IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO.3/2001

In the matter between:

FIRST NATIONAL BANK OF SWAZILAND (LTD)		**APPELLANT**
AND		
MAKHAZA (PTY) LTD		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**TEBBUTT JA**
	:	**BECK JA**

JUDGMENT

Tebbutt JA:

What is involved in this appeal is the authority of a director of, and 90% shareholder in, a company to bind that company in certain suretyship agreements.

The appellant is the First National Bank of Swaziland Limited, to which for convenience I shall refer as "the Bank", is a commercial bank. A company known as Afri-craft (Pty) Ltd, to which I shall refer as "Afri-craft", operated a current bank account with the Bank at its Matsapa branch. A 50% shareholder in and a director of Afri-craft was one Mduduzi Cyprian Maziya.

The respondent is a company in which the said Maziya is a director and, until 10th November 1998, was a 90% shareholder. The other 10% is held by his wife, Ntombifuthi (Ntombi) Maziya, who is also a director of respondent. They are the only two directors.

On 14th March 1996 the respondent caused a first surety mortgage bond No.296 of 1997 to be registered in favour of the Bank over a property owned by it in Matsapa Town. This was to secure the indebtedness of Afri-craft, in respect of its overdraft with the Bank on its current account, in a total amount of E480 000.00. As at 31st January that account was overdrawn in an amount of E411 271.23.

On October 1998 the respondent entered into a written suretyship with the Bank in terms of which it stood surety to an unlimited amount for monies due and owing by Afri-craft to the Bank.

On 27th October 1998 the Bank lent to Afri-craft, in terms of a written loan agreement, the sum of E450 000.00 repayable at E12 200.00 per month over 60 months. With interest thereon, the amount of this loan as at 31st January 1999 stood at E437 223.32.

On 4th November 1998, the respondent caused a second surety mortgage bond No.578 of 1998 in favour of the Bank to be registered over its property in Matsapa Town in a sum of E450 000.00 to service the loan by the Bank of E450 000.00 to Afri-craft.

The suretyship agreement of 5th October 1998 and the powers of attorney to pass the two surety mortgage bonds were signed on behalf of the respondent by the aforesaid Mduduzi Cyprian Maziya in his capacity as a director of the respondent.

In signing the suretyship agreement Maziya stated that he was doing so-

> "Pursuant to a resolution dated the 5th day of October 1998, a certified copy whereof is hereto annexed".

It would appear that no such copy was in fact annexed.

In signing the two powers of attorney Maziya stated that he gave the powers of attorney to the conveyancers –

> "In my capacity as a duly authorised director of Makhaza (Pty) Ltd duly authorised thereto by virtue of a resolution passed at a meeting of the Board of Directors of the Company held at Mbabane on the 14th March 1996". (in respect of the first bond) and "on 4th November 1998" (in respect of the second)

In each instance there was a document which purported to be a true copy of a –

> "Resolution passed at a meeting of the Board of Directors of Makhaza (Pty) Ltd held at Mbabane…"

In which it was stated that it had been resolved –

(A) that the respective surety bonds be passed and
(B) that MDUDUZI CYPRIAN MAZIYA in his capacity as Director of the above company, be and is hereby authorised to sign the Power of Attorney to Mortgage and to include therein such conditions as he may deem fit".

Afri-craft was placed in liquidation on 22nd December 1998.

On 10th February 1999 the Bank issued summons against the respondent in which, because of the liquidation of Afri-craft which could no longer pay the Bank what it owed it and relying on the suretyship agreement and the two surety bonds, it claimed from the respondent payment of the aforesaid and amounts of E411 271.23 and E437 223.32, together with interest thereon and costs on the scale as between attorney and own client. It also claimed an order that the property mortgaged under the surety mortgage bonds Nos 296/1996 and 578/1998 be declared executable.

An abortive application for summary judgment by the Bank, which was opposed by the respondent, resulted in respondent's filing of a plea and the matter thereafter going to trial.

In its plea, the respondent denied that the suretyship was authorised and that the mortgage bonds were valid, in that they had not been authorised

and that the resolution "purporting to be a resolution of the board is not a resolution of the board of the said company (i.e. the respondent)".

