HIGH COURT OF SWAZILAND

Held at Mbabane

Qhawe Mamba

1st Applicant

Ultimate Productions (Pty) Ltd

2nd Applicant

Jouz Media (Pty) Ltd

3rd Applicant

Channel S Proposed Savings & Credit

Co-operative Society Limited

4th Applicant

vs

Central Bank of Swaziland
1st Respondent
First National Bank of Swaziland
2nd Respondent
Nedbank Swaziland Limited
3 rd Respondent
Standard Bank Swaziland Limited
Fourth Respondent

Civil Case No.4536/2008

JUDGMENT

2nd September 2009

[1] This judgment is a sequel to the one I delivered in this matter on 19 February, 2009 which judgement was taken on appeal before the Supreme Court of Swaziland. The latter court confirmed the judgement I delivered on 19th February, 2009 and ordered that the case be remitted back to the High Court to deal with the Rule 53 application by the Applicants.

[2] The Applicants have field a Rule 53 application as directed by the court for the following relief:

"1. Calling upon the Respondent to show cause why its decision to seize assets/accounts belonging to the Applicants held with various financial institutions should not be reviewed and corrected or set aside.

2. Calling upon the Respondent to dispatch, within 14 days of receipt hereof, to the Registrar of the above Honourable Court, the record of the proceedings which led to the seizure together with such reasons as

Respondent by law is required or desires to give or make and notify the Applicants that such has been done.

3. Costs of Application.

4. Further and/or alternative relief.

[3] I must mention that the above prayers were amended by the Applicants on application to the court on the 18th August 2009. The application was for the deletion of the phrase "an order" at the commencement of prayer 1 and 2 to read as outlined above in paragraph 2 of this judgement.

[4] The Founding Affidavit of the First Applicant is filed where he outlines the material facts in this case. In the said affidavit the Applicants' contend that a strict compliance with the Act ensures that an affected party is heard before an adverse decision of seizure is effected by the Respondent. This appears to be the only ground for review advanced by the Applicants after the Supreme Court had ruled that the Rule 53 application be heard by this court. The Applicants also attached a number of annexures pertinent to their case.

[5] On the other hand the Respondents oppose the orders sought by the Applicants and have filed an Answering Affidavit to that effect. In the said affidavit two point *in limine et initio litis* are canvassed.

[6] Firstly, that of misjoinder. The argument in this regard is that no party can be introduced as a party to these proceedings, save with the leave of the court. That in *casu* a new party has been introduced to the proceedings, namely the 4 Applicant, the Channel S. Proposed Savings & Credit Co-operative Society Ltd. The 4th Applicant was not a party to these proceedings and was only introduced as a party when the Applicants filed this application. No leave was sought from the court, nor was any such leave granted. In the premise, the application is bad on the basis of misjoinder as this party is not a party to the proceedings before the court.

[7] The second point *in limine* is that of *locus standi* in that as it is now clear, beyond any doubt, that the so called "Channel S Proposed Savings & Credit Co-operative Society

Limited" was never registered, either provisionally or fully. That it has at no stage any *locus standi,* and that the application stands to be dismissed with costs.

[8] In this regard the Respondents have argued in paragraphs 4 to 10 of the 1st Respondent's Heads of Argument where in paragraph 9 thereof the following is stated:

> "Apart from all the other matters raised in the 1st Respondent's answering affidavits which demonstrate this to be the position, and in the affidavits filed by the Applicants themselves in the first leg of the application which demonstrate that no registration was ever applied for or granted, an affidavit deposed to by the Commissioner of Co-operatives Nonhlanhla Kunene (annexure "MPDH") which proves conclusively that the so-called co-operative society has never been registered. She sets out the position concisely in her affidavit:
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>> It is of paramount importance for me to point out that no cooperative can be registered without my involvement as I am the official tasked with registration, provisionally or fully of all cooperatives in Swaziland. A co-operative society is only registered pursuant to an application by the Applicant for registration."

[9] I shall proceed to consider the two points *in limine* forthwith and if I find in favour of the points *in limine* I shall also proceed to consider the merits of the case for purposes of the record.

(i) Misjoinder

[10] The argument in this regard is that these proceedings form part and parcel and are supplementary to the proceedings before this court which were converted to a Rule 53 application with an order directing the filing of affidavits.

