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THE SUPREME COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Civil Appeal No. 51/2006

In the matter between

EIS MARKETING (PTY) LIMITED Appellant

and

SWAZILAND SUGAR ASSOCIATION Respondent

Coram

BROWDE AJP
TEBBUTT JA
BANDA JA

For Appellant	Adv. P. Flynn Adv.
For Respondent	R.M. Wise SC

JUDGMENT

TEBBUTT JA

[1] Central to this appeal is the legal doctrine of estoppel.

[2] The Respondent, the Swaziland Sugar Association, to which for convenience I shall refer herein as the Sugar Association, sold and delivered to the Appellant, EIS Marketing (Pty) Ltd to which, where it may be convenient to do so, I shall refer herein as EIS Marketing, during April 2004, 13 loads of sugar for a total purchase price of EI 301 055.00. It is common cause that the Appellant has not paid this sum or any part of it. The Sugar Association accordingly brought an action in the High Court for payment of the said amount. The Appellant pleaded that the Sugar Association was estopped from claiming the amount. It, in its turn, brought a counterclaim against the Sugar Association, the amount, basis and detail of which I shall refer to later herein.

[3] In a written judgment delivered on 31 October 2006, Ebersohn AJ rejected the defence of estoppel and granted judgment in favour of the Sugar Association for the amount of EI,301,055.00, together with interest and costs. He dismissed the Appellant's counterclaim but awarded it two amounts of EI 19,945.65 and E65,700.00, in the event of its paying the sum of EI,301,055.00. I shall say what these amounts are for, also later herein.

[4] It is against the judgment and orders of Ebersohn AJ that the Appellant now comes on appeal to this Court on the main ground that the Court *a quo* erred in not upholding the plea of estoppel. It also avers that the Court *a quo* erred in dismissing its counterclaim.

[5] The salient facts upon which the Appellant sought to found its defence of estoppel to the claim of the Sugar Association, reveal a strange tale of some unusual events with some extraordinary features.

[6] The Sugar Association is a statutory body established under the Sugar Act No. 4 of 1967 with statutory duties to perform in the control and administration of the sugar industry in Swaziland. By operation of law it is vested with the ownership of all sugar produced in the sugar mills of Swaziland. It is its function to market and sell such sugar and to account for the proceeds to the growers of sugar cane and the millers. Although the growing of sugar is one of the major industries in Swaziland, the demand for sugar exceeds the supply and the market for sugar is regulated by the Sugar Association by granting allocations to would-be buyers with whom it is prepared to deal and entering into written supply agreements in advance of each sugar producing season.

[7] The Appellant is a registered limited liability company. It struggled for some years to obtain allocations. It was carrying on the business of the purchase and resale of

sugar, mostly for industrial purposes but also by pre-packaging sugar and on-selling it to its customers. The obtaining of an annual allocation from the Sugar Association was therefore vital to the Appellant's being able to continue its business activities.

[8] In the pursuit of those activities the Appellant engaged the services of agents who would secure business for it with large customers.

[9] It is common cause that the Appellant had been granted by the Sugar Association an allocation of sugar which it would purchase in certain agreed monthly tonnages over a period of two years from 1 February 2004 to 31 March 2006, in terms of a written agreement between it and the Sugar Association.

[10] That agreement provided that a failure by the Appellant to purchase and collect the monthly tonnages set out in the agreement would entitle the Sugar Association, either to deem the monthly quantities not purchased as forfeited to the Sugar Association, or to consider such failure as a breach by the Appellant of its obligations under the agreement. In the latter event certain consequences would follow to which I shall shortly refer.

[11] The agreement further provided that the sugar sold in terms of it would be available for collection by the Appellant, at a mill nominated by the Sugar Association, at the time of the

sale. Such collection, delivery and transportation of the sugar from the mill would be for the sole account and expense of the Appellant. The purchase price payable by the Appellant would be the ruling ex-mill price for sugar stipulated by the Sugar Association at the time of delivery.

[12] Clause 3.4 of the agreement is particularly germane to this appeal and I therefore cite it verbatim in full. It reads as follows (the "purchaser" being, of course, the Appellant and the "seller" being the Sugar Association):

> "*3.4 The purchaser acknowledges that any quantity of sugar to be collected by the purchaser from the point of sale and delivery shall not be released to the purchaser unless the seller authorises the relevant mill in writing to do so, which authority shall not be given unless the seller, in its sole discretion, is satisfied that payment has been made in advance for the sugar or any credit facility account has been conducted satisfactorily by the purchaser in all respects*".

