia* to suspend certain executive committee members and electing an interim committee in their stead and authorising them to litigate on behalf of the Co-op. It could not realistically be expected of the applicant to file the minute book, from which the extract was produced with its application.

[33] By all accounts annexure "USC 1" seems to be what it purports to be, namely an acceptable answer to the challenge against the authority of Sabelo Simelane to depose to the founding affidavit of the applicant. The meeting of the general membership, at a special general meeting, authorised the chairperson, vice chair, treasurer and secretary of the interim management committee, of which Simelane is the Secretary (though he somewhat imperiously assumes the title of secretary general) to do exactly what he did. He seeks, on behalf of the Co-op, to have a judgment rescinded which adversely affects the society and to endeavour to protect its interests.

[34] It is for these reasons that the first point *in limine* of the first respondent is dismissed.

[35] The next point is whether the society was represented or not when summary judgment was granted.

[36] In his founding affidavit, which is found to be admissible, Simelane states in paragraph 41 that attorneys Zonke Magagula & Company might have entered an appearance, they were not properly instructed "*...as it never got in contact with the interim executive committee. I submit this was another fraudulent act by* the previous *executive to instruct an attorney on behalf of applicant when they knew they were no longer in office. It seems this was to try and avoid the applicant from being properly represented.*"

[37] At best, the latter part of this paragraph is argumentative, speculative, vexatious and excipiable. It remains unknown under what circumstances and by which person the attorneys were instructed to defend the action. Simelane has it that the interim committee was not in contact with the attorneys, but the adverse conclusion he seeks to infer is not motivated on any factual allegations or supported elsewhere.

[38] The applicant did not deem it necessary to establish the correct position from the attorneys and incorporate it in the application. He does not say why this was not done, as could easily have been expected of him.

One could well speculate that one of the former management committee members may have instructed the matter to be defended but not also that it was to try and avoid proper representation of the applicant. It also remains unknown for what reason the notice to defend, filed by attorneys Zonke Magagula Company, was not followed up with any further pleadings and why the application for summary judgment was not resisted.

From the papers in the court file, it seems clear that the notice of application for summary judgment was served on each of the two firms of attorneys which filed notices to defend the action, on the 23rd February 2004, well in time before the judgment was entered against the Co-op on the 12th March 2004. Had the applicant been more diligent in support of its contention of being unrepresented at the time judgment was given against and that the new interim committee was not aware of either the summons or the legal representation, it at minimum could and should have placed the

version of the attorneys before court. It chose not to do so and does not even attempt to offer an explanation for the omission.

[41] The applicant records that it was advised that in terms of Rule 42(l)(a) a judgment granted in its absence may be rescinded. That this is so bears no argument. What he however overlooks is the keyword - erroneously granted.

[42] This operative word "erroneous" is used in the same context in the South African equivalent. The Swazi Rules read:-

"*42(1) The court may, in addition to any other powers it may have,* mero motu *or upon the application of any party affected, rescind or vary:*

(a) an order or judgment erroneously granted in the absence of any party affected thereby;"

[43] The version of our neighbouring jurisdiction is *verbatim* the same, save to also include "*erroneously sought*".

[44] An instructive exposition of the keywords "erroneously sought or granted" is set out in Superior Court Practice by Erasmus *et al* service issue 7 at B1-308.

"*An order or judgment is erroneously granted if there was an irregularity on the proceedings or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment. Though in most cases such an error would be apparent on the record of the proceedings it is submitted that in deciding whether it was erroneously granted, a court is not confined to the record of proceedings. ...The courts have also consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney.*"

[45] The latitude of judicial discretion to rescind is wide. The objective is to right a wrong, inadvertently done or to correct an error. It is such an error that the applicant contends to be the cause of its application. The applicant may well be mistaken as to it being

deemed aware of the action instituted against it and whether or not the attorneys who filed a notice to defend were instructed by the Co-op or not. It may also be wrong to impute further wrongs to the former committee member which signed the suretyship and then endeavour to conceal the matter by instructing attorneys to defend the action without knowledge or acquiescence of the new interim committee. Neither of these aspects can be found in favour of the applicant.

