

**IN THE KWAZULU NATAL HIGH COURT, DURBAN  
REPUBLIC OF SOUTH AFRICA**

*REPORTABLE*

**5994/2010**

**CASE NO.**

In the matter between:

**UNUS AHMED MEER N.O**

**FIRST PLAINTIFF**

**FATHIMA GOOLAM HOUSEN MEER N.O**

**SECOND PLAINTIFF**

**SHAKEEL AHMED UNUS MEER N.O**

**THIRD PLAINTIFF**

**FURZANA UNUS MITHA NO.**

**FOURTH PLAINTIFF**

and

**NELESCO 655 (PTY) LTD T/A KENPRINT**

**FIRST DEFENDANT**

**LOUISA FOURIE**

**SECOND DEFENDANT**

**GREIG BRIMER**

**THIRD DEFENDANT**

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**JUDGMENT**

*Delivered on: November*

*2010*

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**NGWENYA AJ:**

**Introduction**

[1] This application deals with the *locu standi* of a mortgagee who has perfected its Notarial Bond over the movable assets retained in a property which is the subject of a lease. In perfecting the Notarial Bond the mortgagee was or its duly authorized officials were appointed the mortgagor's attorney and agents for the purposes of taking possession of

and realizing the pledged goods and for conveying valid title and ownership in and to the goods to the purchasers thereof. This authority also extended to the mortgagee continuing with the business of the mortgagor, *“in its stead and acting, until such time that the mortgagee has disposed of it...”*

[2] The question which falls to be answered here is whether in those circumstances the mortgagee can validly resist an eviction order by the landlord on behalf of the mortgagor, and raise substantive defences available to the latter.

[3] It is common cause that the mortgagor here cited as the first defendant is in arrears in its rental for a substantial amount of R484 594.47 plus interest. There is a dispute as to whether the landlord plaintiff has complied with the terms and conditions of the lease terms. The only two directors of the first defendant who were also sureties have already conceded judgment in their respective personal capacities.

In this application for summary judgment the opposition is mounted by Business Partners Limited. It seeks its *locu standi* on the Power of Attorney signed when it perfected its mortgage bond along the lines outlined in paragraph 1 above.

[4] It is a company duly registered in accordance with the company laws of the Republic of South Africa. It is not intervening as a third party. It is contended on its behalf that it is duly authorised by the first defendant to act on its behalf by virtue of the Power of Attorney. Mr. Goddard for

Business Partners submitted that the Power of Attorney to act in *casu* covers eventualities like the one at hand. Ms. Moodley for the plaintiff took a different view. It is her contention that in the absence of a third party notice to intervene, Business Partners is not properly before Court and should not be given audience.

- [5] In approaching the enquiry at hand, I start with the words of Lord MacNaughten in ***Salomon v Salomon and Co, 1897, A.C*** at 51, pronouncing himself as follows:

*“the company is at law a different person altogether from the subscribers to its memorandum, and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hand receives profits, the company is not in law the agent of its subscribers or a trustee for them.”*

- [6] Likewise in ***Dadoo Ltd and Others v Krugersdorp Municipality Council 1920 AD 530***, in similar vein Innes CJ, had this to say:

*“This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be regarded as vested in all or any of its members.”*

To this I should repeat the obvious. While the company has a separate legal existence to that of its members, it always acts through natural persons. Its' mind vest in its directors. They, only they decide how the company should act. While they can direct and employ people, they cannot be in possession of the company assets or business. To the extent that they may be perceived to be, they are only so doing on behalf of the company. Differently put, their conduct is a manifestation of the

juristic person's conduct, the company.

[7] The directors of the first defendant have filed affidavits ostensibly conceding summary judgment on behalf of the first defendant. In their affidavit they each state that they "*have no objection to summary judgment being granted as prayed*" against the first defendant. This they do in their personnel capacities. Therefore in my judgment such conduct is not that of the first defendant.

[8] In giving Business Partners, a Power of Attorney to act, first defendant was not divesting itself of its business. While it might have given Business Partners possession thereof in the sense of day to day running of the business, it nevertheless remained in possession thereof. In as much as any decision taken could only be valid if approved by the first defendant. As the conduct of the first defendant can only be gleaned from that of its directors, it would not help Business Partners here to claim out of its own volition that first defendant is opposing the application for summary judgment here. I think Business Partners has misconstrued whatever mandate it was given here. Firstly, I do not agree that the Power of Attorney to act extended to the present proceedings. But even if I am wrong on this observation, the conclusion remains. A Power of Attorney to act authorizes the agent to act in the stead of his principal as if the principal was there. In short, Business Partner here speaks in tongues. In one breath it says it is the first respondent who is acting. But on the same breath it says Business Partner is acting in its own name by virtue of the Power of attorney authorizing it to act. Yet it is not party to these proceedings.

[9] First defendant can only act through its directors. This means if it

intended to oppose the application for summary judgment, as a party to the proceedings it could only have done so in its name. Likewise had Business Partners have wanted to act in terms of the Power of Attorney authorising it to act, it could only do so in its name. In the circumstances of this case, it is manifestly obvious that Business Partners assume that it has the power of the directors of the first defendant. This interpretation of its mandate is misconceived.

[10] In the result I conclude that Business Partners is not authorised by the first defendant to act in this matter. The Power of Attorney to act was conceived at the time when these proceedings were not even contemplated. It cannot be that first defendant could have abdicated its right to exist and left everything to the discretion of Business Partners. Even if that was the case, it could not be seriously contended that first defendant is now directorless so much so that Business Partners can do what it wishes with and for the first defendant. No doubt, had Business Partners intervened as a third party a different scenario would have emerged.

[11] It follows from what I say above that it must pay all the costs occasioned by the opposition of this application. There is no reason to mulct first defendant with such costs when in fact it did not oppose the matter. This being the situation, it follows that summary judgment has to be granted in favour of the plaintiff as set out in paragraph 1 of its counsel's Heads of Argument.

Accordingly I make the following order:-

1. Business Partners Ltd is not authorised to act in this matter.  
Accordingly not properly before Court;
2. Business Partners Ltd to pay all the costs associated with the  
opposition of the application for summary judgment;
3. First defendant is ordered to pay the sum of R484 594-47 to the  
plaintiff;
- 3.2 Interest on the sum of R484 594-47, at the rate of 16% calculated  
from the date of service summons to date of payment;
- 3.3 Confirmation of plaintiff's cancellation of the lease agreement;
- 3.4 Ejectment of the defendant and all persons claiming occupation  
through defendant from the plaintiffs' aforesaid property; and
- 3.5 Costs of suit as between attorney and client.

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**NGWENYA AJ**

Date of Hearing : 28 October 2010

Date of Judgment : 19 November 2010

Plaintiffs' Representative : **MS. A MOODLEY**

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