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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **10191/2017**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

28/11/2017

DATE

SIGNATURE

In the matter between:

NATIONAL EMPOWERMENT FUND

APPLICANT

and

C-PRO CONSTRUCTION (PTY) LTD

1ST RESPONDENT

STANDARD BANK OF SOUTH AFRICA LTD	2ND RESPONDENT
FIRST NATIONAL BANK, a division of FIRSTRAND BANK LTD	3RD RESPONDENT
ABSA BANK LTD	4TH RESPONDENT
NEDBANK LTD	5TH RESPONDENT
TWO SHIPS TRADING 326 (PTY) LTD t/a SUSUKI MOTORS (REGISTRATION NO. 2006/023185/07)	6TH RESPONDENT
LANSERIA AIRPORT (PTY) LTD (REGISTRATION NO. 1991/001749/07)	7TH RESPONDENT
THE WALTER SISULU UNIVERSITY	8TH RESPONDENT
THE MANGUANG METROPOLITAN MUNICIPALITY	9TH RESPONDENT
DEVELOPMENT BANK OF SOUTHERN AFRICA	10TH RESPONDENT
TSHWANE UNIVERSITY OF TECHNOLOGY	11TH RESPONDENT
UNIVERSITY OF JOHANNESBURG	12TH RESPONDENT
HLABATSHANE SCHOOL	13TH RESPONDENT
NEW SEHLABENG INTERMEDIATE SCHOOL	14TH RESPONDENT
NEW TWEESPRUIT PRIMARY SCHOOL	15TH RESPONDENT

JUDGMENT

FISHER J:

INTRODUCTION

[1] This application, having first been brought in the urgent court and found not to be sufficiently urgent, now comes before me in the normal course. The applicant seeks an order in terms of which it be allowed to exercise certain security provisions under a loan agreement with the first respondent.

[2] The applicant, the NEF was established in terms of the National Empowerment Fund Act of 1998 (*“the Act”*) for the purposes of facilitating the redressing of economic inequality by providing historically disadvantaged persons with structured and directed financial support.

[3] The first respondent, C-Pro applied for and was granted a loan by the NEF in terms of a Revolving Credit Facility Agreement (*“the agreement”*). In terms thereof *the facility was to be used to finance the working capital requirements of C-Pro to execute a contract to construct a fire station at Lanseria (“the Lanseria contract”) and a contract with Suzuki Motors to build a new vehicle show room (“the Suzuki contract”)*.

[4] In terms of the agreement, security was provided for the loan in various forms including cession of proceeds of the Suzuki contract. It is these securities that the NEF seeks to enforce in this application.

[5] Pursuant to an express provision of the agreement, a written deed of cession (*“the cession”*) was entered into in favour of the NEF of the proceeds of the Suzuki contract. It is the terms of the cession which are central to the determination of this matter. The parties to the cession are C-Pro, the NEF, and the sixth respondent Two Ships which trades as Suzuki Motors. Two Ships is the entity from which the proceeds ceded in terms of cession were to flow. In terms of the cession, C-Pro

ceded and transferred to the NEF all rights and interest in the proceeds as security for payment under the agreement.

Clause 5 of the deed of cession is important and reads as follows:

“5.1. To give effect to this cession, two ships shall pay the balance of the proceeds of the Contract due as at the date of last signature to this cession document to the Cedent into the following bank account;

<i>Account Name:</i>	<i>National Empowerment Fund</i>
<i>Bank:</i>	<i>Standard Bank</i>
<i>Account Number:</i>	<i>[...]</i>
<i>Branch:</i>	<i>Sandton</i>
<i>Branch Code:</i>	<i>019 205</i>

5.3. The Cessionary shall deduct from such proceeds all amounts due to it in terms of the Revolving Credit Agreement and shall pay the balance to the Cedent.

5.4. The Cessionary hereby warrants that the above mentioned banking details are accurate and correct.

5.5. Further the Cedent hereby indemnifies two ships against all claims arising from its compliance with clause 5.1.”

[6] In terms of the agreement, provided no default had occurred, C-Pro would be entitled to disbursements from the NEF in the amount of R 5 200 000 and a further amount of R2,800,000.00 was made available conditionally, in that it could be drawn to meet any delays that could have financial implications on the Lanseria and Suzuki contracts, should the need arise.

[7] The capital amounts owing under the agreements were to be repaid quarterly and the outstanding balance would be settled on the final repayment date. C-Pro would be entitled to request a disbursement of any portion of the facility that has been repaid by it to the NEF.

[8] The initial advance of R 5 200 000 was made under the agreement to C-Pro and it is common cause that it was liable to make the first repayment on 31 January 2017.

