

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA  
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**In the matter between:**

**Case No: EL: 224/2011**

**ECD: 224/2011**

**IDEA TECHNOLOGIES (PTY) LTD**

**Applicant**

**And**

**AK COMMUNICATIONS CC**

**First Respondent**

**THE MANAGER, NEDBANK LTD**

**VINCENT PARK, PORT ELIZABETH**

**Second Respondent**

**Coram: Chetty J**

**Date Heard: 17 May 2011**

**Date Delivered: 31 May 2011**

**Summary:** Final interdict – Requisites for established – First respondent admitting liability to applicant – Form of relief circumscribed – Rule *nisi* confirmed in part

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**JUDGMENT**

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**Chetty, J**

[1] The first respondent was awarded a tender to supply the Compensation Fund (the Fund) with toners, cartridges and photo conductors on a quotation and purchase order basis and to that end concluded a service level agreement with the Fund. By its own admission it lacked the financial

resources to fulfil its contractual obligations and consequently entered into a written agreement with the applicant for the supply to it of the goods which formed the subject matter of the service level agreement with the Fund.

[2] The agreement concluded between the applicant and the first respondent provided as follows:

- "1) It is recorded that for the duration of the contract with the Compensation Commissioner, the Managing Director of "Idea", i.e. Edward Jadine Batty, or failing him for whatever reason whatsoever, Nobubele Valencia Vuba shall enjoy joint signing authority on any banking account operated by AK Communications and specifically the cheque account at Nedbank, Account Number 1206 075 155. Branch Code 120 621.
- 2) It is furthermore recorded that "Idea" have secured the supply of printer cartridges to be sold by "AK Comm" to the Office of the Compensation Commissioner and by virtue of its financial exposure which will arise out of the execution of contract, "Idea" shall be entitled to payment of 50% (fifty percent) of the Gross Profit generated by all sales from "AK Comm" to the Office of the Compensation Commissioner.
- 3) Should the managing member of "AK Comm", i.e. Sitembiso Sicengu become unable, for any reason whatsoever, to continue to operate the business known as "AK Comm", the said Sitembiso Sicengu hereby nominates irrevocably Nobubele Vuba to assume his functions as managing member of "AK Comm" for purposes of completing the contract with the office of the Compensation Commissioner.
- 4) "AK Comm" hereby acknowledges that no other party will

be involved in this contract other than "Idea".

- 5) The parties hereto record that the printer cartridges to be delivered in terms of this contract, will be supplied by Advanced Channel Technologies (Pty) Ltd and that agreement has been reached with Advanced Channel Technologies (Pty) Ltd to the effect that payment to the supplier, i.e. Advanced Channel Technologies (Pty) Ltd, will be made immediately upon, but no later than 7 days after receipt of payment from the Office of the Compensation Commissioner.
- 6) Sitembiso Sicengu hereby acknowledges that he shall not be entitled to sell, divest in any other way part with the 100% members interest that he currently holds/owns in "AK Comm" for the duration of this contract.
- 7) It is furthermore recorded that the parties hereto acknowledge that this venture shall be conducted throughout the utmost good faith."

[3] Initially, the contractual arrangements between the applicant and the first respondent were performed in the manner provided for in the agreement. During August 2010 however, the first inkling that the first respondent had breached the terms of the agreement surfaced and, potentially exposed to risk, the applicant unsuccessfully attempted to resolve the impasse between itself and the first respondent's alter ego, Mr *Sitembiso Sicengu* (*Sicengu*). The first respondent's breach of its contractual obligations was further exacerbated by its refusal in September 2010 to authorise the transfer of funds received from the Fund in accordance with the agreement. Further enquiries revealed the withdrawal of funds, likewise in breach of the agreement.

[4] Notwithstanding the fact that as far back as January 2011, the applicant had been apprised of the fact that a substantial amount of money had been deposited into the first respondent's banking account with the second respondent coupled with the refusal to settle its indebtedness to the applicant and the removal of the applicant's managing director, *Edward Jadine Batty (Batty)* as a signatory to the banking account as envisaged in paragraph 1 of the agreement, the applicant, save for remonstrating with *Sicengu*, took no tangible steps to protect its interests.

