IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 550/2010
Date heard: 04 May 2010
Date delivered: 11 May 2010

In the matter between:

NEDBANK LIMITED Applicant

and

USEBENZO TRADING CC
REGISTRATION NUMBER 2008/03161/23 Respondent

JUDGMENT ON APPLICATION FOR SUMMARY JUDGMENT

DAMBUZA, J:

[1] The applicant, NEDBANK LIMITED, a registered bank in terms of the Companies Act (Act 61 of 1973 as amended), seeks an order of summary judgment against the respondent, USEBENZO TRADING CC, a close corporation duly incorporated in terms of the Close Corporation Act (Act 69 of 1984), in the amount of R296,991.21 together with interest thereon at 12.50% from 1 January 2010 and costs of suit as between Attorney and Client. The respondent opposes the application on the basis that the written loan agreement on which the applicant relies is not

binding, as it was never signed on behalf of the applicant.

[2] In the summons, the applicant pleads, amongst others, that on 9 April 2008, at Port Elizabeth the parties entered into a partly written, partly oral agreement. Leon Coetzee (Coetzee), a member of the respondent, represented the respondent when the agreement was entered into. In terms of this agreement the applicant would loan and advance to the respondent an amount of R300,000.00 which would be payable in monthly instalments. A variable interest rate of 16.50% per annum would be payable on the amount loaned. A document termed the “Term Loan Agreement” which, according to the applicant, embodies the terms of the agreement between the parties is attached to the summons.

[3] The applicant pleads in the summons that the respondent has defaulted in its monthly repayments to the applicant to the extent that as at 15 January 2010 the respondent was in arrears in the amount of R28,410.88.

[4] Of the allegations made by the applicant in the summons, the only one disputed by the respondent is the reference to the agreement between the parties as having been partly written and partly oral. In the opposing affidavit, Coetzee states that the parties always intended to conclude a wholly written agreement, the terms of which would only be effective once the agreement was signed by both parties.[1] Indeed clause 2 of PART N (Annexure A) of the "Term Loan Agreement" provides that:

"Once signed, the agreement constitutes a binding agreement between the bank and the client and contains all the terms and conditions applicable to the Loan"

[5] It is trite law that in opposition to an application for summary judgment a respondent must set out in his or her affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim (put differently, a *bona fide* defence).[2]

"The subrule (Subrule 32 (3) (b)) does not require the defendant to satisfy the court that his or her allegations are believed by him or her to be true. It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing; or, put, differently, if his or her affidavit shows that there is a reasonable possibility that the defence he or she advances may succeed at trial."[3]

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[1] "… it was always intended by the parties to reduce their agreement to writing and that the written document will be the exclusive memorial of the transaction and that it will come into existence once it had been signed by both parties."

[2] See Rule 32 (3) (b) of the Rules of this Court; **Marsh v Standard Bank of SA Ltd** 2000 (4) SA 947 (W)

[3] Erasmus; Superior Court Practice; at B1-224 and the authorities quoted therein.

[6] It was submitted on behalf of the applicant that failure by the applicant to sign the agreement is not fatal to the agreement. This is particularly so, it was argued, as the applicant had advanced the money which is the subject matter of the agreement and the respondent had accepted it.

In **Goldblatt v Freemantle** 1920 AD 123 at 128-129 **Innes CJ** held that:

> "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (se Voet 5.1.73; Van Leeuwen 4.2, Decker's note);and in that case there will be no blinding obligation until the terms have been reduced to writing and signed. The question is in each case, one of construction."

In **Woods v Walters** 1921 AD 303 at 305, **Innes CJ** referred to the above passage and added:

> "It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until due execution of a written document lies upon the party who alleges it."

[7] In this case it is common cause that the parties intended that the terms of the agreement between them be reduced to writing and signed by them. It

would appear that the responsible person(s) simply omitted to sign the agreement on behalf of the applicant. But the applicant went on to offer the loan to the respondent, and the latter, in the face of the omission, accepted the loan. The parties therefore performed in terms of the agreement. They both considered themselves to be bound by the terms of the "Term Loan Agreement"; until the respondent discovered the omission of a signature on behalf of the applicant. The parties were therefore *ad idem* as to the terms on which the loan amount was advanced and accepted. It is, in my view, opportunistic of the respondent, having only noticed the error regarding the signature when it received the summons, to plead that the loan may have been advanced on terms other than those that had been agreed upon between the parties.

[8] This case is comparable to **Roberts and Another v Martin** 2005 (4) SA 163 wherein the respondent had agreed to sponsor some of the second applicant's tennis activities. He (the respondent) instructed his attorneys to prepare an agreement to regulate the sponsorship agreement. The written agreement was presented to the applicants for signature and both

applicants duly signed it. The respondent, however, never signed the agreement, but he did act in terms thereof in financing the second applicant's career for some time. About six months after the agreement was signed, the respondent informed the applicants that he would not honour the sponsorship agreement as he considered himself not bound thereby. In opposing a High Court application for specific performance he relied, amongst others, on the fact that he had never signed the written sponsorship agreement. He contended that the parties had intended that the agreement between them had to be reduced to writing and signed by both parties to have a binding effect. At 167 H-J **Ndita AJ** held that:

"It is trite law that where an offer is made and the party to whom it is addressed, with knowledge of the offer, performs an unequivocal and unambiguous act of acceptance, then the parties are in law held to have contracted with one another on the terms as contained in the offer."

[9] In this case, the respondent having unequivocally accepted the loan offered to it by signing the written agreement and accepting the loan amount, I am not persuaded that there is a reasonable possibility that the defence it advances may succeed at trial.

[10] Consequently, summary judgment is granted against the respondent for:

(a) Payment of R296,991.21;

(b) Payment of interest on the said sum of R296,991.21 at the rate of 12.50% from 1 January 2010 to date of payment;

(c) The applicant's costs of suit as between attorney and client.

N. DAMBUZA
JUDGE OF THE HIGH COURT

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Heard on:	4 May 2010
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