[9] C-Pro was not in a financial position to make payment at this time. It thus sought that it be allowed to draw the balance of R 2 800 000. It contends that the conditions for the drawing of this amount had been met.

[10] By this stage however events had unfolded which the NEF contends amounted to default of the agreement and that it was thus not obliged to advance the amount of R 2 800 000. C-Pro, on the other hand, contends that it was not in breach of the agreement and thus was entitled to the advance of the R 2 800 000. It contends further that had the advance been made, it would have been in a position to pay the amount due to NEC under the agreement on time – i.e. by 31 January 2017. It states that a further option, which is contemplated in the agreement, would have been for the remaining amount to have been “disbursed” by the NEF deducting it from the payment due. Had this been done, argues C-Pro, it would not be in default of payment. It contends that it follows that it should not be held to be in default as the NEF was the author of its default.

[11] In terms of the agreement, the NEF was entitled, in the event of breach, to refuse to allow C-Pro to make any further disbursement request against the facility and to exercise its rights in respect of any security provided in terms of the agreement.

[12] C-Pro thus agrees that in the event of this court finding that it had breached the agreement, then it has no defence to the claim. It asserts however that there was no breach.

[13] The breach relied on by the NEF is a breach of the cession. In terms of the agreement, should the cession agreement be breached then this would constitute default in terms of the agreement. It is common cause that the proceeds of the contract were not paid by Three Ships to NEF, but instead were paid to C-Pro. It appears that this was on the instruction of C-Pro in that on 09 March 2017 it wrote a letter to the NEF in terms of which it stated the following:

“We made a mistake by instructing Suzuki not to make payment to the NEF, but to pay the amount due, directly to us, believing that we were acting correctly. We stress that the owners of Suzuki, Two Ships, was at no stage involved in the decision to ignore the cession and made payments to C-Pro directly.(sic)”

[14] It is contended on behalf of C-Pro that the failure to pay the amount to the NEF was not a breach of the cession and hence the agreement in that, given that the cession was one *in securitatem debiti* it could only be relied on in the event of default of the agreement which it alleges cannot be said to have occurred because of the fact that the draw-down of the R2 800 000 was not allowed.

[15] This somewhat circular and contrived argument finds no substance in the terms of the cession. What is clearly provided in terms thereof, is provision for the payments to be made immediately and not only on default. Indeed provision is made in the cession for the payments due under the agreement to be deducted from the proceeds of the Suzuki Contract. The payments under the cession were thus a payment mechanism as much as a security. It is clear that, on its own admission, C-Pro at best acquiesced in the failure to comply with the cession and at worst

orchestrated it. In any event it makes no difference. The fact is that the cession was indeed breached and it follows that the agreement was breached. NEF is thus entitled to enforce its security.

[16] It is argued on behalf of C-Prop that the NEF has not adhered to the spirit and purpose of the Act in seeking to enforce the agreement under circumstances where more funds could and should have been advanced so that the agreement could continue and the funding flow to C-Pro for the purposes of carrying out the Lanseria and Suzuki projects. Indeed the undisputed facts show that it is C-Prop who has flouted the agreement. If the NEF allowed its borrowers to conduct themselves in the manner that C-Pro suggests it should have been allowed to do, this would inure to the detriment of the fund and its purposes.

ORDER

I thus make the following order:

- (a) The applicant is authorised to debit, as and when funds are available in account Number: [...] as well as any other accounts held by the First Respondent at the Second Respondent and from all and any accounts held by the First Respondent at the Third, Fourth and/or the Fifth Respondents, all amounts as are due to the Applicant by the First Respondent under the Credit Facility Agreement.
- (b) The Second, Third, Fourth and Fifth Respondents are ordered to pay to the Applicant or its attorneys all and any amounts as may be due to the Applicants by the First Respondent in accordance with (a) above;
- (c) No transactions by any person other than the Applicant or its attorneys shall be permitted to be transacted on the accounts to which reference is made in (a) until the full amount due under the Agreement is made

and the Applicants' attorneys have in writing certified that such amount has been fully paid.

(d) The Applicant is authorized to claim payment of all amounts owing or which in future may become owing to the First Respondent by the Sixth to Fifteenth Respondents and any other debtors of the First Respondent up to the extent of the amount owing in terms of the Credit Facility agreement.

(e) The costs of this application are to be paid by the First Respondent.

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 08 November 2017

Judgment Delivered: 28 November 2017

APPEARANCES:

For the Applicant: Adv RL Kayingo instructed by Mothle Jooma Sabdia Inc .

For the 1st Respondent: Adv JA Klopper Instructed by KMG & Associates Incorporated.