[46] The real issue that the applicant wants to have considered, and which was not done by the court at the time when the summary judgment was granted, is whether the Co-op society could have been burdened by a suretyship at all. It contends that it was *ultra vires* and of no effect. It says by implication that in the event that the court had been aware of the issues, which it was not because the society did not know about the action and application for summary judgment, the court may well have refused the judgment and given leave to defend, with a subsequent trial ventilating all the issues.

[47] It therefore seems to me that the door should not now be shut *in limine* against the Co-op, for the second time, simply because it

may be deemed to have been represented and that it is now precluded from at least being heard on the issue of the suretyship being *ultra vires,* null and void *ab initio.*

[48] A last final point was raised by the bank, the issue of non-joinder of the persons who signed the deed of suretyship. It is common cause that they did sign it, but also that they did so in their capacities of office bearers, management committee members of the Co-op society, not as individual sureties. Ultimately, they might be held liable by the Co-op, as is provided for in the By Laws of the applicant, but for present purposes, their non-joinder is no reason to refuse entertaining the merits of the application. Even if they were joined and even if they did file papers, their evidence would not affect the legal issue at stake, which is determinative of the outcome of this application.

[49] Having dismissed the points *in limine* I now proceed to deal with the merits of the application. Some aspects have already been dealt with above. The issue now to decide is whether or not the suretyship is enforceable against the applicant. If not to have the judgment that was entered against it, rescinded.

[50] The applicant's case is that if the court had known that the suretyship, on which the bank's claim was based, was *ultra vires,* the court would not have granted the application for summary judgment. This stated absence of knowledge by the court is contended to have been due to the applicant not placing this fact before the court, due to it not being aware of the claim against it.

[51] On the latter aspect, the argument of the applicant is that attorneys Zonke Magagula and Company were not mandated by the Co-op to represent it, entering an appearance to defend the claim.

[52] The deponent of the applicant's affidavit *prima facie* may well have been unaware of both the claim against the society and the instructions to the attorneys to file a notice of intention to defend the matter. In context, the present rescission application is moved by the interim management Committee, elected on the 22nd November 2003. The notice of intention to defend was filed with the registrar on the 12th February 2004, well after the interim committee took over the affairs of the applicant. The inevitable question that arises is that if the interim committee, or its secretary for that matter, did not instruct Zonke Magagula and company to defend the matter it claims ignorance of, who then did it?

[53] Further to what has been mentioned above, the applicant did not deem it necessary to clarify this issue by filing an affidavit from the firm of attorneys to state who, on behalf of the society, instructed it to defend the matter and why it did not oppose the summary judgment application now sought to be rescinded. It merely makes a bald allegation of "not instructing" the lawyers to represent and defend it against a crippling claim by the bank based on a deed of suretyship it regards as invalid and unforceable.

[54] With all deference to the applicant and the legal profession, attorneys are not known to be such champions of causes, like the present, to the extent that they scrutinise court files and enter appearances to defend matters simply because of public spiritedness. Lawyers only do so when they are instructed by a client. On the present facts, the lawyers could only have been instructed by somebody who claimed to have represented the Co-op Society. The identity of that person remains a mystery, not ventilated by the applicant. Mr. Sabelo Simelane says he was not the one who did it, and I accept it so. However, if not instructed by Simelane of the interim committee, acting for the Co-op, it could only have been done by someone else, presumably of the former management committee, but as said, this aspect was left by the applicant for speculation or conjecture. Fact remains: it cannot be

found on the available information that attorneys Zonke Magagula & Co. acted on a frolic of their own when they filed an appearance to defend the action. Why they did not also deal with the matter further, especially to oppose the summary judgment application now sought to be rescinded, also remains a mystery, not explained by the applicant.

