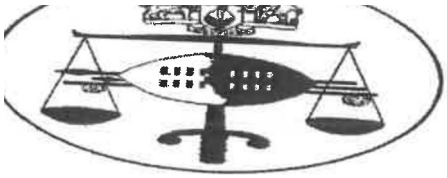

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HOLDEN AT MBABANE Civil Appeal No.74/2020

In the matter between:

Lubombo Property Group (Proprietary) Limited	**1st Appellant**
Norman Sigwane	**2nd Appellant**
Mbhuti Dlamini	**3rd Appellant**

And

ESwatini Development and Savings Bank	**1st Respondent**
Timothy John McSeveney	**2nd Respondent**
Nicholas Charles McSeveney	**3rd Respondent**
Colin George Ries	**4th Respondent**

Neutral Citation: *Lubombo Property Group (Pty) Ltd and 2 Others versus ESwatini Development and Savings Bank and 3 Others (74/2020) [2020] SZSC02 (31st May, 2021)*

Coram: **MCB Maphalala CJ, SB Maphalala JA and JP Annandale JA**

Heard: th April 2021
Judgment: 31st May 2021

Summary

Summary judgment application - cause of action - money lent and advanced but unpaid. Loans by Bank to Company - Directors and Shareholders - Property pledged as security - mortgage bond - description of property vis-a-vis application to execute- affidavit to·resist summary judgment filed by Order of Court. Rescission thereof refused a quo. *Rule 30 (1) Notice of Irregular step, Special Plea and Pleading over incorporated _together - additional affidavits in support of summary judgment - Novel approach - Summary Judgment ordered Triable issues or not - appeal against summary judgment as ordered by High Court dismissed, with costs.*

JUDGMENT

Annandale JA

[1] This appeal emanates from the ordering by the High Court of summary judgment against a company. ESwatini Development and Savings Bank ("the Bank") issued combined summons against

Lubombo Property Group (Pty) Ltd ("the Company") and five others. They consist of Directors and Shareholders in the company, all of them also being sureties in the form of having subjected fixed property covered under a first mortgage bond in fav.our of the Bank. In addition, the five directors also entered into individual "Guarant es" as sureties and co principal debtors *in solidum* for the repayment on demand of all monies owed to the bank by their company.

[2] Having accepted the terms and conditions precedent to the granting of loans to the company as stated in a written offers termed as "Finance Facility Agreement" and having committed themselves as , sureties and co..principal debtors, three separate sums of money were advanced to the company at its own instance and request, as represented by the five directors *cum* shareholders.

[3] In the particulars of claim, the company and its sureties and co principal debtors are sought to be held liable for the debt to the Bank. The Bank relies on three separate claims in its action, the first being E2 000 000, said to have been for the purpose of Value Added Tax while developing a commercial property in Siteki town. A cession over rentals from the property and claims over Value Added Tax joined hands with the mortgage bond (alleged to be in respect of

both portions 149 and 150 of the farm called Flame Tree Nl80, Siteki, but with the annexed Con.tinuing Covering Mortgage Bond No.433 of 2018 limited to only portion 150 of the same farm) and the unlimited guarantees by the company's directors, as security for due performance of obligations under the loan agreement. Breach is alleged to have resulted from non-payment of amounts due, culminating in a debt of El 684 298.69 in arrears, which results in a claim of this amount plus interest and costs, cancellation of the agreement and calling up of the bond. An order which contrasts with the Bond itself as indicated above leads to a further prayer to declare both portions 149 and 150 executable, whereas only portion 150 is subject to the Bond. This patently clear error has not been subjected to an issue of serious contention when the appeal was argued before us.

[4] The second claim is akin to the first in almost all material terms. This loan amounted to E25 000 000 for the purpose of a commercial housing loan for the development of a mall in Siteki Town. It had a facility for redrawals to purchase other assets as well as a moratorium period of eight months on both·interest and principal payments. The same security was offered and accepted. Breach is alleged to have culminated in arrears and a debit balance of

E26 642 594.75 as of the 10th February 2020, with summons having been issued on the 6th May, 2020.

[5] The third claim is for an outstanding amount of E24 885 842.39, again arising from a loan of E23 000 000 for the purpose of a commercial housing loan for the development of a mall in Siteki town.