[11] Consequently, no party can be introduced as a party to these proceedings, save with the leave of the case. *In casu* a new party has been introduced to the proceedings, namely

the 4 Applicant, the Channel S Proposed Savings & Credit Co-operative Society Ltd. The 4 Applicant was not a party to these proceedings and was only introduced as a party when the Applicants filed this application. No leave was sought from the court, nor was any such leave granted.

[12] In the premises, the application is bad for unlawful misjoinder in that this party is not a party to the proceedings before the court. On this ground as well, the application stands to be dismissed.

[13] It is contended for the Applicants that: this *point in limine* is misconceived as it was the Supreme Court which granted *locus standi* to the co-operative.

[14] In my assessment of the arguments of the parties *vis-a-vis* the legal authorities on the subject I have come to the considered view that the arguments of the Respondents are correct on the facts of the matter. The point *in limine* is accordingly upheld.

(ii) *Locus standi*

[15] I now proceed to consider the second point *in limine* that 4th Applicant has no *locus standi.* I must point out for the record that Counsel for the Applicants conceded the point when the matter came up for arguments but relied on the provisions of the *Interpretation Act* which I will address later on in this judgement.

[16] The argument for the Respondents in this regard is that the so called Channel S Proposed Savings & Credit Co-operative Society Limited was never registered, either provisionally or fully. That it has at no stage had any *locus standi* and that the application stands to be dismissed with costs.

[17] In this regard this court was referred to the Supreme Court judgement on the matter where the following was stated:

> "9. I expressly refrain from expressing an opinion on the question of *res judicata,* save to say that it is at least arguable in the light of the order made by the learned Judge that the finding or ruling *obiter,* is not *res judicata* and that therefore if the parties enter upon the review in terms of the Order, it would be open to either of them in the course of the affidavits in the review to produce more evidence than was led before the court *a quo* on the disputed issue.
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> 10. If in the course of the review the learned Judge finds in favour of the appellant, the effect will necessarily be that the application will be dismissed."

[18] The Respondents contend that the evidence now before the court establishes beyond any doubt that this is the position. Apart from all the other matters raised in the 1st Respondent's Answering Affidavits which demonstrate this to be the position, and in the affidavit filed by the Applicants themselves in the first leg of the application which demonstrate that no registration was ever applied for or granted. Filed before court is an affidavit deposed to by the Commissioner of Cooperative's Nonhlanhla Kunene (annexure "Rip 11") which proves conclusively that the so-called Co-operative Society has never been registered.

[19] The Comissiomer sets out the position concisely in her affidavit as follows:

> "6. It is of paramount importance for me to point out that no cooperative can be registered without my involvement as I am the official tasked with registration, provisionally or fully of all cooperatives in Swaziland. A co-operative society is only registered pursuant to an application by the Applicant for registration.

7. Upon being registered, the Commissioner issues a Certificate of Registration in terms of Section 11 which becomes conclusive proof of registration.

8. My office has never received an application for registration by the Channel S Proposed Savings & Credit Society Ltd and as such there is no way in which they would either be fully or provisionally registered. In addition, the so called co-operative would not have any legal standing as it is unregistered in terms of the Act, either fully or provisionally."

[20] After I have considered the above arguments by the 1st Respondent and the concession made by Counsel for the Applicants I have come to the view that Channel S Proposed Savings & Credit Society Ltd has no *locus standi* and therefore the application ought to be dismissed without any further ado. It would appear to me following the reasoning of the Supreme Court on the matter that it was open to either party in the course of the affidavits in the review to produce more evidence than was led before the court on a prior occasion. The Respondents have led conclusive evidence of the Commissioner of Co-operative, Nonhlanhla Kunene in this regard.

[21]I must also mention at this juncture that the argument advanced by Counsel for the Applicants that the provisions of the Interpretation Act apply to the case I disagree and hold the view that the Act does not apply to the facts of this case.

[22] In view of the fact that I have ruled in favour of the Respondents on the points *in limine* I ought to dismiss the application but in view of the very important question brought about by this application on the worldwide phenomenon of pyramid schemes I am duty bound to also consider the merits of the case. I must stress though that my judgement in this regard should be regarded as *obiter dictum* as I have already dismissed the application on the points *in limine* raised by the Respondents.