The release of the sugar purchased was done pursuant to the issue of so-called "release notes" by the Sugar Association to the relevant mill.

[13] Clause 3.6 provided that ownership in the sugar would remain vested in the Sugar Association until paid for in full by the Appellant.

[14] Clause 5 of the agreement set out the terms of payment and Clause 5.1 provided that in the event of a credit facility not being granted to the Appellant the Appellant would make payment to the Sugar Association of the full purchase price of each quantity of sugar purchased, prior to the delivery thereof, either in the form of cash or by way of a bank guaranteed cheque.

[15] It is common cause that no credit facility was granted by the Sugar Association to the Appellant.

[16] It is also common cause that there were still in existence in 2004, when the agreement was entered into, the terms of a letter dated 11 October 2002 to all its customers, the relevant portion whereof reads thus:

> *"It has become necessary for the Swaziland Sugar Association to verify copies of bank cash deposits and advices of funds transferred directly to the Swaziland Sugar Association's bank account before issuing release notes for sugar ordered by customers. This verification will be implemented with immediate effect".*

One further aspect of the agreement must also be mentioned. It is this. The Sugar Association agreed that provided the Appellant used the sugar exclusively for the purposes referred to in the agreement, it would grant the Appellant a rebate of 4% of the purchase price for sugar pre-packed by the Appellant in its premises in Swaziland and 7% on sugar used for industrial purposes in premises occupied by the Appellant in Swaziland. The

Sugar Association also agreed to refund to the Appellant a deposit which the Appellant had to pay, on the return by it to the Sugar Association of the bags supplied by the latter in which it packed the sugar in one metric tonnes for delivery to the Appellant.

The agreement then went on to provide that in the event of a breach of any of its provisions by the Appellant and a failure by it to remedy such breach within seven days of receiving a notice identifying such breach, the Sugar Association would be entitled to cancel the agreement without notice and claim any outstanding monies owed to it by the Appellant. It would also be entitled to cease immediately all supplies of sugar to the Appellant.

[19] The agreement, although effective from 1 February 2004, was signed by the Managing Director of the Appellant Mrs. Martina Sauerman, on 9th March 2004 and by an official of the Sugar Association on 17 March 2004. The former is one of two directors of the Appellant, the other being her husband, Stephen Sauerman.

[20] So far, then, so good. What followed thereafter were the events which I have earlier described as unusual and strange, to say the least of them. The narrative of them is to be found in the evidence of Mrs. Sauerman, who testified on behalf of the Appellant in the trial of this matter in the Court ***a quo.***

[21] In her evidence Mrs. Sauerman outlined the difficulties the Appellant had experienced in obtaining an allocation of sugar and explained how the Appellant had had to buy its sugar from sources which had allocations in order to carry on its business. The on-sale of sugar was the Appellant's sole business activity and the obtaining of sugar supplies was therefore vital, such supplies being its lifeblood.

[22] Mrs. Sauerman also described to the trial Court a further difficulty that the Appellant had in conducting its business. It was this. She said that many, if not most, of the Appellant's customers paid for the sugar sold by it to them, either COD or on credit terms which were sometimes seven days after delivery. The Appellant, however, in terms of Clause 3.4 of the agreement with the Sugar Association, had to pay it in advance for the sugar bought from it. The cost of such sugar was about EI20 000 per load. As the Appellant did not have a credit facility or a bank overdraft it was "quite difficult to pay for sugar in advance and only to receive money later."

[23] Mrs. Sauerman said that one of the agents who used to secure business for the Appellant was one Bernhard Schutte who was in Pretoria in South Africa. Early in April 2004, she said, Schutte told her that he "had a very good deal which would alleviate the cash flow problem regarding the supply to her customers."

[24] The "deal" as explained by Schutte, said Mrs. Sauerman, was the following. He said he could obtain donor funds from a

donor in London who wanted to make a large donation to the Zionist Christian Church (ZCC) of South Africa. The donor would, however, obtain no tax benefit in respect of its donation if it transferred the funds directly to the ZCC but it would do so if the funds were related to a food commodity such as sugar. The proposal was that the funds would be transferred to the Sugar Association for the Appellant's benefit i.e. to enable it to purchase sugar and pay for it in advance. The Appellant could then on-sell the sugar, including some of it to him, and the Appellant would then refund the amount of the donation to him within 14 or 21 days for him to pass on to the ZCC. The deal, said Mrs. Sauerman, was attractive to the Appellant in view of its cash flow problems.