[6] All three loans add _up to a total ofE50 million in the form of money lent and advanced by the Bank, with a claimed outstanding debit balance of E53 212 735.80 as of the 10th February 2020. All three claiins lay charge to *mora* interest at 9°/o p.a. from date of summons to date of final paymep.t, costs of suit,a t the agreed attorney-client scale and an order to execute the mortgaged property, but with the *caveat* in respect of portion 149 as said above.

[7] All three claims are against the Company which is before us as the first appellant. The five directors and shareholders, all sued on the basis of being sureties and co-principal debtors were each cited as co-defendants, with the second and fifth defendants now being the second and third appellants. In its particulars of claim, the Bank attached voluminous documentation in support of its contentions. It seems that the different loans were each separately documented and

substantiated with the relevant company resolutions, authorisations to represent, offers to loan, acceptances, surety papers, calculations, loan agreements, mortgage bond over portion 150 of the farm and so forth. With a fully elaborated claim comprising the three different loans with their comparable terms and conditions, the refrain is that the borrowers reneged on their commitments and are called upon to forthwith pay tl?-e outstanding amounts,· also for the directors to be held personally liable *in soliduin* and to execute on the bond as well.

[8] In plain and simplified terms, the claims are pleaded to be based on monies lent and advanced but which loans were defaulted upon and are now due and payable. The cause of action against the company is extended to the cited directors as debtors *in solidum* through unlimited personal guarantees, a mortgage bon over fixed property and acknowledgement of debt by the company. In all three instances the bank was duly represented by a manager and the company by a designated director, underpinned by a resolution of its board.

[9] A notice of intention to defend was duly and promptly filed by only the three appellants now before us. A few days later, they also.filed what is termed to be a "Special Plea", but which later continues to

also include a second heading termed " Irregular Step" as well as a "Notice of Exception", thereafter it continues with a heading "Pleading Over"," ..in the event the Notice of Exception by the 1st, 2 nd and_ 5th defendant pleads as follows...." (sic). Bad and careless legal drafting of pleadings do not auger well for clarity in litigation. Perhaps the author of this "Notice" simply did not read the text, or whatever, but the pleading over seems to be directed against only a dismissal of its exception and not also the alleged irregular step or the special plea.

[10] The "Special Plea" seeks to absolve the company and two directors, initially the 1st, 2 nd and 5th defendants, now the three appellants, in that they were not involved in the application for such a credit. It is stated that moreover, the manner in which credit was granted is allegedly in contravention of Sections 25(1) and 2 (a) (i) of the Consumer Credit Act of 2016.'

[11] Secondly, it is pleaded that the two defending directors did not understand and appreciate the risks and costs of the loan for bridging finance. It is added that only the third defendant (second respondent in the appeal) dealt with the plaintiff to their exclusion, yet they were all directors, further accompanied by an alleged absence of board resolutions made by all directors authorizing him to bind the

company to borrow from the Bank as he did and .where disbursement of the loan amounts were to be made.

[12] The three further sought to cast aspersions of impropriety onto the former third defendant by accusing him to have acted on a frolic of his own without the sanction of a resolution by all directors. They lament the non-use of the normal company account to deposit proceeds of loans into, and further that the firs·t loan (for VAT purposes) was fraudulently. obtained since it is not related to the objective and mainline of their business. Claim 3 is incorporated in all of this, seemingly as an afterthought.

[13] The Bank is not spared either, standing accused of "reckless lending" as per section 25 (3) of the Consumer Credit Act.

[14] The Notice seeks to further incorporate reference to an irregular step. This is said to offend "Rule 18(b)" (sic) by failure of stating the name of the defendant's director with whom the loan agreement was concluded with, in its particulars of claim. It continues to question issues around his signature and authority to represent the company. I fail to find either this Rule or the imputed requirements as stated anywhere under Rule 18.

[15] This alleged irregular step flies in the face of the stated partfoulars, especially so in the 10th paragraph to which the defendants refer. It dispels of the complaint.

[16] A Notice of Exception is also incorporated in this *omnibus* Notice. The appellants took exception to the particulars of claim as being "vague and embarrassing, does not disclose a cause of action "(sic). The complaint is premised on an apparent error in the particulars of claim and the final relief regarding execution of mortgaged property. Whereas the Bank refers to both portions 149 and 150 as said to be

mentioned in the bonded property, the mortgage bon d on which it relies only refers to portion 150. No option to remove the cause of complaint, by deletion of references to portion 149, is incorporated in the exception, only a prayer that the Notice of Exception must be upheld with costs.

