

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 111/2011

In the matter between:-

UMSOBOMVU YOUTH FUND

Applicant

and

E2BA LE2 (PTY) LTD

First Respondent

(Registration No. 2007/031364/07)

SAMUEL MORENA LEHLOKA

Second Respondent

THABISO LIVINSTONE MAY

Third Respondent

THABO MAY

Fourth Respondent

LERATO MSIBI

Fifth Respondent

OGANNE SHYLOCK PULE

Sixth Respondent

MOJAU RAMATHE

Seventh Respondent

JUDGMENT BY:

KRUGER, J

HEARD ON:

3 NOVEMBER 2011

DELIVERED ON:

10 NOVEMBER 2011

(i) **INTRODUCTION**

1. The applicant seeks repayment of a loan it made to the first respondent. The liability of the second to seventh

respondents, directors of the first respondent, flows from a deed of suretyship. The applicant also seeks confirmation of a rule perfecting a Notarial Bond over first respondent's movable assets.

(ii) **THE PARTIES**

1. The applicant describes itself in the founding affidavit as the 'UMSOBOMVU YOUTH FUND a section 21 company'. The National Youth Development Agency Act 54 of 2008, which came into operation on 6 February 2009 provides in section 21(2) for the transfer of the assets, rights, obligations and liabilities of UMSOBOMVU Youth Fund and The National Youth Fund to the National Youth Development Agency established under section 2 of Act 54 of 2008 ("The Agency"). The Agency is a national public entity as defined in section 1 of the Public Finance Management Act 1 of 1999, being something established in terms of national legislation (Act 54 of 2008), funded by the State and accountable to parliament (definition of "national public entity" in section 1 of Act 1 of 1999).

The letter of demand of 10 November 2010 is in the name of the Agency. It is not apparent from the papers why this application was not launched in the name of The Agency. The notice of motion was signed by applicant's attorney on 13 December 2010, apparently signed by the Registrar on 11 January 2011, and service on the respondents took place on 19 May 2011 by means of attachment to the main entrance at Plot 155, Roodewal, Bloemfontein.

2. The first respondent is the company that was the beneficiary of the loan agreement, and whose property, wherever situate, is the subject of the Notarial Bond. The second to seventh respondents are the directors of the first respondent and its sureties.
3. The fourth respondent, in person, presented argument on behalf of all the respondents in court. The third, fourth and sixth respondents were the only respondents present in court during argument before me.

(iii) **RELIEF**

1. On 4 August 2011 a rule *nisi* was issued by agreement authorising the applicant to perfect its security in terms of its Notarial Bond. The sheriff was authorised to immediately attach all the first respondent's movable property at 95A Kellner Street, Bloemfontein.

2. Prayer 3 of the notice of motion seeking judgment against the first and second respondents for payment of R2 929 325.00, interest and costs was in terms of the court order of 4 August 2011 postponed to the return day of the rule *nisi* "subject to any amendment thereof". No amendment was effected in writing. At the close of his argument Mr. Harrison, for the applicant, sought to amend prayer 3 of the notice of motion by replacing "First and Second Respondents" with "First to Seventh Respondents". The respondents who were in court, objected to this amendment on the basis of prejudice. Mr. Harrison said that if the amendment was disallowed, the relief against the third to seventh respondents should be postponed *sine die*.

(iv) **APPLICANT'S CASE**

The applicant, says Mr. Harrison, has a straightforward case: it advanced money to the first respondent, no payments were made, repayment is due.

(v) **THE RESPONDENTS' CASE**

The defences can be tabulated as follows:

1. Failure of applicant to pay timeously.

As illustration of this contention the respondent says that applicant did not pay the landlord on time resulting in lockouts and disruption of the respondents' business.

The applicant's response is that it was not a party to the lease agreement; it had no contractual duties towards the landlord. If the landlord acted illegally by spoliating the respondent, the respondent had remedies. It was not applicant's fault that first respondent was spoliated, if that did happen.

2. Applicant did not assist the respondent in solving the problems it had in developing its business.

Respondent says that applicant did a Due Diligence study, as well as an Aftercare Report, which both indicated that the respondent had a feasible business if assisted by the applicant, as was the applicant's duty.

The applicant's response is that the respondents' business is in the hands of its management team as is set out at page 415. The aftercare report of December 2009 demonstrated that the respondent was not operating and in dire financial straits. The aftercare report was a rescue plan, not a variation. The loan agreement contains a non-variation clause (page 47, clause 22). No amendment is binding unless recorded in a written document signed by the parties. See **SA SENTRALE KO-OP GRAANMAATSKAPPY BPK v SHIFREN EN ANDERE** 1964 (4) SA 760 (A) at 766 G - H; **BRISLEY v DROTSKY** 2002 (4) SA 1 (SCA).

3. It is the applicant's duty to guide and assist entities like the respondent so as to promote the interests of the youth in participation in the economy (section 3 of Act 54 of 2008).

The respondents say the applicant should help it, not sue it.

In answer Mr. Harrison refers to section 51(1)(b)(i) of the Public Finance Management Act 1 of 1999 which imposes a duty on applicant to collect all revenue due to it.

(vi) **ARGUMENT BY MR. MAY**

The fourth respondent, Mr. May, one of the directors of the first respondent, pointed out that applicant took a shareholding in the first respondent for R500 000.00. Applicant also had a nominee on the board of directors, namely Mr. Dumisa Gumede, who was the partnerships manager of the applicant. According to Mr. May Mr. Gumede attended all board meetings of the first respondent. Mr. May said the applicant, through Mr. Gumede, was involved in all decisions taken by the first respondent. As to the failure by the applicant to pay the first respondent and its creditors on time, Mr. May referred expressly to the webmail provider, Actaris, who pulled out, as a result whereof respondent could do no business. With reference to the

2009 meeting at which the situation of the respondent was discussed, Mr. May pointed out that this meeting was followed by the aftercare report. Mr. May also referred to the entity MoPay, run by one Cobus Potgieter, who failed to deliver what he had promised the respondent, to the detriment of respondent. Mr. May contended that applicant should have been aware of these pitfalls and should have assisted the respondent.

(vii) **CONCLUSION**

The crux of the defence is that the applicant failed to mentor and guide the respondent. As is pointed out by the applicant in its papers, applicant fulfils its function by giving loans to people who would not qualify to get money from banks and financial institutions, at favourable interest rates (1% below prime rate). Applicant is not part of the business. The fact that it has some shares (for which it paid) makes applicant share in the loss. The fact that it has a nominee on the board of directors means that it can talk to the other directors. Applicant's nominee director is not part of the management team. He cannot tell first respondent what to do or to decide.

The respondents have no defence to the money claim, or the claim to confirm the rule relating to perfecting of the Notarial Bond.

(viii) **THE AMENDMENT**

The respondents were not legally represented at the hearing, when the amendment of prayer 3 of the notice of motion was sought. The respondents are entitled to have the benefit of the opportunity to consider that proposed amendment and to possibly discuss it with a legal representative. Mr. Harrison's suggestion that relief against the third to seventh respondents in respect of the money claim be postponed *sine die* should be followed.

(ix) **ORDER**

1. The rule *nisi* granted on 4 August 2011 is confirmed.
2. The first and second respondents are ordered jointly and severally to pay the applicant:
 - (a) R2 929 325.00
 - (b) Interest on that amount at 1% below the prime overdraft rate from 1 September 2010 to date of payment.

- (c) Costs on the scale as between attorney and client.

A. KRUGER

On behalf of applicant:

Mr. G.M. Harrison
Instructed by:
Hutchinson Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Fourth respondent - In person

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