At a pre-trial conference the liability of Afri-craft to the Bank in respect of the overdraft and loan account was admitted. Respondent further admitted that the suretyship of 5th October 1998 was signed by Maziya, who was a director of the respondent when he signed it but it denied that the resolution referred to in the suretyship –

"is a resolution of the defendant (respondent)".

It was, and is, the respondent's case that no board meeting of the two directors viz Maziya and his wife was ever held at which any resolution authorising Maziya to sign the suretyship agreement or the two powers of attorney was ever taken.

The trial of the matter came before Sapire CJ. In a written judgment delivered on 23rd January 2001 he stated that the only issue between the parties was whether Cyprian Maziya who, as a director of respondent granted the conveyancer, Stanley Bongani Mnisi, power of attorney to register the two bonds, was authorised by a resolution of the directors of respondent to do so, as also to bind respondent in terms of the suretyship agreement. The basis of respondent's defence was that no valid resolutions had been taken by respondent as Mrs. Ntombi Maziya who was one of the directors of respondent was not a party to the resolutions. Mrs. Maziya and Maziya both gave evidence denying that she had attended any meetings of directors at which the resolutions were taken. She also denied that Maziya as 90% shareholder was given a free rein to conduct the affairs of the respondent and to contract on its behalf. Holding that the Bank's case on the pleadings was based on an actual authority to Maziya given by resolution of the board of directors and that it could on the pleadings not rely on his having an implied authority to act on respondent's behalf, the learned Chief Justice found that the authority of Maziya to bind the respondent had not, in the proceedings before him,

been established. He therefore granted the respondent absolution from the instance, with costs.

It is against that judgment that the appellant Bank now comes on appeal to this Court.

In his argument on behalf of the appellant Mr. Flynn submitted that the authority of Maziya could be inferred from the evidence. This authority, on all the evidence was either actual authority or such authority could be inferred from the acquiescence of Maziya's fellow director, his wife Mrs. Ntombi Maziya, in his conduct of the affairs of the company. Mr. Flynn relied for these submissions on two cases in the South African courts of **DICKSON V ACROW ENGINEERS 1954(2) SA 63 (WLD)** and **ROBINSON V RANDFONTEIN ESTATES GOLD MINING COMPANY LIMITED 1921 AD 168.**

In the **ROBINSON** case, Innes C.J. referred to the fact that there the directors of the Randfontein Est, G.M. Company had not passed any resolution authorising the plaintiff, Robinson, to act on their behalf. He then went to say the following (at page 181)

> "An express mandate would therefore have been within the competency of the Board. And, that being so, there is no reason on principle why a mandate of similar scope should not be inferred if sufficient grounds exist. It was held in an American case (**JONES V WILLIAMS (37 LAWYERS' REPORTS, ANNOTATED,** page 682)) that management of the entire business of a corporation might be entrusted to its president either by an express resolution of the directors or by their acquiescence in a course of dealing. And the directors, who, in **COOK V DEEKS (1916, 1 A.C.** p. 561), were described as having the entire management of an important section of the Company's operations in their hands, had not, so far as the report shows, been placed in that position by any express mandate from the Board. So that there is no legal obstacle to the existence

of an implied mandate here. Whether it was rightly implied depends upon the facts".

In the same case, Solomon J.A. at pages 217-218 said this, after referring to the English case of **BURLAND V EARLE 1902 A.C. 83:**

> **"**It is clear from this case that a director is not as such an agent of his company. He may, however, become an agent in more ways than one. Under the Articles of Association of the plaintiff company, as of most companies, the directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit, and upon such delegation to one or more of their number the director or directors in question would themselves become agents of the company in regard to the duties so entrusted to them. Moreover such delegation may take place not only formally by express resolution of the board but also informally by the directors acquiescing in a course of dealing".

In **DICKSON V ACROW ENGINEERS (PTY) LTD** supra, Roper J in considering whether one de Vigier, a director of the defendant company had authority to bind the company said at page 64 –

> "In my view the question is whether de Vigier had implied authority to bind the company. It is clear that such authority can be inferred from a course of dealing inside the company itself".

As support for this Roper J referred to the passages in the Robinson case that I have quoted above and said at page 65C:

> "An implied mandate to a director to manage and control the affairs of the company may therefore be inferred from the acquiescence of the other directors in the course of dealing of the company".

