

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE No. 632/24

In Matter between:

E-MALI LIMITED

Applicant

And

TWODROS ASRAT ASFAW

First Respondent

TAHMER ASFAW

Second Respondent

ASFAW INVESTMENTS

Third Respondent

Neutral citation: *E-Mali Limited v Tewodros Asrat Asfaw (632/24)*

SZHC 354 [2025] (06.02.2025)

CORUM: Z.Magagula

Date heard: 05.07.2024

Date delivered: 06.02.2025

Summary: *Civil Law – Law of Companies – where a person is transacting with a company official, he is not required to inquire into the authority of company official – The “Tarquand Rule”*

- *The 1st Respondent, a director of a company entered into a “ deed of settlement and agreement to pay” with the Applicant for funds alleged to have been misappropriated by him from the Applicant, and pledged certain landed property as security. The property is registered in the name of a company in which he is a director.*
- *The 1st Respondent signed a power of attorney to pass mortgage bond and submitted a company resolution which inter alia authorized him to act for the company and also permitted that he cause the registration of the bond.*
- *2nd Respondent a co-director of the property holding company disputing authority of 1st Respondent to act for the company on grounds that he resigned as director.*

Held: *Respondents are estopped from denying authority of 1st Respondent on the Tarquand Rule*

- *Purported resignation failed to meet requirements of articles of Association.*
- *Purported resignation not confirmed on statutory returns.*
- *Application allowed.*

JUDGMENT

[1] The Applicant, a Fintech company incorporated within the Kingdom of ESwatini discovered that it had been the Victim of a fraudulent scheme

perpetrated by the first Respondent. The fraud resulted in a loss of E 8 400 (Eight Million Four Hundred Thousand Emalangeni). A complaint was made to the Royal ESwatini Police Service and the 1st Respondent was arrested.

[2] The 1st Respondent was admitted to bail and at the time of this judgement, he was still awaiting trial. At the time of the Commission of the fraudulent acts, the 1st Respondent had been employed by a service provider to the Applicant.

[3] The 1st Respondent admitted to the fraud and made an undertaking to the Applicant to repay the funds. This undertaking was confirmed in a written **“Acknowledgement of debt and agreement to pay”** signed by the 1st Respondent. In terms of the said agreement, which is undated, but according to clause 1.1.4 thereof, the effective date is the 21st February 2023 notwithstanding the date of signature; the payments were to be made as follows;

3. Payment

3.1 The Principal debtor undertakes to repay the debt in three (3) instalments as follows;

3.1.1 *The first instalment shall be for the sum of E 2 000 000.00*

[Two Million Emalangen] which shall be payable on or before 30th March 2023.

3.1.2 *The second Instalment shall be for the sum of E 3 200 000.00*

[Three Million Two Hundred Thousand Emalangen] which shall be payable on or before 21st May 2023.

[4] As security for the due performance by the 1st Respondent of his obligations, he agreed to the registration of a Notarial Mortgage bond over property described as Portion 1285 (a portion of portion 257) of farm Dalriach No 188, situation at Mbabane, Hhohho Region registered in the name of Asfaw Investments (Pty) Limited, in favour of the Applicant **(the property)** ASFAW Investments (Pty) Limited has been cited as the Third Respondent in these proceedings.

[5] Cited as the 2nd Respondent is Tahmer ASFAW, who is also a director and shareholder in the 3rd Respondent. She is also the wife of the 1st Respondent. In the acknowledgement of debt and agreement to pay, the 1st respondent is described as the Principal Debtor, the 2nd Respondent is the Co-Principal debtor and the 3rd Respondent, a company in whose name property is registered is described as the " first surety". The agreement is signed by the 1st Respondent in the space provided for his

signature as well as where the 3rd Respondents signature is provided for. The 2nd Respondent has not signed the agreement. It may be apposite to mention that the 2nd Respondent is the only one who filed opposing papers to this application.

