IN THE COURT OF APPEAL OF SWAZILAND

Civil Appeal Case No.32/2005

In the matter between:

USUTHU CREDIT AND SAVINGS COOPERATIVE SOCIETY	**Plaintiff**

VS

NEDBANK (SWAZILAND) LIMITED SAPPI	1st Respondent
USUTHU PULP COMPANY LIMITED	**2nd Respondent**
MHLAMBANYATSI GENERAL DEALER	**3rd Respondent**

CORAM **BROWDE J.A.**
STEYN J.A.
BECK J.A.

For the appellant For the Respondent	**Adv. P. Flynn Ms J.M. vd.Walt**

JUDGMENT

SUMMARY

Summary Judgement granted by the High Court - Application for rescission refused -appeal against such refusal - summary judgment allegedly granted in the absence of the appellant -notice of intention to defend filed and appellant represented at the hearing but no affidavits filed opposing summary judgment - effect of action based on a deed of suretyship -allegation that such deed ***ultra vires*** *the powers of the appellant - the principal debt and the*

deed part of a fraudulent scheme-executive of appellant misrepresented to I$^{s'}$ Respondent that it had the ri$ht to bind avoellant as surety and co-orincipal debtor - whether aovellant estopped from relying on the fact that the transaction was ***ultra vires*** *- no triable issues which justified the granting of a rescission of the summary judgment - appeal dismissed.*

STEYN J.A.

[1] The appellant (the Society) appeals against the decision of the High Court refusing to rescind a summary judgment granted on the application of the 1st respondent (the Bank). It is common cause that save for the allegations set out below the application granting summary judgment could not be challenged. The relevant allegations are:

1.1. The resolution to authorise the granting of the loan to the 3rd Respondent and to enter into a deed of suretyship with the Bank was ultra vires the powers of the Society; and

2.1. The Society's executive acted fraudulently and misrepresented to the Bank that it had the right to bind the Society as surety and co-principal debtor for the obligations of the principal debtor (the 3rd respondent).

[2] The relevant facts are the following: On the 19th of March 2004 the Bank sought and was granted summary judgment against the Society. It is common cause that two notices of an intention to defend the action was filed by two firms of attorneys Messrs Zonke Magagula and Company and Messrs Mzamo M. Nxumalo and Associates and that these firms appeared at the hearing representing the two defendants (the Society and the 3rd respondent). In response to the contention that in these circumstances the judgment was not obtained by default - the Society having been present and represented by its attorneys - the Society alleged that the duly elected interim committee had not mandated the said firm to defend the proceedings. The deponent to the affidavit filed on behalfof the Society in reply stated that:

"I submit and verily believe that members of the previous committee.......................and without the Knovvieuge or cne inienm coniiiiutee inscmcieQ *ua* ***iirm*** oi attorneys... to Geienc tne proceedings." (own emphasis)

He goes on to say:

> "This I humbly believe was to try and conceal the proceedings from the interim committee lest other acts of....................the said committee came to be known."

No other evidence in support of the speculative assertion was placed before the court. Indeed the court a *quo* correctly describes these averments as argumentative and speculative and that these assertions are not supported by any factual allegations.

[3] It appears to me *prima facie* to be unlikely that an unauthorised person or persons would have responded to the service of proceedings and instructed attorneys to oppose these in order to try to conceal these from the Society. It should not have been difficult to place other evidence before the Court to establish the assertions set out above. I do not believe that it is sufficient - when proceedings have been properly served, a notice of intention to defend filed and an appearance noted at the hearing - merely to "submit" that the attorneys who acted were not mandated to do so. The onus was on the Society to prove this assertion. Thus e.g. the attorneys themselves would have been able to testify that they had no proper mandate and had not been validly instructed. It would open the floodgates of impropriety if litigants were to be permitted to avail themselves of such pretexts.

[4] However, in view of the conclusion to which I have come in respect of the merits of the matter it is not necessary to decide this procedural dispute. The crisp matter for decision is whether the appellant is correct in contending that there are triable issues as to whether ihe

decision to enter into a deed of suretyship was *ultra vires* the Society. The fact that the transaction was not authorised and indeed was *ultra vires* was not contested by counsel for the Bank. Her contention was that on the facts as set out in its founding affidavit filed on behalf of the Society, all the requirements of a defence of estoppel were established.

[5] In this regard the deponent says the following:

"23. The previous executive of the applicant by the letter which is annexure UC2, falsely alleged that it had obtained a mandate from the members to bind the applicant in order to get 2nd respondent to accept its request. The unfortunate thing is that the 2nd respondent did not seek for proof of such mandate and it is my submission that no such mandate had been given as I had been a member of the applicant dating as far back as 2001 and do not recall as a member such being given."

He also says the following;

"25. The previous executive further went on to misrepresent with the Is' respondent that it had a right to bind the applicant as surety and co-principal debtor for the 3rd respondent, which was not correct." (own emphasis)

The deponent then elaborates further as follows;

"Z~. What L-ecome uniortunaie for the applicant is tnat certain members of its executive were also part of the shop committee and whether knowingly or not, went on to participate in activities of the 3rd respondent company as if representing the applicant; For instance a resolution of the Shop Committee was used by the executive to bind the applicant for the securement of a loan from the Union. I annex hereto a letter written on letterheads of the applicant signed by persons who were not even in the executive of applicant marked UC3. The opening paragraph of the letter clearly indicates where the resolution to bind applicant was taken."