[23] The Applicants on the merits of the case have advanced a formidable argument in their Heads of Argument. That the Respondent, in its attempt to cloud issues and create an atmosphere, has led this Court through a maze of transactions occurring in the accounts of the Applicants. Respondent has further told the Court how the 1st Applicant has 'stolen, defrauded and masterminded the theft of millions' of Emalangeni from innocent citizens

and siphoned money from his 'alter-egos' to fund his luxurious lifestyle.

[24] That the Respondents are deliberately missing the point. Not only is the 'evidence' brought inadmissible by virtue of it being electronically generated, but there are no affidavits from the banks where these documents were procured from, confirming the veracity and accuracy thereof. It is submitted that these are NOT the merits. The merits are as they appear from the Notice of Motion and affidavit since the Applicants are *dominus litis.* The merits are whether or not the Respondent complied with its own Act, i.e. the Financial Institutions

Act. The image tarnishing campaign used by the 1s Respondent is an issue which the 1st Respondent should have dealt with after complying with its own Act. Assuming these bold allegations were true, there would be still be insignificant, for the purpose of Rule 53 application.

[25]Review applications restrict themselves to procedure. See the case of *Sikhatsi Dlamini & Others v The Minister for Housing & Urban Development & Others — Case No.1356/08.* The above cited case makes it patently clear that in the present constitutional dispensation the right to be heard is paramount. In the above cited case, there was no procedure stipulated unlike in the present case where there is procedure stipulated which places an even higher burden on the 1st Respondent. A strict compliance with the Financial Institutions Act guarantees an *audi alterum partem.* More importantly, it is submitted, the Respondent is putting the cart before the horse. The Rule is specific, a record must be filed before any such evidence of 'illegal activities' can be placed before Court, even if such evidence was relevant, which it is denied that it is relevant.

[26] Applicants further contend that no mention of the presence or absence of the record is made in the 'answering affidavit'. Therefore, the Applicants were placed in the invidious and unenviable position of not knowing what case they had to make or meet. Hence, the application with the Registrar's stamp of the 12 August 2009 was launched, compelling compliance with the

Order of the Court and Rule 53. Only in the Heads of Argument in a scanty paragraph did the Respondent hint that there was no record. This, obviously would have to be properly placed before the Court on affidavit, which was done after the Court so directed. It was only then that the Applicants knew what case they had to meet and then made their election.

[27] Clearly, it is submitted, the Respondent misses the object, motive and intention of Rule 53. 'Rule 53 is designed to aid the applicant, "not to shackle him."

[28] In conclusion, the Applicants contend that the Respondent have not met the requirements of Rule 53, until the belated filing of the affidavit stating that there is no record. Therefore, there being no record, it means the Respondent in seizing the accounts did not and could not have applied its mind in deciding whether the Applicants' activities were illegal or not. In the event that the Respondents contend that it was relying on previous communication, then that is the record it should have filed. To boldly say there was no record is an admission that the Act was not complied with.

[29] According to the Applicants Section 8 of the Financial Institutions Act 2005 states the procedures to be followed in 'determining' whether the activities are illegal. This language presupposes that the Applicants' presentations will be invited prior to the decision to seize being taken. Clearly, if this had been done, then the correspondences would form the 'record of proceedings', particularly after the creation of the 4 Applicant. The absence of such means the Respondent never complied with the Financial Institutions Act in 'determining' the illegality of the activities. As stated in the affidavit, the first contact some of the Applicants had with the Respondent was during the seizure.

[30] Therefore on this point alone and the concession that there is no record, the Court must put aside the seizure and unfreeze the accounts without hesitation.

[31] Furthermore, it is contended that in the era of the Constitutionalism, the Respondents cannot be allowed to act to the adverse interests of citizens without giving the citizens the opportunity to be heard. Not only does the Respondent's handling of this matter transgress the Constitution but also violates the principles of natural justice, particularly the most important of them all, the *audi alteram partem.*

[32] Lastly, the Court was urged to take notice that it has taken this matter close to 12 months to be resolved and the point which featured prominently is whether or not the 4 Applicant is a co-operative society. This point was taken up to the appeal stage. It should be noted that the 1st Respondent was, for the first time 'faced with this allegation and/or contention'. This is enough evidence to illustrate the point that had the 1st Respondent complied with the Financial

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Institutions Act, it would have been informed that 4 Applicant is a credit co-operative society. This was the stage where 1st Respondent should have investigated whether the registration was proper or not.