(See also **WOLPERT V UITZIGT PROPERTIES (PTY) LTD & OTHERS 1961(2) SA 257 (WLD)** at 262H).

The authority of a director to represent the company can therefore be implied when, on a balance of probabilities it is the reasonable inference

to be drawn from the conduct of the parties (see **DE VILLIERS AND MACINTOSH ON AGENCY 2ND EDITION** page 38, Article 9). The conduct of the parties must be regarded in the light of any special relationship existing between them for where there is such a relationship the inference of authority will be more easily drawn. (See **DE VILLIERS & MACINTOSH** loc. cit)

In regard to the resolutions in this case no minutes or other written record of the proceedings of the directors' meetings were produced at the trial and no evidence was given that any such minutes were entered in any minute book. Mrs. Maziya however stated that minutes of directors meetings were kept and that these were stored in a file at the premises of Afri-craft where all the books of respondent were kept. Those files, together with all the rest of respondent's books, were, however, she said, destroyed after the liquidation of Afri-craft.

It was Mrs. Maziya's evidence that she attended no meetings of directors at which the resolutions regarding the suretyship agreement or the passing of the mortgage bonds were taken. She averred that she only got to know of the existence of the agreement and of the bonds after summons was served on respondent in the present action. In regard to the resolution in respect of the first mortgage bond in March 1996, she said that she was not aware of any meeting being held at Mbabane on 14th March 1996. She was certainly not present. She was not living in Swaziland at the time being out of the country in South Africa from 1994 to 1997 and only came to visit her husband in Swaziland once or twice a month. She was also not aware of any meeting at which the resolution of 4th November 1998 was said to have been taken and was certainly not present at one.

Mrs. Maziya said only one or two meetings a year of the directors of respondent were ever held.

Grave doubts exist in my mind as to the veracity of Mrs. Maziya when she testified that she knew nothing about the resolutions in regard to the suretyship agreement and the mortgage bonds and the meetings at which the were, as set out in the resolutions, said to have been taken.

A reading of her evidence on the record leaves one with the distinct impression of a singularly untruthful witness. For example, early in November 1998 Maziya resigned as a director of the respondent company and transferred his 90% shareholding over to his 18 year old son for a consideration of E90. The value of the property which was the sole asset in the company was over E1 million at the time. Mrs. Maziya said she had signed the resolution and the document for the transfer of the shares "because he (i.e. Maziya) wanted that". Asked why she had agreed to a resolution enabling a 90% shareholding making over his shares in a company that owned a property of over E1 million to his son for E90 she said "I did not really go through each and every page of it. I just signed". Mrs. Maziya said she did not recall a meeting of the directors in regard to the transfer of the shares and her husband's resignation from the board. She was, she said, not aware of a meeting of the board on 10th November 1998. Asked why a minute of that meeting recorded that she had been present at the meeting she replied, "Well it is a year or two ago. I do not remember". Shown the document which reflected her signature as the secretary at the meeting, she changed her evidence and said she might have attended the meeting.

This unreliability on her part as a witness permeates the whole of her evidence. In opposing the Bank's application for summary judgment, the respondent filed an affidavit by Mrs. Maziya. Asked at the trial by Mr. Flynn if she had signed such an affidavit, she said that although the signature on the affidavit "looks like my signature but I do not recall signing it". When it was pointed out that she had signed it on 15th April 1999, only a year earlier, she said, "I think I must have signed it" which represented another *volte face* in her evidence.

Mrs. Maziya also stated that when she signed the affidavit on 15th April 1999 the liquidators of Afri-craft had taken possession of the books of the respondent company and it will be recalled that she said that all those books had been destroyed. In her affidavit she stated the following-

> "I am one of the two directors of the company. I am not aware the company having authorised any person to enter into a suretyship. I have thoroughly searched the books of the company and there was never a resolution authorising any person to sign the suretyship on its behalf". (my emphasis)

Asked what books she had searched she said "I do not recall". Asked by the learned Judge "Why did you search the books?", she replied "I did not search any books". The following questions and answers then follow:

> "JUDGE: But why did you say you did?
> FLYNN: Why did you on oath say that you did?
> NTOMBI: (Silent)
> FLYNN: Can you not answer that?
> NTOMBI: No."

Referred to a further paragraph in her affidavit that "the loan agreement was never authorised" she was asked by Mr. Flynn.