[5] On 4 March 2011, it awoke from its slumber and sought orders as one of urgency in which the relief was framed as follows:-

"2. Directing that a rule nisi to issue returnable on a date to be determined by the above Honourable Court calling upon the First Respondent to show cause, if any, why, pending an action to be instituted by the Applicant against the First Respondent for all amounts due to the Applicant in terms of the Memorandum of Agreement entered into between the Applicant and the First Respondent and costs;

2.1 The First Respondent should not be interdicted and restrained from making any withdrawals from its bank account held at the East London branch of Nedbank, Vincent Park (the bank) under account number 1206 075 155 (the bank account) without the prior written permission of the Applicant.

2.2 The First Respondent should not be directed to deposit into the bank account all amounts it may receive as payment from the Compensation Fund in

respect of the supply of toners and printer cartridges;

- 2.3 The Compensation Fund should not be directed to deposit into the bank account all amounts payable by it to the First Respondent in respect of the toners and printer cartridges which have and will be supplied to the Compensation Fund in accordance with the tender awarded to the First Respondent by the Compensation Fund.
- 2.4 The Sheriff of the above Honourable Court should not be authorised and directed to attach all funds in the bank account.
- 2.5 The First Respondent should not be directed to pay the costs of the Application.”

[6] There is no clear indication from the papers that the application was served on the second respondent but the application was nonetheless entertained as one of urgency and a *rule nisi* issued in conformity with the relief foreshadowed in the notice of motion. On 18 March 2011, the first respondent gave notice of its intention to oppose the application and filed its answering affidavit on the return day. By agreement between the parties the matter was postponed to the 17<sup>th</sup> of May 2011 with directions as to the filing of further papers.

[7] The answering affidavit, in common with the founding affidavit, lacks cohesion and is likewise not a model of clarity. It raises a dispute of fact but it is unnecessary to deal with it or the founding affidavit in any detail for the simple reason that the first respondent, in contradistinction to its earlier

averments therein consented to an order being made authorising the second respondent to withhold an amount of R162 129, 97 standing to its credit in its banking account pending the finalisation of the proceedings. In the replying affidavit, the deponent thereto, *Batty*, sought the dismissal of the first respondent's opposition to the application and confirmation of the rule nisi only in the amount of R162 791, 33. In amplification of this narrowed ambit of the relief sought, he annexed a letter addressed to the first respondent's manager wherein the following agreement is recorded as follows:-

"2.1 It is agreed that A K Communications is indebted to our client, Idea Technologies (Pty) Ltd in the sum of R162 129, 97 and that instructions are to be given to Nedbank to release the sum of R162 129, 97 and for the said sum to be transferred to the following account:

Bank	:	First National Bank
Account Name	:	Edward J Batty
Branch Code	:	Private Client, Port Elizabeth
		258 612
Account Number	:	622 788 650 38

2.2 It is further agreed that in terms of the Court Order dated the 4<sup>th</sup> March 2011, the sum of R58 000, 00 is to be retained in the Nedbank account until further notice.

2.3 It is a further a term of the agreement that the balance in the said Nedbank account is to be released to AK Communications.

[8] In argument before me, Mr *Sicengu*, who argued in person, was constrained to concede that the first respondent was lawfully indebted to the applicant in the sum of R162 129, 97 and in effect consented to an order

being made in terms of which the second respondent was ordered to retain such amount in its banking account with the proviso that the first respondent be permitted to otherwise operate its banking account. The simple solution would of course be for the first respondent to pay its admitted liability to the applicant.

[9] It is apparent from the foregoing that the rule nisi must be confirmed with costs but its ambit curtailed. In the result the following order will issue:-

1. The rule nisi is confirmed to the extent that the second respondent is directed to retain and pay over to the applicant's designated banking account number 6227 886 5038 held at First National Bank under the name Edward J Batty, branch code, Private Client, Port Elizabeth 258 612 the amount of R162 129, 97.
2. The first respondent is to pay the costs of the application including the costs occasioned by the postponement on 28 March 2011.

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**D. CHETTY**

**JUDGE OF THE HIGH COURT**

Obo the Appellants: Adv Wood

Instructed by: Niehaus Mc Mahon, 13 Belgravia Crescent,  
Southernwood, East London, Tel: 043-743 3680

Obo the 1<sup>st</sup> Respondent: Sitembiso Sicengu