[25] The further history of the "deal" is that on 13 April 2004, according to Mrs. Sauerman, Schutte telephoned her and had a further discussion with her about his proposal. He told her that the funds would be transferred directly into the account of the Sugar Association by means of a swift, i.e. electronic, transfer from London. Schutte had, about a week beforehand, asked for the Sugar Association's banking details, which she had given to him. Schutte said that the transfer would be made on that day i.e. 13 April 2004. It would be for an amount of 197,500 pounds sterling.

Mrs. Sauerman said that on 13 April 2004 she contacted the Sugar Association and spoke to an official in its financial department, Ms Khetsiwe Mdziniso, to whom it will be convenient to refer herein merely as "Khetsiwe". She told Khetsiwe that the

Appellant was expecting a transfer of British Pounds to be made into the bank account of the Sugar Association by way of swift transfer and asked Khetsiwe to inform her as soon as the Sugar Association received the funds and the funds were cleared and available to the Appellant. Khetsiwe undertook to do so.

Mrs. Sauerman said that 24 hours later, on 14 April 2004, she again contacted Khetsiwe who said she was trying to contact Mrs. Sauerman to say that the funds had been received. Khetsiwe gave Mrs. Sauerman the amount in Emalangeni that had been transferred viz E2 291 595.25. She said the Sugar Association had received a swift transfer of the funds, and that the funds were cleared and available. Mrs. Sauerman said she asked Khetsiwe if she could place orders for sugar. Khetsiwe said she could. Following on this the Appellant, on various occasions between 15 and 20 April 2004, bought and took delivery of 13 loads of sugar from the Sugar Association. On each occasion they obtained a release note issued by the financial department of the Sugar Association. Many of the notes were signed by Khetsiwe.

It is in the further saga of events that matters become even more murky. Khetsiwe confirmed that Mrs. Sauerman had told her that she was expecting a swift transfer to be made from London into the account of the Sugar Association and asked her, Khetsiwe, to let her know if it had been received. On 14 April 2004 she learnt from the Sugar Association's bank that an amount had been received by them and she verified from her computer, on which the Sugar Association's account with the bank is reflected, that an amount of E2.291.595.25 had been transferred into their account

on 15 April 2004. So she thought it had come via a swift transfer. But it had not. The factual position was that there had not been a swift transfer made of 197,500 pounds, translating at the exchange rate then prevailing into over E2.2 million, but that on 14 April 2004 a cheque for an amount of 197,500.00 pounds was deposited into the Sugar Association's account. Khetsiwe said she was not familiar with the bank's codes and would not therefore have known that the amount shown as a credit on the statement of the Sugar Association's account with the bank was a cheque deposit and not a swift transfer as she had been expecting. The head of the Corporate

Banking Division of the Standard Bank, the bank where the Sugar Association had its account, Mr. Barry Schutzler, agreed that a lay person - i.e. not one of the bank's officials - such as Khetsiwe would not have known if the amount shown as a credit in the account was as a result of a transfer of the funds or the deposit of a cheque.

However, because an amount of E2.291.595.25 was reflected as being in the account, she agreed that she had told Mrs. Sauerman that the funds were there and that the Appellant could, in consequence, purchase sugar. She had signed certain of the release notes enabling the Appellant to do so.

It is here that the murkiness begins to deepen. The cheque deposited was, it is common cause, a fraudulent cheque. I shall come to deal with the cheque and its deposit in a moment. But first I must advert to another factor in this unusual tale.

There is, dated 15 April 2004, a letter sent by Schutte to the Appellant, for Mrs. Sauerman's attention stating that

> "This *letter serves to confirm our agreement with regard to the funds placed at the SSA by ZCC and marked for usage by EIS Marketing (Pty) Ltd for the purchase of sugar*"

This letter went on to say that the amount in question was E2,291,928.25 and that

> "*the intent of the project is to stay within the undertaking by B. Schutte to the ZCC that (those) funds will be turned around and returned through the account of B. Schutte at FNB Pretoria to the ZCC within 14 days from the clearance thereof ...force majeure considered*".