- [6] The 1st Respondent, in furtherance of the provision of clause 4 of the agreement appeared before conveyancer, Gabsile Maseko-Gamedze and executed a power of attorney to pass a mortgage bond over the property. In doing so the 1st Respondent stated that he was acting on behalf of the 3rd Respondent. The 1st respondent also exhibited a “ written resolution of the Board of Directors of ASFAW Investments (Proprietary) Limited passed at Mbabane on the 21st February 2023. Present at this meeting as directors are listed the following persons: Tewodros Asrat Asfaw – 1st Respondent, Tahmer Asfaw – 2nd Respondent. In the said resolution, the directors approve the registration of a mortgage bond against the property for the sum of E 8 400 000.00 (Eight Million Four Hundred Thousand Emalangen) in favour of the Applicant. The 1st Respondent in his capacity as director is authorised to sign all documents in respect of the bond registration “and the power of attorney and to do whatsoever shall be necessary to give effect to the resolution.”

- [7] According to the applicants, and this is a requirement of the deeds office, they need original the title deed, or the nominated conveyancer, requires the original title deed in order to carryout the instructions, per the resolution of the 3rd Respondent and the Power of Attorney. The respondents appear to be reluctant to deliver the original title deed and according to 2nd Respondent they are under no obligation to do so.
- [8] It is the 2nd Respondent's contention that she is the sole director of the 3rd Respondent. The 1st Respondent having resigned this position and relinquished both the position of Director and the shareholding in the 3rd Respondent. In support of this contention the 2nd Respondent pointed to a document titled "company meeting minutes and resolution". The date of the meeting under reference is the 9th December 2022 and present were both the 1st and 2nd Respondents as director. The agenda was resignation of the 1st Respondent and the resolution was that the 2nd Respondent accepts the resignation of the 1st Respondent and would from then henceforth assume sole directorship of the 3rd Respondent. There is also a letter dated 8th December 2022 where the 1st Respondent tenders his resignation and another letter of the same date where the 2nd Respondent accepts her appointment as the sole director. It may be worth

noting that when the 3rd Respondent was incorporated in November 2021. Each of the 1st and 2nd Respondents held 50% of the 1 000 shares.

[9] The 2nd Respondent argued that the 1st Respondent had no authority to bind the 3rd Respondent on the 21st February 2023 as by that time he was neither a director nor shareholder.

[10] When the matter come up for arguments, the 2nd Respondent raised a point in *limine*. The point being that the matter was riddled with disputes of fact which the Applicant ought to have foreseen. The dispute, so argues the 2nd Respondent, is that the Applicant alleges that second and third Respondents agreed to register a notarial bond over 3rd Respondent's property in favour of the Applicant, yet the 2nd and 3rd Respondents deny that claim and also deny that they signed annexure "A" and GN 9 being the acknowledgement of debt and the resolution to pass the bond. This point lacks merit. The Applicant alleges that the Respondents agreed to pass a notarial bond. The 2nd respondent denies this. This issue is settled by the fact that the 2nd Respondent did not sign the acknowledgment of debt and agreement to pay. That is the end of the dispute in so far as that issue is concerned.

[11] The real issue before this court is whether the 1st respondent had the authority to bind the 3rd Respondent to pass the Power of Attorney and/or

to sign the resolution in which the 3rd Respondent authorises him to sign and/or do such acts as would result in the passing of the notarial mortgage bond.

[12] It is trite that a juristic person acts through its officers such as directors, company secretaries or managers. It is common cause that the original subscribers to the memorandum of association of the 3rd Respondent were the first and second Respondents. This information is available on perusal of the articles of association and a search at the office of the Registrar of Companies would yield the same results. Form J was filed with the office of the Registrar of Companies in compliance with the requirements of the companies Act No. 8 of 2009. Confirming the 1st and 2nd Respondents as the two directors of the 3rd Respondent.

[13] The Applicants contended that in terms of the clause or article 24 (a) (iii) a director can only vacate his/her office if he/she resigns by notice in writing to the company and the Registrar. They argue that the purported resignation by the 1st Respondent is by letter directed to the 3rd Respondent only and therefore null and void.

[14] It is applicant's further argument that the respondents are estopped from denying the authority of the 1st Respondent to bind the 3rd Respondent as he has done. In this case the 1st Respondent is a founding member and

director of the 3rd Respondent according to the memorandum and articles of association for him to resign as a director he had to do so in writing directed to the company (3rd Respondent) and the Registrar of companies. Such resignation would also have been reflected in the statutory filing i.e Form J with the office of the Registrar. Once such filing is done then it becomes information available to the general public that he is no longer a director and therefore had no authority to act for or on behalf of the company.