[17] This fourfold Notice ends with a section called "Pleading Over". It commences with an unclear paragraph which reads:
"In the event the Notice of exceptioh the 1st, 2nd and 5th Defendant pleads as follows... " (sic). Presumably, their attorney meant to say that "if the exception is dismissed ....", but he does not so say.

[18] The pleading over need not be detailed for present purposes. Suffice to say that it seems as if the second claim of E25 000 000 might be less contentious but overall, the present appellants take issue with whatever they can. In the main, the other directors are said to have acted beyond their corporate powers and were unauthorised to secure loans from the Bank. This resulted in the court *a quo* referring to and incorporating the "Turquand Rule" in her reasons for judgment, to which I will soon revert.

[19] Hot on the heels of the multipurpose Notice which three of the defendants filed, the Bank then lodged a Notice of Application for Summary Judgment in respect of all three claims. The credit manager of the plaintiff annexed her supporting affidavit, in which she stated the two main requirements for this relief, namely verification of their cause of action and the amounts claimed, as well as her motivated opinion that there is rio (*bona fide)* defence. She does not refer to the issue of the mortgaged property, which portion 149 of the farm which is also sought to be executed upon but is not recorded in the Bond.

[20] Thereafter; the matter was enrolled for hearing of the application for summary judgment. Nkosi J then called upon the defendants to file an affidavit to resist it and postponed the matter without adjudicating

the special plea or exception, notice of an irregular step, etcetera. Prior to this, a Rule 30 Notice was filed by the defendants. They opined that the application for summary judgment ought to be set aside as an irregular step because the special plea has not yet been decided. Be that as it may, the directive re arding an affidavit to resist summary judgment reluctantly caused it to find its way into the pleadings.

[21] Therein, the Bank is sought to be chastised for allegedly contravening Sections 25 (1) and (2) (a)(i) of the Consumer Credit Act of 2016 in that the P\ 2nd and 5th defendants were not involved in the application for such credit. The loan is also said to have been granted irregularly in that these defendal).ts were not sensitized to the risks and costs of such bridging finance since the Bank only dealt with the third defendant, to their exclusion. It is again repeated that there was no resolution by all directors of the Board to authorize the. 3 rd defendant to bind the company and how disbursements were to be made. They also lament the fact that a loan to pay Value Added Tax is outside the objective of the business, that it was a frolic of his own, with the proceeds of the loan not finding its way into their regular joint business account.

[22] The Bank is also accused of reckless lending as defined in Section 25 (3) of the Consumer Credit Act, again on the assertion that the Company itself together with the 2nd and 5th defendants as directors were not personally involved in the loan applications and but that the consequences seek their personal liability.

[23] The refrain about an irregular step is again repeated. The complaint remains that the resolution by the Board does not include the 2nd and 5th defendants *qua* directors a signatories and that the identity of the director who dealt with the loan application is not sufficiently identified in the particulars of claim and its annexures.

[2 J All of this is raised as points of law *in limine* in the resting affidavit. It then goes on to deal with the claims. Yet again, the defendants tread on the ambit of the "Turquand Rule" through their denial of having personally participated in the resolution by the company to authorize the third defendant to apply for .and sign loans which involve the company and its directors, *in solidum* as co-principals. and debtors. Apart from the loans averred to have not been duly authorized, it is yet again restated that the company did not need any loan for bridging finance to pay VAT, with it being labelled as "an absurdity." The loans are held out to be non-binding on the resisting defendants since it was "unlawful" as there was no reason for

payment of VAT. It goes on the repeat yet again what was already stated about the third defendant acting without a properly executed resolution arrived at without their participation, since the "meeting was wrongly constituted". In short, c_laim one· is held out to be unlawful or non-authentic, rendering it to be not binding on them.