The letter went on to ask Mrs. Sauerman to study it and if in order to print, sign and fax it back to him. The letter bore a stamp "Bernhard Schutte" but was not signed by him.

The letter then contained the following legend. I cite it as it appears in the letter. It appears in the same type face as the rest of the letter and thus appears to have been part of what was sent to the Appellant by Schutte.

> "*The undersigned Ina Sauerman, hereby declare that I underwrite the above declaration and agree with the*

contents thereof and undertake to honour the relationship as set out herein.

Signed at Matsapha on 15th day of April 2004".

The letter was signed by Mrs. Sauerman and her husband, S. Sauerman. According to Mrs. Sauerman it was faxed back to Schutte on the same day i.e. 15 April 2004. I shall revert to this letter again later herein.

[33] I return then to the cheque and its deposit. The drawer of the cheque was Centrica pic, which is apparently a large well-known British company. The cheque was drawn in favour of the Sugar Association and is said to be an "Ordinary Shares Dividend Cheque". This is the first indication of its fraudulent nature: it is undisputed that the Sugar Association was never a shareholder of Centrica and would therefore never been entitled to a dividend cheque from the latter. Secondly, the amount of the cheque is 197,500.00 pounds. The "dividend" was thus exactly the same amount as, according to Mrs. Sauerman, Schutte said the Sugar Association would be getting from the unknown donor. The third unusual feature is that the cheque is dated 8 March 2004 and was therefore in the hands of whoever deposited it from that date or, probably before then, because on the cheque appear the words "Please do not present this cheque for payment before the date shown".

[34] The deposit of the cheque is even more extraordinary. It was deposited at the Mbabane branch of the Standard Bank on

14 April 2004, into the account of the Sugar Association at the bank, the deposit slip setting out the account number of the Sugar Association. It will be recalled that at his request Schutte was provided with the Sugar Association's banking details by Mrs. Sauerman, who knew them. The signature of the depositor purports to be that of Mrs. Sauerman's husband S. Sauerman. It bears a remarkable similarity to that of Sauerman. He however, emphatically denied, in his testimony before the Court *a quo,* that the signature was his or that it was he who had made the deposit.

[35] Another strange feature of the cheque and its deposit is that although it was a foreign cheque and the normal clearing period for such a cheque would be 21 days, the cheque was cleared on the same day as it was deposited. Mr. Schutzler explained that the bank allowed a blue chip company customer, such as the Sugar Association, to draw against "uncleared effects" such as the cheque in question.

[36] The further history of the matter is that on 22 April 2004, after the purchases between 15 and 22 April 2004 had been made, Mrs. Sauerman received a telephone call while she was on a trip to South Africa from a Mrs. Sharon de Souza, the finance director of the Sugar Association. Mrs. De Souza told her that the bank had notified them that the cheque that had been deposited had been dishonoured. She told Mrs. Sauerman that she would have to pay for the sugar the Appellant had purchased, or return the sugar, and that she was stopping further sales. Mrs. Sauerman said the sugar could not be returned as it had been processed and on-sold.

[37] It is common cause that, as stated earlier herein, payment was not made by the Appellant, which was called upon to remedy this within seven days or else the Sugar Association would invoke the breach provisions of the agreement and cancel it forthwith. As payment was still not made within seven days, the Sugar Association on 3 June 2004 cancelled the agreement and thereafter brought its action for payment of the purchase price of the sugar, which is now the subject of this appeal.

A further factor is that by 22 April 2004 the Appellant had paid E500 000 to Schutte in terms of their arrangement.

It might be convenient at this stage to say a brief word about the Appellant's counterclaim. The Appellant averred that by reason of the applicability of the doctrine of estoppel to the facts of the case, the Sugar Association was not entitled either to succeed in its claim against the Appellant or to cancel its agreement with the Appellant. The Appellant pleaded that in cancelling the agreement the Sugar Association had repudiated its obligations to sell it the sugar set forth in the agreement, which repudiation it had accepted. As a consequence it had suffered damages.

Those damages, it averred, arose from the fact that the agreement would have still had to run from June 2004 to 31 March 2006 if the Sugar Association had not repudiated it. It would have purchased in that period the allocations of sugar to which it would have been entitled in terms of the agreement and would have earned the value added rebates referred to in the

agreement and that I have mentioned earlier herein. These, claimed the Appellant, would have totalled E2,254,620.30. It had also suffered monthly expenses during the three months of the agreement's existence, totalling El72,800.It was, said the Appellant, also entitled to rebates on the sugar purchased in April and May 2004, which it calculated at E186,784.70.

