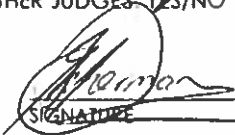


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>27/10/2020</u> DATE	
 SIGNATURE	

CASE NO: 20766/2019

**THE SMALL ENTERPRISE FINANCE  
AGENCY SOC LIMITED**

Applicant

(Registration number: 1995/011258/06)

and

**SAKTHI TRADING (PTY) LTD t/a SAKTHI FINANCIAL  
SERVICES (PTY) LTD**

First Respondent

(Registration number: 2009/014671/07)

**NEDBANK LIMITED**

Second Respondent

(Registration number: 1951/000009/06)

**STANDARD BANK OF SOUTH AFRICA LIMITED**

Third Respondent

(Registration number: 1969/017128/06)



**FIRST RAND BANK LIMITED t/a FIRST NATIONAL  
BANK**

(Registration number: 1929/001225/06)

Fourth Respondent

**ABSA BANK LIMITED**

(Registration number: 1986/004794/06)

Fifth Respondent

**CAPITEC BANK LIMITED**

(Registration number: 1980/003695/06)

Sixth Respondent

This judgement was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 27 October 2020

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**JUDGMENT**

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**INGRID OPPERMAN J**

**Introduction**

[1] On 25 November 2014 the Applicant and the First Respondent entered into a Developmental Loan and Capacity Building Agreement (*'the Loan Agreement'*) in terms of which the Applicant agreed to lend monies to the First Respondent which, in turn, would be utilised by the First Respondent to advance end-user financing to micro and survivalist enterprises. The loan funding provided by the First Respondent to end-users is defined in the Loan Agreement as *'End-User Loans'*.

[2] The First Respondent ceded and pledged to the Applicant all its rights, title and interests in and to all present and future book debts in respect of the End-User Loan



agreements ('the Security') as security for the due, proper and timeous performance of all of the First Respondent's obligations arising out of the Loan Agreement.

[3] The Applicant seeks, in the main, an order authorising it to perform certain acts for purposes of enforcing the Security granted to it by the First Respondent, an order interdicting and restraining the First Respondent from appropriating or in any way disposing of any amounts collected from its debtors who are debtors under the End-User Loans and that the First Respondent be ordered to permit the Applicant's representative/s to inspect all or any of the records of the First Respondent relating to the End-User Loan debtors and to take into possession any such original documents or copies thereof.

#### **Defences raised**

[4] In the answering affidavit, the First Respondent, the only respondent who opposed this application, raised 3 *in limine* defences: lack of jurisdiction, the alleged failure to give notice in terms of clause 7 of the Cession<sup>1</sup> and the absence of authority on behalf of the deponent to the founding affidavit to launch this application. In the heads of argument initially drafted, only the jurisdiction point was taken. Ms Dreyer who represented the First Respondent at the hearing of this matter but who was not the author of the initially drafted heads of argument, did not pursue the jurisdiction point. Wisely so.

[5] The issues which Ms Dreyer argued fell for determination were whether the Applicant had (a) made out a case for the relief having regard to the averments set out

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<sup>1</sup> Defined in para [7] hereof



in the founding and supplementary affidavits<sup>2</sup> and (b) whether the relief sought by the Applicant was appropriate having regard to the Applicant's reliance on the First Respondent's failure to make payment in respect of the loan amount and interest only. Because this was raised for the first time at the hearing of this application, the court permitted the filing of supplementary heads of argument.

### **The Facts**

[6] In terms of the Loan Agreement, the Applicant agreed to lend an amount of R5 000 000 to the First Respondent. The First Respondent would repay to the Applicant the loan funding over a period of 60 (sixty) months. In the event of the First Respondent committing a breach of any of the terms of the Loan Agreement and failing to remedy such breach within a period of 10 (business) days after receipt of a written notice from the Applicant calling upon the First Respondent to remedy such breach, then the Applicant would be entitled, in its sole discretion and without prejudice to any of its other rights in law, to either claim specific performance of the Loan Agreement or to cancel same forthwith and without further notice, claim and recover damages from the First Respondent. The Loan Agreement also contains an acceleration clause.