It is therefore that the applicant cannot hide behind its bald allegation of not instructing the attorneys, and equally so, contend an absolute lack of knowledge of the summons. Clearly, despite the number of criticisms that may be raised against the drafting of the notice to defend, at the very least the citation of the matter had to be gleaned from the face of the summons that was indeed served on the then second defendant, the present applicant. If this precarious position was caused by its own internal mismanagement or lack of communication, it cannot justify that the judgment be rescinded on this basis.

The primary issue, determinative of the matter, is the applicant's contention that the suretyship is *ultra vires,* a fact not made known to the court when entering judgment, which fact, had it been made known through a properly instructed resisting affidavit, would have

prevented the error, causing the matter to be dealt with in a trial, as it is now sought to be done.

To summarise the applicant's position regarding the suretyship being *ultra vires,* null and void and to be elevated to the *causa causans* of rescinding a judgment granted in error, I cannot but follow the clear and well worded exposition put forth by advocate Flynn. His meticulously prepared argument sets it out as follows and I quote it *in extenso:-*

"The applicant is a registered cooperative society in terms of Section 7 of the Cooperative Societies Act, 1964, and functions in terms of by-laws which were registered in terms of the Act on the 21st October, 1999.

The objects of the cooperative society are contained in clause 3 of the by-laws and accord with the provision of section 4 of the Act. Clause 3.1 is the principal object and specifies that the object of the society is for members to save and lend money to one another at low interest rates. The applicant's name reflects this object - it is a savings and credit cooperative.

The supreme authority of the society is vested in the general meeting in terms of clause 5.1.1 of the by-laws and in terms of section 34 of the Act. The duties of the general meeting are set out in clause 5.1.6 of the bylaws.

Regulations 51 and 52 of the Cooperative Societies Regulations, 1964, limit the application of funds of a registered society. Regulation 51 provides that the funds of a registered society shall be applied only to
the promotion of the stated objects of the society and any other purpose mentioned in the Act, regulations and the by-laws of the society.

The Committee may only perform or authorise any action consistent with the law and by-laws not specifically reserved by the by-laws for the members. In terms of clause 5.1.6 the general meeting transacts the general business of the society.

It is submitted that standing surety is *ultra vires* the society. The society's power to bind itself as a surety depends on the Act and by-laws registered in terms thereof which set out the objects of a Co-operative Society. Standing surety is not encompassed in these objects and the suretyship relied upon by the First Respondent is accordingly void. (So contended by the applicant - my insert).

Sections 42 and 43 of the Act restrict transactions and investments and in terms of section 43(d) a registered society may only invest in such manner as the Registrar may approve.

A section similar to section 36 of the 1973 South African Companies Act is not included in the Swaziland Act and the abovementioned law remains applicable in Swaziland and the suretyship in this matter is therefore void. (So contended - my insert)

It is submitted that the society, and in particular its committee, operates and exercises powers strictly in terms of the statute. The applicant may not contract other than in terms of specific provisions of the Act and in accordance with its objects. In terms of Regulation 36 the committee may only borrow on behalf of the registered society to an amount not exceeding such total amount as may have been fixed in terms of regulation 52. The document "UC2" indicates that a loan was obtained in the amount of E450,000.00 and the document permits the Second Respondent to deduct any amount owing "from the savings of the monthly cheques received by the society". The suretyship makes the applicant a co-principal debtor and it was sued on that basis.

The suretyship is not only not provided for in the objects of the society but contravenes regulation 36 as read with regulation 52(1) and the by-laws (in respect of maximum liability under regulation 52). It is therefore void." (As per the applicant's argument).

[58] From the authorities referred to by Advocate Flynn, his argument is partly correct. For purposes of this judgment, it is indeed found and accepted that in executing the contentious deed of suretyship, signed by Ginindza and Nkambule on behalf of the applicant Co-op Society it was *ultra vires* the objects of the society, also falling foul of the applicable legislation. But that is not the end of the matter.