> "Do you know at all what you were talking about that paragraph or did you just sign it?"

Mrs. Maziya replied –

> "I just signed it".

The following passage in the evidence then ensues.

> "FLYNN: Am I correct Mrs. Maziya that you signed something that you knew absolutely nothing about…
> JUDGE: That does not make her a very good witness.
> FLYNN: That is the point, My Lord.
> JUDGE: I am not sure what effect this has on the whole thing.
> FLYNN: It is a matter of credibility My Lord. It is of great importance.

JUDGE: Yes."

It is clear from the aforegoing that she was untruthful. She said in her affidavit that she had thoroughly searched the Books of respondent company at a time when she knew the books had been destroyed. The other passages I have quoted also show her also to have been a lying and unreliable witness at the trial.

It is significant that she should have lied in relation to looking for resolutions in the books of the company and this leaves one with the distinct suspicion that there were the requisite resolutions and that she knew about them.

Her evidence can also not, in my view, be relied on when she says that she would have participated in the passing of the resolutions. She had in my opinion left the conduct of the affairs of the respondent company entirely to her husband, Cyprian Maziya.

Mrs. Maziya said she did not play an active part in the affairs of the company because most the time she was not in Swaziland. When she found out about the suretyship she "was really disappointed. He (her husband) was not honest enough to let me know about that". It was never discussed with her at all. "He did everything on his own" she said. "He never told me anything about it". She conceded that she knew very little about what was happening in the respondent company. The company was not trading. It was a property-holding company. Asked if she took no interest in the affairs of the company, she said –

> "Not really that I did not take any interest in the affairs of the company. He was here. I trusted him that he would do whatever was necessary. Really there was nothing much to be done. It was not trading". (emphasis added)

And further questions and answers during her cross-examination by Mr. Flynn for the Bank read as follows.

> "Q: Tell me, when it came to the running of the affairs of Makhaza basically as I understand it you left everything to your husband?
>
> A: I would say that. That I left everything with my husband.
>
> Q: You took no interest in the actual affairs or the documents of the company?
>
> A: No I did not".

She also conceded that she did not know, as the facts established, that payments of approximately E15,000.00 were made on respondent's behalf to the Bank in respect of the indebtedness of Afri-craft or of payments made by a company known as Dundee Investments (Pty) Ltd to respondent. Pursuant to this, the following questions by Mr. Flynn and her replies to them appear on the record:

> "Q: So throughout the course of the affairs of Makhaza is that what you are saying; that you really played no part. You took no notice?
>
> A: Like I said at that time I was not even living in Swaziland.
>
> Q: So you took no notice of the affairs of Makhaza?
>
> A: With the affairs of Makhaza I was not even living here in Swaziland at the time".

Referring to the time when the resolutions were passed Mrs. Maziya was asked –

> "Q: When those things were done, you were not playing any part in the company?
>
> A: I was but I was not active at all".

Furthermore, in questioning by the learned trial Judge, the following appears:

> "Q: The point about it is this Mrs. Maziya. I want you to be frank. The fact of the matter is that in the affairs of Makhaza you were

> really a figurehead as a director. It was all left to Maziya himself to run the company and run both companies as a matter of fact. Is that not the situation because you keep telling us throughout your evidence that you do not know anything. Is that not so?
>
> A: There is not much that I know I admit to that".

In assessing Mrs. Maziya's evidence learned Chief Justice found that "although cross-examined at length she remained firm and unshaken on this crucial issue" i.e. on whether she took part in the passing of the resolutions. He said further in regard to her evidence:

> "She denied that she in effect abrogated, abandoned her right to have a voice in the important decisions affecting the defendant. She denied, and, notwithstanding close questioning, maintained her denial that the affairs of the defendant were conducted in such a manner that her husband was in fact given a free rein to contract on behalf of the defendant".

I have considerable difficult with these findings by the learned Chief Justice, particularly in the light of the evidence I have quoted to the effect that she left everything in the company to her husband and especially when one has regard to his own question and her answer to it as to her part in the company.

I also find his conclusion that she remained "firm and unshaken" on the issue of the resolutions incomprehensible. As set out above, she showed herself to be a consummate liar under cross-examination and the learned Judge himself opined that she was "not a good witness".