[41] It will, of course, be immediately appreciated that the counter-claim can only succeed in the event of the Sugar Association's failing to establish that it was entitled to cancel the agreement or, put otherwise, in its being estopped from doing so.

[42] Estoppel by representation is a well-established doctrine, both in the South African law and in the law of this Kingdom, which, as is well-known, frequently derives support from the law in South Africa. It has come into the law of South Africa from the English law (see BAUMANN v THOMAS 1920 A.D. 428; JOHAADIEN v STANLEY PORTER (PAARL) (PTY) LTD 1970(1) SA 394(A); SONDAY v SURREY ESTATE MEAT MARKET 1983(2) SA 521 (CPD) and finds its equivalent in the South African law in the Roman-Dutch law concept of the exceptio doli mali. As stated as early as 1904 in the Full Bench decision of the Transvaal Supreme Court of UNITED SOUTH AFRICAN ASSOCIATION LTD v COHN 1904 TS 733 by Innes CJ -

> "*The principle which underlies the doctrine of estoppel is, in its main incidents, recognised by the Roman-Dutch law*".

The Roman-Dutch law is, of course, the common law of Swaziland.

[43] The doctrine has been recognised and has found application in Swaziland over several decades and it is well established that anyone who sets up a case of estoppel against another must prove that the latter has led him to believe in the existence of a certain state of facts and has induced him to act on that belief so as to alter his own previous position to his detriment (see BAUMANN v THOMAS supra at 435-436). Estoppel is a defence or, as it has often been stated, it is a shield rather than a sword. And the onus is on the party setting it up to establish it.

[44] The Appellant therefore bore the onus of proving

(a) a representation made by the Sugar Association on which it relied; (b)that, in relying on that representation, it, the Appellant, changed its position to its detriment;

(c) that the said representation and the reliance on it was the proximate cause of the detriment it had suffered.

Mrs. Sauerman, in advancing the case for the Appellant, said that the representation upon which she, for the Appellant, relied, was the statement made to her by Khetsiwe that the funds she was expecting had arrived, that Khetsiwe had verified this fact and that the Appellant accordingly was entitled to purchase the sugar

it required from the Sugar Association. The Appellant had therefore done so and when it emerged that the funds were not available it had, having changed its position by purchasing the sugar that it did, suffered detriment. Such detriment consisted of its now having to pay the sum of EI, 301,055.00, which it would not otherwise have had to do; the loss of its allocation consequent upon the cancellation of its agreement with the sugar Association; and its payment of E500.000.00 to Schutte. The proximate cause of that detriment, the Appellant averred, was the representation made by Khetsiwe.

In assessing whether those factors have been established by the Appellant, the following situation requires consideration. It arises from what I have set out above as being either common cause or undisputed.

[47] The Appellant needed the allocation of sugar it was granted by the Sugar Association, in terms of its agreement with the latter, in order to stay in business. It had to make monthly purchases of certain quantities of sugar involving large sums of money, in terms of the agreement, in order to avoid the agreement being cancelled. It did not have credit facilities or a bank overdraft nor the cash resources in order to have the funds available to pay for those purchases, which payments had to be made in advance before the Sugar Association would allow the purchases to be made. The Sugar Association's attitude as to this was rigid and it required strict compliance with those provisions. The Appellant's

position was therefore a precarious one. The "deal" with Schutte would accordingly have been a godsend.

[48] However, the "deal", by any standards, was an unusual one. It involved the provision of funds from an unknown donor, destined ultimately for the ZCC, but of use on the way to their destination by the Appellant. In other words, the Appellant was to have the use of 197 500 pounds, interest free, at the expense of ZCC. That alone should, in my view, have aroused Mrs. Sauerman's suspicions about the validity of the "deal".

[49] The money, so she said Schutte told her, was to come from a donor. She was not told who the donor was. However, that is not what is set out in the letter from Schutte of 15 April 2004, the content of which she confirmed as being correct. As cited above, it says in its very first sentence that it serves to confirm

> "*our agreement with regard to the funds placed at the Swaziland Sugar Association by ZCC and marked for usage by (the Appellant)*".