[25] The second claim of E25 000 000 in relation to a commercial housing loan to develop their mall in Siteki town is seemingly acknowledged, but with reservations about the due date for commencement of repayments as well as the due and owing amount. This is said to be as a result of grouping all three loans together for accounting purposes and they now request a debatement of account, while also stating that whatever might have been due, has already, _ _been paid. It goes even further, to state that in fact, "the defendants are way ahead in terms of their payments" coupled with a promise to "continue to honour their obligations" and stating that "there is absolutely no breach of the loan which should have necessitated the plaintiff to approach this court". Cancellation of the agreement is held out to be impossible as there was no breach, it is premature. Claim 2 is thus asked to be rejected"... as it has been comprehended basis" (sic). I confess to a failure to understand just what this means.

[26] The third claim is tarred and feathered with the same brush. The annexures in support of all claims are disavowed on the ground that they *"are not known to the defendants",* that they were signed by an unauthorized (and unknown) person. A confusion _is sought to be established as to just which supporting documentation refers to which claim. Moreover, the plaintiff is accused of " ... being a *delinquent* who 1s intentionally *disingenuous"* .with its *"manipulation"* of documents when it should have known that the applications were not authorised, thereby again extending an invitatio-nto apply the rule per British Royal Bank v Turquand. The parting shot is to accuse officers of the Bank to have "failed to heed advice for the 2nd and 5th defendants, whether recklessly or with intend" (sic). I will yet again refrain from commenting upon the professional capability and skills of the defendant's attorneys of record who drafted this pleading.

[27] From the reference to the contents and multiplicity of legal papers, exceptions, objections etcetera as alluded to above, it is abundantly clear that the extracted litigation in the High Court was destined to result in dissatisfaction either way. It also reverberated in both Courts which had occasion to deal with this convoluted matter.

[28] Surprisingly, it seems as if the defendants have placed all of their eggs in one basket, one with various compartments. However, many decades of jurisprudence have regularly incorporated the various facets of the summary judgment procedure in our civil law. An application for such form of relief is resisted by way of well established precedent and procedure. The plaintiff and the court is notified that resistance to an application for summary judgment is brought into the arena and that therein, it will be shown that the court is enjoined to initially decide the matter by considering the potential prospects of success of its·*bona fide* defence which is proffered by the not so hapless defendant, and that all in all, a trial of all issues in dispute must follow.

[29] When the matter initially appeared before Nkosi J, he ordered the defendants to file their papers and affidavits in which they resist the pending application for summary judgment. It remains unascertained as to just why such a pre-supposed order would have had to be made in the first place, and it furthermore makes one think that it just as well might have crossed the minds of certain advisory legal practitioners that reliance upon their aforementioned salvo of legal interventions would have staved off the need for such resisting affidavits.

[30] Be that as it may, the matter again resurfaced before the Honourable M Dlamini J, from whose Court this matter arises. This time around the Court was enjoined to entertain a further addition to the papers which by then had already been filed of record. As it went, it is focused on the import of certain affidavits, totally unexpected by any standard, in which a number of defendants add, yes they concur, their voices to the call for summary judgment through their supporting affidavits. This exceptionally rare occasion to file pleadings in this manner was explained by their attorney of record, Mr Sibusiso Shongwe.

[31] Attorney Shongwe submitted that instead of the more usual mode of admittance and confession of a claim against a person, the more honourable, justiciable and responsible attitude would be to support the application for summary judgment, even in the face of various combined techniques in litigation as employed by opposing attorneys. Instead of stereotyping and trodding the well followed route, they felt morally and intellectually inclined to "do the right thing" and rather support the cause of the litigation.

(32] Their attorney also argued that in view of the damning but incorrect accusations which were made against them, such as unauthorized borrowing, acting on their own Without board resolutions and

flushing borrowed funds into their own accounts, they were obliged to disclose the correct position to the court. This they did in their affidavits to support summary judgment.

[33] They must have been well advised about the consequences of their actions in_ supporting the claim. They were cited as "co-principal debtors" and held out to be liable through diverse suretyships, which by its very nature engages a surety to answer for the debt or default of a principal to a third party. In my personal view, conduct as expressed as above is commendable on the side of a practitioner of law in the Supreme Court of ESwatini.· However it might be interpreted, it resulted in *inter alia* the ultimate Order of the Court against which this appeal lies, to not order against any of these defendants when the claim was finally adjudicated upon. These three defendants are the third, fourth and sixth, or 2nd, 3rd and 4th respondents in the appeal.