[15] It was argued very strenuously for the 2nd respondent that the companies Act does not provide a time frame for filing returns which would reflect the current status of company. There is merit to this argument, but it soon loses its luster when a company is faced with a situation as in the present case. What becomes of third parties who transact with a person who is no longer a director and no longer has the authority so act if the fact of his resignation has not been published.

[16] The Companies Act does not address a situation such as in this case, but Section 195 is the closest to disentangling a web such as is confronting the court in this matter. This section deals with defect in the appointment of a director and the validity of acts performed by him.

[17] Section 195 *“The acts of a director of a company shall be valid*

notwithstanding any defect that may afterwards be discovered in his appointment or qualification”

[18] Clearly the Section quoted refers to a director whose appointment may be found to have been defective; but the underlying principle is the same. Third parties may not be aware of the defect, just as third parties may not be aware of the fact that a director has resigned until that information becomes public by filing a return with the office of the Registrar.

[19] Before to the doctrine estoppel, I wish to address one more issue pertaining the purported resignation of the 1st Respondent. In the letter of the 8th December 2022 addressed to the company by the 1st Respondent, he writes that he tenders his resignation from the position as director and shareholder effective 9th December 2022. While a director is free to resign his/her position as such, it boggles the mind how a shareholder can resign as such without transferring the shares either back to the company or to a third person. The letter of “resignation” and/or the 2nd Respond in her answering affidavit does not explain what happened to the 500 shares held by the 1st Respondent. This brings into question the legitimacy of the resignation altogether, more so because such changes were not notified to the Registrar of companies in the

prescribed form. The actions the 1st and 2nd Respondents boards on the fraudulent.

[20] It is doubtful whether the Applicants were enjoined to inquire into the internal processes of the 3rd Respondent to confirm that the 1st Respondent had the authority to act on behalf of the 3rd Respondent. The 1st Respondent had produced all the relevant documentation; that is the company resolution, the power of attorney and the signed agreement to pay.

[21] Section 31 of the Company's Act 2009 provides:

“A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitations on the powers of the board of directors to bind the company or authorise others to do so”

[22] A similar case was dealt with in the British case of **Royal British Bank v Turquand [1856] 6 E & B; 119 ER 886** and the court. Established what was called the “indoor management rule” or the Turquand rule which states that a person dealing with a company in good faith can assume that the company has complied with its own internal procedures and is not required to investigate whether the company has followed its own rules,

even if this is not the case, protecting the right of third parties transacting with the company; essentially an outsider can rely on the apparent authority of the company representative without needing to verify internal company matters.

[23] The 2nd Respondents is estopped from denying the authority of the 1st Respondent from binding the 3rd Respondent. The whole resignation by the 1st Respondent appears to have been designed to defeat the agreement of settlement.

[24] There is nothing before me, nor was anything advanced to justify any doubt that the Applicants acted with the necessary bona fides. The 1st Respondent has not supported the 2nd Respondent's version of events and there is no doubt in my mind that he acted with the requisite authority.

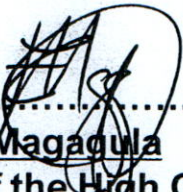
[25] The 1st Respondent has unhelpfully failed to depose to an affidavit in support of the 2nd Respondents contention and his silence can only be interpreted to mean he does not support her.

[26] In the premise, I make the following order;

1. The Respondents are hereby ordered to deliver the original Title deed for the property described as certain portion 1285

(a portion of portion 257) a farm 188, Mbabane Hhohho District to the Applicant's attorneys for purposes of registering the mortgage bond .

2. The First and Second Respondents are hereby ordered to execute all instruments and furnish all documents required for purpose of a mortgage bond over the property fully described in order (1) hereinabove.
3. Costs of suit are to be borne by the respondents.


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Z. Magadula
Judge of the High Court

Appearances:

For the Applicant – Mr Z.D Jele – Robinson Betram

For the Respondents – Ms N. Ndlangamandla – Mabila Attorneys