[50] The funds according to that letter were to come directly from ZCC, not from a donor. No mention was made at all of a donor. That factor, in my view, casts grave doubts on the credibility of Mrs. Sauerman. At he least, it should again have sounded loud warning bells to her as to the validity of the "deal". It is, in my view, inconceivable that ZCC would

have had 197 500 pounds (translating into over E2.2 million) available to put into the Sugar Association for the Appellant's benefit or, if it had such amount available, to have done so, interest free, and with no advantage to it, as a gesture of charity to the Appellant. It is also such a remarkable coincidence as to be quite unbelievable that the amount, if it had come from the ZCC, would have been exactly the same as that on the fraudulent cheque that was ultimately deposited. It also runs directly contrary to her evidence that she was told by Schutte that the reason for the "deal" was to provide a tax benefit for the donor. Mrs. Sauerman's suspicions, to put it at its lowest, must have been seriously aroused.

[51] Questioned about this Mrs. Sauerman's reply was that she did not find anything about the scheme that was weird or should have aroused her suspicion. It was not something that was strange "in the sugar industry".

[52] Then comes the issue of the placing of the funds in the bank account of the Sugar Association. Mrs. Sauerman told Khetsiwe that the funds would come via a swift transfer from London. This is clearly what she led Khetsiwe to believe. She was then obviously so anxious to know if the Sugar Association had received the funds that she not only telephoned Khetsiwe at least once to find out if they had arrived but asked Khetsiwe to inform her as soon as they had come. This, in my view, underlines her anxiety as to the Appellant's having to have access to monies with which to

make the purchases it was obliged to make in order not to jeopardise its agreement with the Sugar Association. On the occasions on which she spoke to Khetsiwe, Mrs. Sauerman never indicated that the money might not come by way of transfer, so maintaining in Khetsiwe the belief that the funds would arrive in that manner. Mrs. Sauerman testified that she was not aware that there had been no transfer and that the funds that Khetsiwe believed were validly deposited into the Sugar Association's account had come by way of a cheque.

The whole saga of the cheque and its deposit is not only mysterious but highly suspicious. The impression having been created that the funds that would go into the bank account of the Sugar Association would get there by way of electronic transfer, no such transfer was made. Instead, a fraudulent cheque was deposited in the account on the same day on which the transfer, which did not take place, was supposed to have been made. That cheque was for the exact same amount as the one which was supposed to have been transferred. It had, having regard to the date on it, obviously been in the hands of whoever deposited it for sometime prior to the date on which it was deposited viz 14 April 2004 - the day on which, incidentally, Mrs. Sauerman was making anxious enquiries about the arrival of the funds.

[54] Who deposited the cheque? It is obvious that whoever did so, did it on behalf of the Appellant. Mrs. Sauerman's evidence under cross-examination on this aspect is illuminating. The record of it reads thus (P.C. being counsel for the Sugar Association and DW1 being Mrs. Sauerman):

"P. C.: Who is likely to have effected that deposit?

DW1: It is clear that it was the Defendant that wanted credit for placing orders so the Defendant is the likely one to effect that deposit.

P. C. So can I accept it that somebody on behalf of the Defendant effected that deposit?

DW1: Yes".

[55] The deposit could therefore clearly only have been made by either the Appellant or by some unknown person on its behalf or by Schutte. There is nobody else who could possibly have done so. It would obviously not have been Centrica, which is located in Britain, nor would it have been the ZCC, which has its location in South Africa. It was clearly made by somebody who was in Mbabane on 14 April 2004 for the deposit was made at the Mbabane branch of the Standard Bank on that day, the deposit slip reflecting that the deposit was received by "teller No. 9" at the branch.

[56] Could it have been Stephen Sauerman? The deposit slip bears what purports to be his signature. As I have stated, a comparison with his signature on the letter from Schutte confirming the agreement between Schutte and the Appellant - which Stephen Sauerman admittedly signed - and that on the deposit slip reveals a remarkable similarity between the two signatures. Stephen Sauerman, however,

denied that he deposited the cheque or that the signature was his.