[33] The Respondents on the other hand contend that *in casu* it is clear that the 1st Applicant used the other Applicants as vehicles to carry out his illegal activities. There are numerous instances in which the court has disregarded the principles relating to the separate corporate personality of a company because the circumstances warranted it. This is especially so where fraud, dishonesty or other improper conduct is found to be present.

[34] In this regard the court was referred to a plethora of decided cases including that of *Botha vs van Niekerk 198(3) S.A. 513(W)* at 521-523, *Lategan v Boyers 1980(4) S.A. 191 (T) 200 E-H; Banco de Mocambique vs Inter-Science Research and Development Services (Pty) Ltd 1982(3) S.A. 330 (TPD); Dithaba Platinum (Pty) Ltd vs Erconovaal Ltd 1985(4) S.A. 615 (TPD); J Louw*

and Co (Pty) Ltd vs Ritcher 1987(2) S.A. 237 W; The Shipping Corporation of India Ltd vs Eudonon Corporation 1984(1) S.A. 550 (AD) and that of *Cape Pacific Ltd vs Lubner Controlling Investments (Pty) Ltd 1955(4) S.A. 790(AD).*

[35] On the review before the court the Respondents have taken the position that the Applicants have failed to set out any basis on which this court will be entitled to review and set aside the 1st Respondent's decision.

[36] The Respondents contend that there was an attempt in the first portion of the application to suggest that the Applicants had not been afforded a hearing. The papers demonstrate that this is palpably untrue. The 1st Applicant (on his own version) had discussions with the 1st Respondent's representatives, received correspondence from him requesting details of the entities he has been using (which details he failed or refused to provide), addressed a number of letters to him and has regard to the letter he wrote in response which did not address the issues.

[37] The Respondents further contend that it has not been suggested on behalf of the Applicants, nor could it be, that there was any bias or improper motive on the part of the 1st Respondent. It has not been suggested, nor could it be, that the 1st Respondents representatives did not apply their minds to the matter before they reached their decision.

[38] It has not been demonstrated that the 1st Respondent acted contrary to the provision of the governing legislation. All the evidence points to the contrary. In the premises, there is no basis on which the review can succeed.

[39] The Respondents argue that the 1st Respondents Answering Affidavit set out in minute detail the various transactions on the account utilised by the Applicant for his illegal activities and how he stole and misappropriated himself and his company, the 2nd Applicant, huge amounts of

money.

[40] The affidavits further demonstrate conclusively that over R12 million was obtained from unsuspecting members of the public by the 1st Applicant in the furtherance of his pyramid scheme.

[41] The Respondents, furthermore contend that the Is Respondent's Answering Affidavit demonstrate not only the 1st Applicant's criminal activities in operating the illegal scheme, but also his dishonest conduct in suggesting that this court is bound by its previous finding in regard to the alleged registration of the so called co-operative society, despite the stance adopted by his legal advisors before the Supreme Court of Appeal, were they successfully contended that the ruling was interlocutory and not binding.

[42] The Respondents argue that in this regard a court should not countenance this type of behaviour and that a punitive costs order is called for.

[43] In my assessing of the arguments of the parties on the merits of the case I have come to the considered view that the Respondents are correct. The main reason being that the Applicants have failed to set out any basis on which this court will be entitled to review and set aside the 1st Respondent's decision. The arguments advanced for the Applicants in this regard are not persuasive under Rule 53 of the High Court Rules. Coming to the issue that Applicants have not been afforded a hearing I find the Applicants' version palpably untrue. The First Applicant (on his own version) had discussions with the 1st Respondents' representatives, received correspondence from him requesting details he failed or refused to provide). Addressed a number of letters to him and regard to the letter he wrote in response which did not address the issues.

[44] The gravamen of the Applicant's case on the merits as stated earlier on is that the Respondents have not furnished the required record in terms of Rule 53. I find that this argument rings hollow in view of what is stated by the Respondent's acting Secretary to the Board Bonisile Lukhele who states the following at paragraphs 3 and 4 of her affidavit:

"3. I have been advised that at the hearing of this matter on 17th August 2009, after he had referred to Heads of Argument filed on behalf of the 1st Respondent in which it was pointed out that there is no record of proceedings as is apparent from all the affidavits already filed the documents contained in the Application and that the reasons for the 1st Respondent's decision are fully set out therein, he nonetheless invited the 1st Respondent to file an affidavit to state the obvious in this regard, without in any way conceding that there is an obligation on the 1st Respondent to do so, the 1st Respondent's legal representative indicated that they would do so in order to bring this unnecessary long drawn out Application to an end.