[34] The three appellants (Pt, 2nd, and 5th defendants) failed in their bid to have the further affidavits in support of summary judgment to be set aside as an irregular step by resorting to Rule 30·. They also

failed to have the order by Nkosi J to file their own affidavits resisting summary judgment rescinded.

....

[35] In the impugned judgment, the rescission application was dismissed. The learned Judge *a quo* found no justification to bring it with n the ambit of Rule 42 since the order was made in the· pre ence of th parties and no error, ambiguity or omission was alleged, n()r could a mistake common to the parties be shown. · Rescission under ·our· common law was also found to be non-applicable since there was no*Justus error* in the order through the manner in which it was done.

[36] The special plea which seeks refuge under various sectfons of the Consumer Credit Act of 2016 was likewise considered but rejected by the Court *a quo.* The absence of an affidavit to resist summary judgment by the second respondent/appellant resulted in his fate being sealed, following the rejection of ·various other tactics. Regarding the Company itself and the 5th respondent (3rd appellant), the issues pertaining to board resolutions, authority to represent and bind . the company and signatures were carefully and comprehensively considered by the Court below in respect of each of the three claims. · They were rejected, resulting in summary judgment being ordered against the appellants whereas the 2nd to 4th respondents were not held liable.

[37] It is against the ordering of summary judgment that this appeal was noted. To not further overburden this judgment I shall not reproduce

the stated grounds of appeal here - suffice to say that it consists of fourteen (14) 'differe nt grounds of appeal, spread over four full pages.

[38] The first eight grounds of appeal centre around the plethora of procedural issues arising from the multiple attempts to avoid a consideration of the actual merits of the claim. The cause of action is straight-forward but it was obfuscated by - the appellants who sought to prescribe just how they wanted adjudication of the matter to be done and which aspects of their issues had to take precedence at the hearing.

[39] The special plea which comprises averments of an irregular step and exception, are said to have required determination *ante amnia*. This alleged irregularity is then said to have culminated in the dismissal of the rescission application, then a resultant failure to dismiss the application for summary judgment itself and going on to consider the affidavits which deal with the merits of the application, including those of the co-defendants.

[40] The Rule 30 Notice has it that the application for summary judgment is an irregular step due to it having been filed prematurely since a special plea had not yet been determined by then. The special plea

which indeed predates the application for summary judgm_ent does not address the. merits of the claims as such. . Instead, the focus therein is to raise all sorts of issues which could ostensibly arise under the Consumer Credit Act. The Bank is accused of granting credit *contra* Sections 25(1) and (2) (a) (1) of the Act in that the company and two directors, the 2nd and 5th defendants, "were not involved in the application for such credit". Further, that the Bank did .not ensure that these two directors appreciated the risks attendant to the loans and in_ any event, since there was no board resolution, they were not involved at all. A so, that the disbursements were not made into the company's usual account.· All of this is then said to have culminated into "reckless lending" *contra* section 25(3) of the Act.

[41] That the learned Judge *a quo* did not deal with the special plea and its attendant tentacles as is contended by the appellants, is not supported by her written judgment. The Court aptly referred to the provisions of Section 3 of the Act, with section 3(2) (a) (i) specifically excluding application of the Act when the consu1ner is a company (or body corporate) whose assets or turnover value equals or exceeds the threshold as determined by the Minister. With no such threshold yet having been determined and gazetted by the Minister at the time when the agreements were concluded, it

becomes difficult to insist on an application of the Act. She also found that there was no agreement between the parties to be bound to the Act despite the absence of a monetary threshold, and more specifically how the applicant's alleged failure to comply with Sections 25(1) and (2) (a) (i) could vitiate the action by the credit provider.

[42] Section 25 requires full and truthful answers to questions by the service provider and Section 25 (2) (a) (i) calls for an assessment of the borrower before credit is provided. That this was indeed done is evidenced by the numerous supporting documents which were annexed to the summons. Reckless lending as is referred to under Section 25(3) of the Act is equally non-sustainable. The defendants place their reliance on reckless lending in order to evade responsibility. Furthermore, the Bank did not lend money to the two appealing directors but to the first appellant, with the directors being sureties and co-principal debtors.