[7] The First Respondent and the Applicant entered into a Deed of Pledge and Cession ('*the Cession*'), securing the Applicant's rights in terms of the Loan Agreement. The Cession provided that the First Respondent ceded, assigned and made over to the Applicant, *in securitatum debiti*, as security for the due, proper and timeous performance of all its obligations arising out of the Loan Agreement, all its rights, title

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<sup>2</sup> The supplementary affidavit dealt with the other two *in limine* points (not the jurisdiction point). There was no objection to receipt of the supplementary affidavit and no prejudice was claimed. The court accordingly permitted its receipt.



and interest in and to all present and future book debts in respect of End-User Loans under the Loan Agreement. The Cession is a continuing covering security and will terminate upon the unconditional and irrevocable fulfilment of all of the First Respondent's obligations under the Loan Agreement.

[8] Clause 7 of the Cession provides that upon the occurrence of an event of default and failure by the First Respondent to remedy such event of default within 10 (ten) business days from being called upon to do so in writing, then the Applicant would be entitled to consider the amount of the First Respondents indebtedness to be legally claimable and due without notice and the Applicant may proceed with the recovery thereof, and of such other amounts as may be due under and by virtue of the Cession, and the Applicant is irrevocable and *in rem suam* authorised as well as empowered by the First Respondent to collect and in any way dispose of and realise the Security, or any part thereof, in such manner and on such terms and conditions as the Applicant in its sole discretion deems necessary to realise the Security and any access on realisation and any balance owing to the Applicant.

[9] The First Respondent agreed that the Applicant would have the right to examine and inspect the First Respondent's books and other records and would, for that purpose, have a right of entry to the First Respondent's business premises at all reasonable times. The First Respondent furthermore agreed that the Applicant would have the right to instruct any person to verify any information in connection with the Security, the cost of which verification would be for the Applicant's account in the event of the verification process being a process not exercised by the First Respondent in the normal course of business.



[10] The Applicant complied with its obligations in terms of the Loan Agreement and advanced a total amount of R5 000 000 to the First Respondent. The First Respondent breached the terms of the Loan Agreement by failing to make payment in respect of the interest and capital amount.

#### **The Demands**

[11] On 20 March 2019, the Applicant addressed, by way of email, a letter to the First Respondent (*'the March letter'*).

[12] As the First Respondent now contends that the March letter was not a letter of demand but a response to a request for the restructuring of monthly repayments, it has become necessary to quote the relevant portions of the March letter:

'We acknowledge request of your request dated 1 December 2018 to effect the restructuring of the repayment terms stipulated in terms of the Developmental Loan Agreement dated 25 November 2014 concluded between Sakthi Financial Services (Pty) Ltd (Sakthi) and sefa ("the Agreement") from monthly instalments of R127 624.41 to R53 587.84 per month.

The sefa Post Investment Monitoring team engaged with Sakthi upon receipt of the intention to request the restructuring and also appointed a mentor to assist with financial reporting of the company. The mentor raised concerns about Sakthi's cooperation in the mentorship process.

Sakthi was advised by sefa to continue servicing the loan with minimum instalments of R60 000 per month during the process but Sakthi has failed to do so with the last instalment received on 11 September 2018 of R50 000. Sakthi has also failed to fully address all the issues raised in the projections submitted for restructuring, and sefa was at the end not able to place reliance on the projections submitted.



The request was tabled at sefa's Executive Management Committee meeting held on 6 March 2019. Sakthi's affordability to service the loan could not be substantiated with the information at hand.

In light of the above, we hereby inform Sakthi that its request for the loan restructuring was hereby declined by sefa's Executive Management Committee.

If Sakthi fails to comply with its repayment obligations, as stipulated in the Agreement, sefa reserves the right to commence with legal proceedings to recover the debt without further written notice to Sakthi's and this letter may be tendered in court as evidence of your failure to pay. Legal action may result in Sakthi having to pay legal costs, interest and could impact on Sakthi's credit history.