4. Apart from the documentation contained in the Application there is no further documentation pertaining to this matter in the possession of the 1st Respondent.

[45] On the facts of the case it is inescapable to conclude as follows:

"(i) Applicant was operating an illegal pyramid scheme utilising various bank accounts including his own and those of the other Applicants which are controlled by him and in respect of which he has sole signing powers, and he was doing this in contravention of the law and of the Financial Institutions Act. Particulars were requested from him in terms of the Act by the Is Respondent which he failed to provide.

(ii) He was afforded the opportunity to provide the requisite information at meetings with the 1st Respondent's representatives and he failed to do so. He failed to have regard to written notifications to cease his illegal activities.

He formed the cooperative society to continue with his illegal activities and continued unlawfully accepting deposits from the public and effectively stealing the money. He was evading the arms of the law and the society was never registered and was acting in flagrant contravention of the law".

[46] According to the US Securities and Exchange Commission pyramid schemes are described in the following terms:

"In the classic "pyramid" scheme, participants attempt to make money solely by recruiting new participants into the program. The hallmark of these schemes is the promise of sky-high returns in a short period of time for doing nothing other than handing over your money and getting others to do the same.

The fraudsters behind a pyramid scheme may go to great lengths to make the program look like a legitimate multi-level marking program. But despite their claims to have legitimate products or services to sell, these fraudsters simply use money coming in from new recruits to pay off early stage investors. But eventually the pyramid will collapse. At some point the schemes get too big, the promoter cannot raise enough money from the schemes get too big, the promoter cannot raise enough money from new investors to pay earlier investors, and many people lose their money.

[47] It is a fundamental principle of law that no one is allowed to improve his/her own condition by his/her own wrongdoing. As was pointed out by Schutz JA in *Wimbledon Lodge (Pty) Ltd v Gore NO. and Others 2003(5) SA 315 (SCA)* at 321G:

"[10] Can this situation be countenanced? I think not. I am content to start with the Roman Law. In D50.17.134.1 Ulpian tells us *'Nemo ex suo delicto meliorem suam condtionem facere potest'* rendered in *Watson's* translation as: No one is allowed to improve his own condition by his own wrongdoing". This fundamental principle has been applied expressly at least twice in this Court, in *Principal Immigration Officer v Bhula 1931 AD 323* at 330 and *Parity Insurance Co Ltd v Marescia and Others 1965(3) SA 430 (A)* at 433 and 435. It finds exact application to this case".

[48] In the matter of *Afrisure CC & Another v B J Watson NO & Another (511/07) [2008] ZASCA 89,* Brand JA; speaking for the Supreme Court of Appeal in South Africa, stated the following at page 19 thereof:

> "But since I have found the whole agreement to pay broker's commission illegal because it was concluded *in fraudem legis,* it is not necessary to embark upon the rather intricate enquiry whether, on a proper interpretation, reg 28(1)(d) renders a contravening agreement both illegal and unenforceable or only illegal and punishable by criminal sanction. I did not understand appellants' counsel to contend that even an agreement found to be *in fraudem legis* could notionally be valid and enforceable. In any event, I do not think such contention could ever be sustained. After all, as Lord Diplock so aptly stated in *United City Merchants (Investments) Ltd v Royal Bank of Canada [1982] 2 All ER 720 (HL) 725: "[FJraud unravels all".* The courts will not allow their process to be used by a dishonest person to carry out a fraud'.

See also: *North West Provincial Government & Another v Tswana Consulting and Others 2007(4) SA 452 (SCA)*

[49] On the merits I would rule in favour of the Respondents as I said earlier on that this ruling is merely *obiter dictum* in view of my finding on the points *in limine.*

[50] In the result, for the aforegoing reasons the points *in limine* are upheld with costs to include costs of Counsel in terms of the Rules of Court. The Applicants to further pay all the costs of the previous application being that of 19th February, 2009.

S.B MAPHALALA (PRINCIPAL JUDGE)