[43] That the appellants are aware of the need to provide sufficient particularity concerning their purported defence of reckless lending is evidenced by reference to relevant case law, which although it deals with foreign legislation on a similar footing, nevertheless demonstrates the hollowness of their accusation of reckless lending.

See SA Taxi Securitisation (Pty) Ltd v Mbatha and Another (51330/09), Molefe and Another (52948/09) and Maluhoba, South Gauteng High Court, Johannesburg - undated and unreported - at para 53 to 58.

[45] Similarly, the appellants were unable to justify any reason why the Bank should have overseen the disbursements and internal accounting for the monies received. It was not the duty of the plaintiff to check and play nanny over the manner in which the loaned amounts were dealt with.

[46] The appellants are further dissatisfied by the judgment against them in that the learned Judge *a quo* would have erred in law and in fact through finding that the 2nd Appellant, by not deposing to an affidavit, resisting the summary judgment application or filing a confinnatory affidavit had consented to the order sought, or that he had no defence because at the time when the application for summary judgment was filed, the 3rd Appellant had long ago sold his shares to the 2nd Appellant and was no longer part of the 1st Appellant company.

[47] Just as the Bank could not be expected to be aware of the internal affairs of the shareholders, the Court *a quo* could also not have been

expected to delve into this If the third appellant sold his shares to the second, it wc;ts not the business of the Court to have knowledge thereof, then to embark on an nquiry as to when it would have been done and if he was still "a part of the 1st appellant Company" at the time summary judgment was applied for.

[48] The affidavit resisting summary judgment was filed by the 5th defendant only. The second defendant waited until a Noti e of Appeal was filed to ventilate his novel proposition, that having sold his shares, he was no longer to be considered as "part of the company". He also fails to recall that from the onset, he was regarded as a surety and co-principal debtor. He also seems to have forgotten about the sheaf of documents which bears his signature.

[49] Whichever way his position is looked at, he cannot now seek to have the appeal upheld insofar as he is concerned in order to avoid the adverse consequences of both his conduct and his omission to adequately deal with adversity. He cannot impute his predicament to an ostensible error made by the Court.

[50] Regarding diverse and frequent assertions by the second and third appellant that the Bank granted loans to first appellant company without verification of its internal affairs, such as directors acting on

frolics of their own, obtaining loans which are not within the scope and ambi of the business, disbursements· of proceeds of loans contrary to company . procedures, the wrong or non-designated directors signing board resolutions and various other issues, the learned Judge *a quo* adequately dealt with it in the hnpugned judgment. Her application of the rule as formulated in Royal British Bank v Turquand (1856) 6 E&B 327 was to the point and correct. It was stated that a third party transacting with·a company, body corporate or institutions is ent tl.ed to assume that the legal entity has complied with all of its relevant necessary internal procedures and formalities. The Court correctly rejected the aspersions which were sought to be cast on the present respondents. With the availability of the many resolutions; in addition to the company's own Articles of Association· and Statutes, the learned judge actually went the extra mile to ensure that at least *prima facie,* the company did not transact beyond the confines of its internal rules.

[51] The final aspect to d al with is the exclusion of the 2nd - 4th Respondents from the judgment.· The appellants failed in their attempt to have affidavits in support of summary judgment, which were filed by the 2nd, 3rd, and 4th Respondents, to be s ruck out. Advocate Flynn argued that the acceptance of their affidavits prejudiced the appellants in that they were not afforded an

opportunity to file their "counter affidavits" in that the Court did not have an opportunity to hear their reply.

(52] From the transcript of proceedings *a quo* and reading the judgment, together with argument by learned counsel, I cannot anywhere locate any manifestation of an application to file a reply but which was refused. To the contrary, it rather seems to be that the Court opened the door for such an application but that the opportunity was not taken. By now, they are a bit too late to raise this on appeal.

[53] In any event, the case of the appellants in this regard was that the affidavits by the respondents in support of summary judgment could not have been admitted at all since there is no specific provision in the Rules for a defendant to do so. In argument on appeal, Mr Shongwe readily . conceded that the nonn has always been that affidavits in support of summary judgment are filed by plaintiffs and not defendants. However, he also pointed out that the Rules which regulate this aspect are tacit insofar as just who may and who may not do so. An application for summary judgment under Rule 32(1) requires under Rule 32 (3) (a) that it:

> " ... shall be made on notice to the defendant accompanied by an affidavit verifying the facts on which the clahn, or the part of the claim, to which the

application relates is based and stating that in the deponenf s belief there is no defence to that claim or part, as the case may be and such affidavit may in addition set out any evidence material to the claim."