He summarises his contentions by saying the following;

" 38. In the aforegoing paragraphs I have sought to set out grounds upon which the applicant could not have been bound as surety as purportedly done and therefore cannot be liable for the debt as such and co-principal debtor. It is my submission therefore that the grounds outlined above if same had been presented before court, judgement against the applicant would not have been entered and they would constitute a good defence for applicant."

[6] Mr Flynn who appeared for the Society submitted that the summary judgment was "erroneously granted" as provided in Rule 42 (i) (a) of the Rules of Court. He contended that had the issue of estoppel been raised in the summary judgment application in response to the appellant's defence that the suretyship was void, this would have constituted a triable issue and summary judgment would have been refused. He conceded that if there were no "triable issues" the court *a quo's* decision to refuse to rescind the judgement would have to be upheld. See in this regard Central Merchant Bank Ltd vs. Granze Benefit Society A 1975 (4) S.A. 558 (C), and the decision confirming the Cape Court's judgment reported in 1976 (4) S.A.659 (A).

[7] On the question as to whether there are triable issues, Ms v.d. Walt contended that on its own case the Society had set out all the facts that would sustain a reliance on estoppel as a defence. The allegations made by the Society in its founding papers were, *inter alia* the following:

7.1. The executive committee of the Society responsible for its governance at all relevant times prior to their alleged removal from office in November 2003, had committed "various acts" of impropriety: Examples of such misconduct included monies used from the Society's coffers for the benefit of the third respondent, it being the principal debtor in the impugned money - lending and suretyship transactions. The Committee used their positions as an executive "to unlawfully secure favours" from the Society -including binding it as surety and co-principal debtor in respect of these

agreements. Although requested to disclose whether the Society had outstanding loans or liabilities they falsely alleged that it had none.

7.2. The incestuous relationship between the executive and the third respondent underpinned the decision to advance monies and ultimately to stand surety for its debts. This despite the fact that the Society had been advised by the Registrar - also referred to as the Commissioner in terms of the Co-operative Societies Act 1964 - that any relationship with the third respondent had to be conducted separately from that of the Society. Memoers wno wishea to participate in such a venture could do so voluntarily but not as members of the Society.

7.3. One of the alleged unlawful acts performed by the executive was to submit a letter on the Society's letterhead to the 2nd respondent dated the 8th of February 2001 alleging that the signatories had been mandated to enter into a suretyship agreement with the Bank. The letter reads as follows:

"8th February 2001

RE: SURETY ASSISTANCE AGAINST USUTU CREDIT AND SAVINGS SOCIETY FOR LOAN APPLICATION FOR MHLAMBANYATSI SUPERMARKET.

We the undersigned officials of the Usutu Co-op Society have been mandated after consultation with the members of the Society and in conjunction with the second shareholder SAPAWU to authorise the Usutu Pulp Company to undertake surety on behalf of the Society with Nedbank Mainbranch Mbabane for a considerable amount of E450,000,00 (Four hundred and fifty thousand Emalangeni) being a loan to run the supermarket.

We therefore on behalf of the members hereby certify that if the supermarket fails to meet her payment obligation the Usutu Pulp Company is being permitted to deduct any amount owing from the savings of the monthly cheques received by the Society."

The letter is signed by the chairman, the secretary and the manager of the Society. (This is the letter cited above under par.23 of the founding affidavit as UC2). As reflected in this citation the averment is made that the executive "falsely alleged that it had obtained a mandate from the members" and that it did so to secure 2nd respondent's support.

7.4. The most important allegation is however that contained in paragraph 25 cited above. The deponent avers unequivocally, that the executive misrepresented to the Bank that it had the right " to bind the (Society) as surety and co-principal debtor for the 3rd Respondent................" Indeed an extract from the Society's minutes dated the 17Ih of October 2001 purports to authorise its relevant officers to sign surety documents on its behalf to secure facilities in favour of the 3rd Respondent.

[8] It is clear from the above that the Society places reliance on the following:

8.1. There was a illicit relationship between its then executive and the 3rd respondent.

8.2. It was the executive's intention throughout to use the resources of the Society unlawfully to benefit the third respondent.

8.3. In order to do so it was necessary to borrow E450.000.00 from the Bank which

would in the course of banking practice and commercial prudence require security by way of a deea or suretyship, inueed u is tne Society's case that it was to obtain this loan that it misrepresented to the Bank that it was lawfully mandated to bind the Society as surety and co-principal debtor. None of these matters are therefore triable issues.

[9] Mr Flynn was therefore constrained to argue that it was a triable issue whether the Bank was in fact induced to advance the funds by the admitted fraudulent misrepresentation. This contention would disregard the overwhelming inherent probabilities. The Bank was making a substantial loan to a General Dealer shop. It is common cause that it required a deed of suretyship from the Society to protect itself against a failure of the venture. Such a deed could only be entered into by the Society via duly authorised representatives, because without such authorisation such deed would be worthless. No allegation was made that the Bank was not so induced. The submission that this was a triable issue cannot therefore be sustained. .

[10] As indicated above Mr Flynn conceded that if there were no triable issues arising in respect of the defence of estoppel, the application for rescission of the judgment could not be sustained. If this were an informed decision, it was a wise one. I say this because he did not raise one of the key issues debated in the Central Merchant Bank case cited in paragraph 6 above. However, even if the Court were to have held that the defence of estoppel could only validly have been raised in a delectual context, it would only have postponed the evil day and have exposed the Society to further, fruitless litigation and additional costs. If the decision was *per incuriam,* the above comments nevertheless remain valid.

[11] It is my view that the Court *a quo* was right when in these circumstances it refused to rescind the summary judgment. It falls as that the appeals is dismissed with costs.

I agree

C.E.L. BECK ,T.A.

Delivered this 11 day of November 2005.