[57] If he did not deposit the cheque and the signature on the deposit slip was not his, then who else could have done so? Mrs. Sauerman suggested it was somebody pretending to be the Defendant. If so, that somebody must have had in his possession the fraudulent cheque purporting to be a dividend cheque from Centrica to the Sugar Association, which was not one of its shareholders. I interpose to remark that it is surprising that someone in authority from Centrica was never called to testify at the trial. Be that as it may, the person with the cheque then in his possession, on the same day that the nonexistent transfer should have been made, made the deposit of the cheque into the Sugar Association's account for the benefit of the Appellant. In so doing, he must have forged the signature of Stephen Sauerman, a director of the Appellant, for some obscure and unaccountable reason if, as Sauerman says, the signature is not his. The forgery, if such it be, is a very good one. And the person concerned must have known of the "deal" and that, as Mrs. Sauerman testified, Schutte had told her of a transfer of an amount which was exactly the same as that of the cheque. All this I find highly improbable.

So was it Schutte that deposited the cheque? Stephen Sauerman suggested at the trial that it was Schutte. Under cross-examination he was asked

> *"If you are suggesting Mr. Schutte, he is a natural suspect for having effected this fraudulent deposit, that I can understand and accept. Is that what you are suggesting?* "

Stephen Sauerman's reply was "yes"

If it was Schutte, it would mean that he must have had the bogus cheque in his possession prior to 14 April 2004. His abode is apparently Pretoria in South Africa. He must, therefore, have travelled to Swaziland in order to deposit the cheque in Mbabane on 14 April 2004. in doing so, he forged Stephen Sauerman's signature on the deposit slip. He only got a specimen signature of Sauerman, contained on the confirmatory section of the letter sent by him to the Appellant, on 15 April 2004, the day Mrs. Sauerman said she faxed the letter back to him-and, of course, the day after he made the deposit, if it was he who did. There is no evidence that Schutte had any other specimen of the signature in his possession. That he, therefore, was able to perpetrate a surprisingly accurate replica of Sauerman's signature must be open to some doubt.

It is quite evident that what we have to deal with here is a fraudulent scheme to falsely induce the Sugar Association to allow the Appellant to purchase sugar from it in terms of the allocation agreement between them.

If it was Schutte who deposited the cheque then that was clearly part of that fraudulent scheme and that it was devised by him for the benefit of the Appellant. The statement conveyed to Khetsiwe

acting on behalf of the Sugar Association by Mrs. Sauerman that a large sum of money would be placed into the account of the Sugar Association by way of an electronic transfer from London was obviously false. It never eventuated. Mrs. Sauerman said this was the information she got from Schutte. It, however, induced in Khetsiwe the belief that such money would be transferred in that way. She therefore laboured under a false impression, induced by Schutte, when she made the representation now relied upon by the Appellant to establish its defence of estoppel that the funds had arrived in the account of the Sugar Association and that such funds were genuine.

[62] They were not and the fraud was exacerbated when a bogus cheque was deposited into the account. Khetsiwe was never told that the transfer would not occur. She was then still under the falsely induced belief that the funds were genuine when they were not. Her representation to Mrs. Sauerman was made on the basis of that belief.

[63] The possibility, however, cannot be discounted that it was the Appellant itself who perpetrated the fraud which induced in Khetsiwe the belief upon which she made the representation in question. We have only Mrs. Sauerman's word for it that Schutte said that the money involved was to come from a donor and would be sent to the Sugar Association by way of swift transfer from London. I have pointed out earlier that in the letter of 15

April from Schutte to her, unsigned by Schutte, no mention is made of any donor; it says the money will be coming from the

ZCC, which, it is common cause, is not to be found in London. Her anxiety to know that the Sugar Association had received the money is a significant feature and the change of the alleged source of the funds from an electronic transfer to a bogus cheque is a disquieting factor. I have already referred to the manner in which the deposit of the cheque was made. The Appellant's possible involvement in that cannot be lightly discounted.

It is, however, unnecessary to come to any firm decision as to who the architect of the fraudulent scheme was i.e. the Appellant itself or Schutte. In either event it was that fraudulent scheme that was designed to give the Appellant access to illegitimate funds and which induced the representative of the Sugar Association, Khetsiwe, to make the representation that funds were available in the Sugar Association's account when she was unaware that such funds were not genuine. If it was the Appellant *caedit questio;* if it was Schutte the appellant would be liable for his fraud, Schutte having been the agent of the appellant in attempting to secure the funds in question (see RAND BANK BPK v SANTAM VERSEKERINGS MAATSKAPPY BPK 1965(4) SA 363 (A.D.).