[54] Accordingly, he submitted that in order to depose to an affidavit in support of summary judgment, the deponent must satisfy the threefold requirements under the Rule, regardless. of which side of the fence it originates from. The basics are that the deponent must satisfy the requirements of verifying the facts on which the claim is. based; it further requires that the deponent must have a stated belief that there is no defence to the claim; and the affidavit may even contain statements of information or belief with the sources and grounds thereof and also that the deponent has the ability to swear positively to the facts verifying the claim.

[55] In Swaziland Manufacturing and Allied Workers Union v Alex Shabangu and Co., Civil Appeal Case No-52/2003, Steyn JA dealt with a comparable issue as to the identity of the deponent who files a supporting affi4avit in a su1nmary judgment application. The Court emphasized th differences between our local rules vis-a-vis South African, also between the old and the new local rules. The

Court referred with approval to an extract from the judgment then undet appeal where the Court stated that:

> "The Swaziland High Court Rule 32 (3) (a) as it presently stands does not.specify by who affidavit is to be made, at all. Nor does it even require quantum of the claim to be verified. It does require a stated belief that there is no defence to the. claim, but not also that the defence is *bona fide* or that the notice to defend is dilatory or that it has been delivered solely for the purpose of delay. In addition, such an affidavit may even contain statements of information or belief with the sources and grounds thereof".
>
> "Stripped of all but the bare essentials., the deponent of the affidavit in our law is really required only to verify the fa ts on which the claim is based and state his belief of a non-defence."

[56] Unconventional as it may be, the three defendants *a quo* who chose to file affidavits in support of summary judgment incorporated the triad of requirements to do so. In fact, they placed a very comprehensive picture of the matter before the court and in so doing, also provided a different perspective to the manner in which the

business .was operated and how it came about that the Bank was obliged to call up the differept loans.

[57] There are many accusations from both quart rs wherein the company directors blame each other for their misfortunes. All of this might well become subject future litigation between them but as things now stand, I agree with the learned Judge *a quo* that even on a comprehensive analysis, the cause of action as stated in the summons did not require refe1Tal to trial in order to ascertain. the existence or otherwise of a triable defence, *bona fide* or not.

[58] The High Court rightly concluded, in my considered view, that from all of the available material before the Court, summary judgment was justified. Obviously the Court also considered the affidavits of the supporting defendants, as well as submissions by counsel. Ultimately, the .three appellants had judgment entered against them in the amounts claimed, plus interest and *costs:* The 2nd, 3rd and 4th respondents were not included.

[59] The Court did not expressly state the reasons why they were not also included. The only explanation could be that an assessment of their affidavits as well as the re1nainder of the evidentia:ry material, the learned Judge *a quo* did not consider it to be proper to include them

in the final order. The explanation which was offered as to how it came about that they were also sued as defendants by the Bank fell on fruitful soil. What this translates to is that these three respondents are not also liable to pay to the first respondent the claimed amounts each, jointly and severally, one paying the other absolved, plus interest and costs. The order does not exonerate or absolve them, it only does not include them as judgment debtors.

[60] It must be recalled that shareholders in a company with limited liability remain exposed to the fortunes and woes of the company to the extent of their unpaid shares, hand in hand with the loss of value of all other shareholding. Should the first appellant be unable to pay its debts, inclusive of the judgment at hand, various legal procedures may well be implemented to obtain payment of its obligations. There is also a mortgage bond over fixed property which will feature in the process of execution, as well as other instruments on which the Bank wili rely. In the event that letters of execution be presented for issue herein, the Registrar/Sheriff is directed to note the anomaly in the description of property vis-a-vis the application to execute and judgment of the High Court.

[61] It is for the reasons as recorded above that I cannot conclude that the appeal must be allowed and that the impugned judgment be set aside. It is therefore ordered that:

The appeal be dismissed, with costs.

J.P ANNANDALE

JUSTICE OF APPEAL

I **agree·** **MCB Maphalala CJ**

I **agree** **SB Maphalala JA**

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