[13] The March letter recorded that the monthly instalments payable in terms of the Loan Agreement were R127 624.41. The Applicant expressly recorded that the First Respondent had failed to pay the monthly instalments and that the last instalment had been received on 11 September 2018 in the amount of R50 000. The Applicant informed the First Respondent that if it failed to comply with its repayment obligations, the Applicant might commence legal proceedings to recover the debt owed by the First Respondent to the Applicant.

[14] The letter read in its entirety clearly constitutes a demand by the Applicant on the First Respondent to remedy its failure to comply with its repayment obligations.

[15] On 25 April 2019 (*the April letter*) the Applicant recorded that the First Respondent had failed to comply with its repayment obligations and the Applicant demanded immediate repayment of the entire outstanding loan amount and accrued interest owed by invoking clause 7.1 of the Loan Agreement, which contained an acceleration clause. The Applicant demanded payment in the amount of R2 513 439.09,



being the outstanding capital and interest as at 31 March 2019, within 14 days from date of receipt thereof failing which the Applicant would exercise whatever rights and remedies it had.

### **The relief sought**

[16] The relief sought in the notice of motion reads as follows:

1. Interdicting and restraining the First Respondent from appropriating or in any way disposing of any amounts collected from any of its debtors who are debtors under "End-user Loans" as defined in the Developmental Loan and Capacity Building (Institutional Strengthening Support) Agreement, entered into between the Applicant and the First Respondent, dated 25 November 2014 ("the End-User debtors")
2. Authorising the Applicant, for purposes of perfecting and enforcing its security pledge and cession of debts owing by End-User debtors to –
  - 2.1 take into possession all End-User loan agreements and related documentation;
  - 2.2 give notice to all the End-User debtors of the First Respondent that all amounts owing to the First Respondent have been ceded to the Applicant;
  - 2.3 take all steps it may deem fit to recover the amounts owing to the First Respondent by each of the End-User debtors;
  - 2.4 access all banking accounts of the First Respondent held with the Second, Third, Fourth, Fifth and Sixth Respondents, to monitor the transactions thereon and to debit therefrom all amounts paid by End-User debtors as and when they are paid;
  - 2.5 notify the End-User debtors of new payment arrangements for payment of their indebtedness to the First Respondent, including notifying the End-User debtors of new banking details for purposes of payment;
3. That the First Respondent is ordered to:
  - 3.1 Permit the Applicant's representatives, Mahlatse Paul Johannes Maboja and/or any other person nominated thereto in writing by the Applicant, to inspect all or any of the records of the First Respondent relating to End-User debtors and to take into possession any such original documents, including End-User loan



agreements, make any such copies and take any such extracts therefrom as the Applicant may deem fit.

3.2 deliver to the Applicant forthwith a schedule setting out –

3.2.1 all of the First Respondent's End-User debtors as at 30 June 2019;

3.2.2 all amounts owing to the First Respondent by all of the End-User debtors as at 30 June 2019;

3.2.3 The contact details, including telephone and fax numbers email addresses and last known physical addresses of each of the End-User debtors as at 30 June 2019.

4. The Second, Third, Fourth, Fifth and Sixth Respondents are directed to take steps to ensure that the provisions of 2.4 above are implemented and adhered to;
5. That the costs of this application be paid by the First Respondent, and by the Second, Third, Fourth, Fifth and Sixth Respondents jointly and severally with the First Respondent but only in the event of the Second, Third, Fourth, Fifth and Sixth Respondents opposing this application, on the scale as between attorney and own client;
6. Granting to the Applicant such further and/or alternative relief as the above Honourable Court may direct.

[17] Ms Dreyer, at the commencement of the hearing and without acknowledging any wrongdoing, gave an undertaking in terms of the relief sought in prayers 3.1 and 3.2. This she did as she contended that the Applicant was contractually entitled thereto in terms of clauses 9.6.1 and 10.1.4 of the Loan Agreement. She also committed her client to complying with clause 12.7.1 of the Loan Agreement on the same basis.

Relief sought in paragraph 2 of the notice of motion

[18] The First Respondent breached the Loan Agreement by failing to pay the instalments on due date. The last payment was made in September 2018. Clause 15 of the Loan Agreement entitles the Applicant to cancel the Loan Agreement or to claim



specific performance. The Applicant elected to keep the Loan Agreement in tact, to accelerate payment which was communicated in the April 2019 letter and then chose to seek relief from this court in respect of the Security. The relief it seeks in paragraph 2 of the notice of motion are contractual rights flowing from either the Loan Agreement or the Cession. Ms Dreyer argued that the only relief the Applicant is entitled to would be for payment of the accelerated amount plus interest and costs. Although it is strange that the Applicant did not seek judgment for the accelerated amount in these proceedings, the legal premise for Ms Dreyer submission is flawed. Clause 7 of the Cession provides expressly the contrary:

"Sakthi agrees that, in the event of any default by it in the observance or performance of any of the conditions of this deed or of its failure to discharge any obligation or liability to sefa on the due date thereof or within 10 (ten) business days of being called upon to do in writing to pay such amount as may be demanded from Sakthi by sefa and/or to provide, deposit with or deliver to sefa such other or further security as it may require, then and in such case sefa shall at its sole option be entitled forthwith to consider the amount of Sakthi's indebtedness or liability as aforesaid to be legally claimable and due without notice and sefa may forthwith proceed for the recovery thereof and of such other monies as may be due under and by virtue of this deed and Sakthi authorizes and empowers sefa to immediately, or at any time thereafter, irrevocably and *in rem suam* or in its discretion in Sakthi's name(s) to collect and in any way dispose of and realise the security or any part thereof in such a manner and on such terms and conditions as sefa in its sole and unfettered discretion may deem necessary to realise the security and any excess on realization or any balance owing to sefa, as the case may be, shall be paid to sefa and any shortfall shall remain as a debt due by Sakthi to sefa ...."

(emphasis provided)



[19] The right to dispose of a pledged article without the intervention of a court order is commonly known as *parate executie*.<sup>3</sup> In the case of movables held in pledge, a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid. It is valid because in the case of a pledge, the movables are already in the lawful possession of the creditor. It cannot be said that a *parate executie* clause in the case of a pledge allows the creditor to take the law into his own hands.<sup>4</sup>

[20] In *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*<sup>5</sup> the Supreme Court of Appeal upheld the validity of a general notarial bond over movables which entitled the creditor, in the event of default on the part of the debtor, to take possession of the debtor's business and assets as security for the debt, to sell the assets and to apply the proceeds in settlement of the debt. The court held that the common law, insofar as stipulations for *parate executie* are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable. The Court held that when a creditor is however not in possession, such creditor is obliged to apply for a judicial sanction prior to enforcing the stipulations for *parate executie*.<sup>6</sup>

[21] The First Respondent ceded and pledged all its present and future book debts in respect of the End-User Loan Agreements to the Applicant.

[22] Clause 7 of the Cession affords the Applicant the right to collect, dispose of and realise the Security, immediately, in the event of a default by the First Respondent to

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<sup>3</sup> *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at para 6

<sup>4</sup> *Bock and Others* (supra) at paras 7 & 13

<sup>5</sup> 2004 (5) SA 248 (SCA)

<sup>6</sup> *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) @ para 14; *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at 256 F-I



pay its monthly repayment obligations and failure by the First Respondent to remedy such event of default within 10 (ten) business days from being called upon to do so in writing. Clause 7 thus gives the Applicant a right to collect, dispose of and realise the security without a court order and is accordingly a clause allowing for *parate executie*.

[23] As held by the Supreme Court of Appeal clauses allowing for *parate executie* in the case of a pledge of movables are valid.

[24] However, the Applicant is not in possession of the End-User Loan agreements. In order to lawfully exercise its rights in terms of the Cession, it seeks a court order that it be authorized to perform certain acts for purposes of enforcing the security granted to it by the First Respondent.

[25] No argument was advanced that the enforcement of the provisions of the Cession would be contrary to public policy generally or in the context of this case. I too can see none. The Applicant is accordingly entitled to the order in terms of:

- 25.1. paragraph 2.1 of the Notice of Motion, by virtue of clause 1 of the Cession;
- 25.2. paragraph 2.2 of the Notice of Motion, by virtue of clause 5 read with clause 7 of the Cession;
- 25.3. paragraph 2.3 of the Notice of Motion, by virtue of clause 7 of the Cession;
- 25.4. paragraph 2.4 of the Notice of Motion, by virtue of clause 5 read with clause 7 of the Cession; and
- 25.5. paragraph 2.5 of the Notice of Motion, by virtue of clause 5 read with clause 7 of the Cession.



Relief sought in paragraph 1 of the notice of motion

[26] The Applicant seeks an order Interdicting and restraining the First Respondent from appropriating or in any way disposing of any amounts collected from its debtors who are debtors under End-User Loans as defined in the Loan Agreement.

[27] The First Respondent does not dispute that the Applicant has a clear right to the security.

[28] The First Respondent contends that the Applicant is not entitled to an interdict because the Applicant has not alleged that the First Respondent is appropriating or disposing of any amounts collected from debtors who are debtors under the End-User Loan agreements.

[29] It would be sufficient for purposes of obtaining an interdict for the Applicant to establish a reasonable apprehension of injury. The term 'injury' means a breach of the right, which has been shown or demonstrated, and the prejudice that has resulted therefrom. It will suffice to establish potential prejudice.<sup>7</sup>

[30] A reasonable apprehension of injury is one, which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he is only to show that it is reasonable to apprehend that injury will

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<sup>7</sup> *Minister of Law and Order, Bophuthatswana, and Another v Committee of the Church Summit of Bophuthatswana and Others* 1994 (3) SA 89 (BGD) at 98 H-J



result.<sup>8</sup> The test whether there exists such reasonable apprehension is an objective one.<sup>9</sup>

[31] The facts *in causa* are as follows: The First Respondent has defaulted on its obligations in terms of the Loan Agreement. The last payment made to the Applicant was in September 2018. The First Respondent has not disputed that it has failed to pay. No defence has been raised for its failure to pay. In my view, the inference is irresistible that the First Respondent is not meeting its obligations because it is financially constrained and unable to do so. In my view, there is a reasonable apprehension that the First Respondent is using, and will use, the money that it collected from the End User debtors for purposes other than satisfying the Applicants' secured claim. This would prejudice the Applicant in that the security that the Applicant has for its claim could be left worthless. It follows that the Applicant has established a reasonable apprehension of injury.

[32] The First Respondent contends that the Applicant has an alternative satisfactory remedy available to it, that the Applicant should institute an action against the First Respondent and claim payment of the outstanding loan amount and interest.

[33] A remedy can only be said to be an alternative remedy for purposes of refusing an interdict if such remedy is adequate in the circumstances; is ordinary and reasonable; is a legal remedy and grants similar protection.<sup>10</sup> The mere existence of other remedies is not enough to tilt the scale against the granting of an interdict. The

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<sup>8</sup> *Minister of Law and Order and Others v Nordin and Another*, 1987 (2) SA 894 (A) at 896F-I, *Free State Gold Areas Ltd v Memspruit (OFS) Gold Mining Co Ltd*, 1961 (2) SA 505 (W) at 518A.

<sup>9</sup> *Pickles v Pickles* 1947 (3) SA 175 (W) at 179-180, *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at 304 H-J.

<sup>10</sup> *Links field Nursery CC v Wickstrom* 2015 JDR 1503 (GJ) at paragraph 27; *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at paragraph 120, Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> Edition at 1467-1468.



other remedy, which must be ordinary, should afford protection that is equally or more effective to the one provided by an interdict.<sup>11</sup> A continuing violation of the applicant's rights, should be protected by an interdict:

"Even where an injury be capable of pecuniary evaluation and compensation, the court will generally grant an interdict if the injury is a continuing violation of the applicants rights."<sup>12</sup>

[34] The First Respondent continues to violate the Applicant's rights by failing to make payment in terms of the Loan Agreement. The Applicant is seeking to enforce its security, which it is entitled to do in terms of clause 7 of the Cession.

[35] The purpose for the Applicant seeking an order interdicting and restraining the First Respondent from appropriating or in any way disposing of any amounts collected from the End-User debtors, is to protect its security that it holds in terms of the Cession. A claim for payment and interest would not stop the First Respondent from utilising the amounts that it collected from the End-User debtors for purposes other than satisfying the Applicant's claim. It is not as if the First Respondent said in the affidavit that it is good for the claim. Indeed, the First Respondent in response to the April letter said the contrary. On 26 April 2019 it said it was in a '*desperate cash flow situation*'. A claim for payment and interest does not protect the Applicant's right to the Security. Only an interdict would do so. The Applicant does not, on the facts of this case, have another satisfactory remedy.

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<sup>11</sup> *Masstores (Pty) Ltd v Pick N Pay Retailers (Pty) Ltd*, 2017 (1) SA 613 (CC) at para 104

<sup>12</sup> *Nkuni Holdings (Pty) Ltd v Fuller* 2014 JDR 0946 (GSJ) at paragraph 13, *Crystal Holdings (Pty) Ltd v The Regional Land Claims Commissioner - KwaZulu-Natal The Premier* 2007 JDR 1090 (N) at paragraph 90



Relief sought in terms of paragraph 3

[36] The relief claimed in paragraph 3 of the notice of motion is essentially a mandatory interdict and Ms Dreyer has conceded that the Applicant is entitled to this relief.

[37] The trigger for the calling up of the Security in terms of clause 7 of the Cession, is the failure to pay the monthly instalments and the failure to remedy such breach. The Cession provides that the Applicant shall have the right to examine and inspect the First Respondent's books and other records and shall, for that purpose, have a right of entry to the First Respondent's business premises at all reasonable times.<sup>13</sup> There can thus be no dispute that the Applicant has a clear right.

[38] The First Respondent has defaulted on its obligations in terms of the Loan Agreement and the last payment that it made to the Applicant was during September 2018. The First Respondent has not disputed that it has failed to pay. No defence has been raised for its failure to pay. For the reasons advance in respect of the relief sought in paragraph 1 of the notice of motion, in respect of the reasonable apprehension requirement, I find here too, that a reasonable apprehension of harm exists.

[39] The purpose of the relief claimed in paragraph 3 of the Notice of Motion is for the Applicant to obtain possession of the originals of the End-User loan agreements and related documents. The First Respondent contends that the Applicant is seeking specific performance of clauses 9.6, 10.1.4 and 12.5 of the Loan Agreement and of clause 10 of the Cession by seeking the relief claimed in paragraph 3.

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<sup>13</sup> Clause 10 of the Cession



[40] Clause 9.6 of the Loan Agreement provides, in relevant part, provides that the First Respondent shall:

"provide such information as may be requested by sefa (the Applicant) within a period of 5 (five) Business Days or within any other reasonable period agreed to between the Parties, as from date of receipt of such request. This includes but is not limited to....."

[41] Clause 10.1.4 of the Loan Agreement provides that the First Respondent shall:

"provide a report on the usage of End-User Loans by End-Users and the loan profile, including impact of such loans which the Financial Intermediary (the First Respondent) is in a position to report on, and, to the extent that it is within its power to do so, ensure that End-User Loans are used for the purpose it was lent for."

[42] Clause 12.5 of the Loan Agreement provides that the First Respondent:

"undertakes that as long as any amount is owing to sefa (the Applicant), it will allow sefa's (the Applicant's) authorised representatives at all reasonable times, to inspect the Financial Intermediary's (the First Respondent's) premises, equipment, books, documents and records and to make extracts from or copies of same."

[43] Clause 10 of the Deed of Pledge and Cession provides the First Respondent agrees that the Applicant:

"shall have the right to examine and inspect Sakthi's (the First Respondent's) books and other records and shall have for that purpose right of entry to Sakthi's (the First Respondent's) business premises at all reasonable times."

[44] At first glance it would appear that none of these clauses entitle the Applicant to obtain possession of the originals of the End-user loan agreements and related



documentation. However, the import of the Loan Agreement and the Cession is clearly to enable the Applicant to take over the collection of the monies owing in terms of the End-user loan agreements.

[45] In my view, the reasons for granting the interdict in prayer 1 are equally applicable here. Moreover, the First Respondent has, without conceding any wrongdoing, consented to this relief and the basis for granting it has accordingly largely become academic.

[46] The concession by the First Respondent could have a bearing on costs but in my view, in this case, such benefits are limited as the Applicant has despite this, been substantially successful.

[47] The Applicant has tendered to return to the First Respondent all such funds realised from the security over and above the First Respondent's indebtedness<sup>14</sup>. I intend incorporating this tender into the order.

#### **Order**

[48] Wherefore I grant the following order:

- 48.1. The First Respondent is interdicted and restrained from appropriating or in any way disposing of any amounts collected from any of its debtors who are debtors under '*End-user Loans*' as defined in the Developmental Loan and Capacity Building (Institutional Strengthening Support) Agreement, entered into between the Applicant and the First Respondent, dated 25 November 2014 ('*the End-User debtors*').

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<sup>14</sup> The Loan Agreement and Cession in any event require this



48.2. The Applicant, is authorised for purposes of perfecting and enforcing its security pledge and cession of debts owing by End-User debtors to –

48.2.1. take into possession all End-User loan agreements and related documentation;

48.2.2. give notice to all the End-User debtors of the First Respondent that all amounts owing to the First Respondent have been ceded to the Applicant;

48.2.3. take all steps it may deem fit to recover the amounts owing to the First Respondent by each of the End-User debtors;

48.2.4. access all banking accounts of the First Respondent held with the Second, Third, Fourth, Fifth and Sixth Respondents, to monitor the transactions thereon and to debit therefrom all amounts paid by End-User debtors as and when they are paid;

48.2.5. notify the End-User debtors of new payment arrangements for payment of their indebtedness to the First Respondent, including notifying the End-User debtors of new banking details for purposes of payment.

48.3. The First Respondent is to:

48.3.1. Permit the Applicant's representatives, Mahlatse Paul Johannes Maboja and/or any other person nominated thereto in writing by the Applicant, to inspect all or any of the records of the First Respondent relating to End-User debtors and to take into possession any such original documents, including End-User



loan agreements, make any such copies and take any such extracts therefrom as the Applicant may deem fit;

48.3.2. deliver to the Applicant forthwith a schedule setting out –

48.3.2.1. all of the First Respondent's End-User debtors as at 30 June 2019;

48.3.2.2. all amounts owing to the First Respondent by all of the End-User debtors as at 30 June 2019;

48.3.2.3. The contact details, including telephone and fax numbers email addresses and last known physical addresses of each of the End-User debtors as at 30 June 2019.

48.3.3. The Second, Third, Fourth, Fifth and Sixth Respondents are directed to take steps to ensure that the provisions of 49.2.4 hereof are implemented and adhered to.


48.4. The Applicant is to return to the First Respondent all such funds realised from the Security over and above the First Respondent's indebtedness of R R2 513 439.09, being the outstanding capital and interest as at 31 March 2019 and costs, as ordered herein.

48.5. The costs of this application are to be paid by the First Respondent as between attorney and own client<sup>15</sup>.

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<sup>15</sup> Clause 5.9 of the Loan Agreement permits this





**TOPPERMAN**  
Judge of the High Court  
Gauteng Local Division, Johannesburg

**Heard: 1 September 2020**

**Further submissions filed by agreement: 4 and 9 September 2020**

**Judgment delivered: 27 October 2020**

**Appearances:**

**For Applicant: Adv S Hussein-Yousuf**

**Instructed by: Mothle Jooma Sabdia Inc.**

**For First Respondent: Adv E Dreyer**

**Instructed by: Nolan Naicker & Co**

**For Second to Sixth Respondents: No Appearances**