In the latter case a principal was held responsible for his agent's fraudulent concealment, notwithstanding that the agent was committing a fraud not only on a third party but also on the principal. The South African Appellate Division of the Supreme Court held that where there had been a fraud committed by a bank official even where the bank was an innocent party, equity demanded that the bank should bear the responsibility for the

fraud of the person it had chosen to represent it - in *casu* Schutte on behalf of the appellant in attempting to secure funds for it.

In PRICE N.O. v ALLIED JBS BUILDING SOCIETY 1979(2) SA 262 (ECD) at 268 F - H, the late Addleson J cited with approval De Villiers and Macintosh: Law of Agency 2nd Edition at 246 to the effect that

> "*It has long been recognised that a fraud may fall within the scope of an agent's authority though no principal would actually authorise his agent to commit a fraud*" and

> "*Whether the fraud is committed for the benefit of the principal or for the agent, the fact that he had used his authority mala fide or in fraud of his principal would not entitle the principal to repudiate the authority*".

[67] It matters not, therefore, whether the Appellant itself, in the persons of Mr. & Mrs. Sauerman, or their agent, Schutte - or both together - was the architect of the fraudulent scheme involved in this case. It is trite that a representee cannot rely upon a representation made by a representor which has been induced by the fraud of the representee himself or herself. Nor, I would add, by the representee's agent. One cannot seek to benefit from one's own fraud.

[68] Applying that principle to the facts of the present case, the Appellant cannot seek to rely on a representation, to found its defence of estoppel, made by Khetsiwe on behalf of the

Sugar Association which was induced by the fraud either of the Appellant itself or of Schutte.

[69] There is a further aspect. As pointed out above, one of the essentials that the Appellant bore the onus of proving was that the representation was the proximate cause of its acting to its detriment (see STANDARD BANK OF SA LTD v STAMA (PTY LTD 1975(1) SA 730 (AD), the relevant portion of the judgment being reported at 1975(4) SA 965).

[70] Counsel for the Appellant argued that it was the procedure adopted by the Sugar Association viz of assuring itself that funds were available for a purchaser to buy sugar from it, by verifying that the funds were in its account, that had given rise to the representation made by Khetsiwe that the funds in this case were available and that the appellant was entitled to make the purchases it did. Indeed, Mrs. Sauerman repeated on several occasions that she had relied on it. While that procedure may have been the *sine qua non* of the representation it was not, in my opinion, the proximate cause of any loss that the Appellant may have suffered. The proximate cause of such loss was obviously, in my view, the fraudulent scheme of which, as I have opined above, either the appellant or its agent, Schutte, was the architect.

[71] It follows that, in my judgment, the Appellant failed in the trial Court to establish its defence of estoppel and that Ebersohn AJ was correct in rejecting it.

[72] In the result the appeal cannot succeed. It also follows, as I have stated earlier herein, that if the Appellant failed in its defence of estoppel on the claim in convention, its counterclaim would fall away. Indeed, Mr. Flynn for the Appellant conceded that to be the position. I need therefore say no more about the counterclaim.

[73] Early in this judgment, in referring to the orders Ebersohn A J made, I said that he had granted the Sugar Association's claim with interest and costs. The rate of interest he ordered was 8% per annum from 21 April 2004 to date of payment. He gave his reasons in his judgment for arriving at that rate of interest and I can find no reason for interfering with it. In any event, it was not challenged by the Appellant and there was no cross-appeal in regard to it by the Sugar Association.

[74] I also stated that Ebersohn A.J. ordered that upon the Appellant paying the claim and interest thereon in full, the Defendant would be entitled to payment of two sums viz El 19 945.65 and E65,700.00. I said I would say what these amounts were for. The first sum of El 19,945.65 is in respect of the rebate on the sugar the Appellant purchased and the second sum of E65,700.00 is a credit for the bags in which the sugar was supplied and which were apparently returned by the Appellant to the Sugar Association. The latter has not challenged the award of these amounts and they will therefore stand.

[75] Accordingly, the following order is made:

1. The appeal fails and is dismissed, with costs.
2. The orders made by the Court *a quo axe* confirmed.

P.H. TEBBUTT

JUDGE OF APPEAL

I agree

J. BROWDE

JUDGE OF APPEAL

I agree

BANDA

JUDGE OF APPEAL

Delivered in open Court this 10 Day of May 2007