[59] Being found *ultra vires* does not also lead to a conclusion that it is therefore void and unenforceable. The maxim *nemo contra suum factum venire* has given rise to the well-known doctrine of 'estoppel', which lays down that a person who makes a representation, either by words or by conduct, including silence and in actions, and thereby induces another person to alter his position to his detriment, is subsequently estopped from denying the truth of such representation (see Wille's Principles of South African Law, 7th edition by Gibson, at page 18 and the authorities referred to in notes 42 to 45).

[60] The applicant, through its representatives, two members of its former management committee, Ginindza and Khumalo, represented to the bank that they were authorised to bind the Co-op as surety and co-principal debtor of the third respondent company. An extract from the minutes of the applicant's meeting of the 17th October 2001, purports to authorise them to "sign security documents" on behalf of the Co-op to secure facilities in favour of the third respondent/first defendant. It is the latter entity which defaulted and brought misery over the applicant when it was held liable, as surety, for debts of the defaulting business.

[61] It is only now, after it was held liable as surety, that the applicant seeks immunity on the basis that the suretyship was *ultra vires* its objects and the law. When the bank advanced credit to the general dealership, it was because it was induced to do so by the Co-op standing as surety and co-principal debtor. The officers of the Co-op made a representation that they were mandated to bind the Co-op as surety, expressly so. This cannot be held to be void and unenforceable. Even if this aspect was brought to the attention of the court when judgment was granted against both applicant and the general dealer, it is my considered view that that court would have erred to dismiss the application for summary judgment against the present applicant, on the same grounds it now places before this court to rescind the judgment due to an averred error made by the court.

[62] Advocate Flynn finds himself in the same predicament as Advocate Kentridge SC, as he then was, in the case of **Central Merchant Bank Ltd v Oranje Benefit Society**
1975(4) SA 588(C), a decision that dealt with the very same issue as the one at hand.

[63] Therein, van Winsen J (as he then was) with Steyn J(as he then was) concurring, held that "*...our courts would regard it as*

unconscionable conduct on the part of a company who by a decision of its directors had fraudulently misled a party to contract with it on the understanding that it had the power to enter into the contract, if it should seek to raise as a defence to a claim in delict that the representee, having constructive knowledge of its memorandum and articles, was not misled by its fraud" at page 595 E - F). At page 596 D -E, that court continued by holding that "... *the defendant would be as little entitled to seek the protection of the doctrine of ultra vires as it would have had should the board of directors itself have resolved to make the fraudulent misrepresentation that it had the power to afford the guarantee*".

[64] The belief by the bank that it was *inter vires* of the society and that it induced the bank to enter into the contract, as it is also the position in the present matter, with the result that the society cannot afterwards be absolved, as decided in the CPD.

[65] The decision by the CPD of the High Court was unanimously upheld on appeal (1976 (4) SA 659(A)). As in the present matter, the position remains that the bank was induced to contract with the society, as surety, in the belief that it was *inter vires* for the society to do as it incorrectly presented itself to be able to do. It is Ginindza

and Nkambule, *prima facie* properly authorised by the society, who represented to the bank that the society will be properly bound as surety for the borrower, the general dealership. This representation was made in their representative capacities.

[66] The Co-op may well seek legal advice as to whether it wants to hold them accountable for losses by the Co-op arising from the liability of the applicant, which it cannot shy away from even temporarily so, by way of a rescission. That is another issue and does not affect the outcome of the present application.

[67] It is for these reasons that it is my considered view that the applicant must fail to have the judgment against it rescinded, particularly because of an alleged error, said

to

to have been mistakenly made by the court, due^the society not informing it that to be a surety is *ultra vires.*

[68] The application to rescind the judgment is therefore ordered to be dismissed, with costs. Costs of counsel are ordered to be taxed with regard being had to the provisions of Rule 68(2).

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE