22289/2010

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 22289/2010

DATE: 25 OCTOBER 2010

In the matter between:

IZEMBI TRADING 46 CC Applicant

and

NEDBANK LIMITED t/a NEDBANK BUSINESS BANKERS Respondent

J U D G M E N T

LOUW, J:

This application started off on 8 October 2010 as an urgent application for a *rule nisi* serving as an interim interdict. A full set of papers have now been filed and the applicant now asks for final relief, namely the enforcement of a contract concluded between the parties on 6 October 2010, which was to endure until 5 November 2010. In argument Mr Uijs, who appeared on behalf of the applicant, asked for the enforcement of the contract for a period of one month from the date of this order.

The applicant carries on a business which renders services to

institutions and individuals who receive regular electronic payments from their customers, which are activated by debit orders placed against the customer's account at a commercial bank. The respondent is a commercial bank (the Bank), with whom the applicant concluded a Corporate Payments System Service agreement during August 2005. This agreement was referred to in the papers as the CPS agreement. As an ancillary to the CPS agreement, the parties concluded a further agreement, referred to as the facility agreement during December 2009.

The Bank contends that it has validly cancelled the two agreements, together with the further agreement concluded between the parties on 6 October 2010, and that it did so on 7 October 2010. As a consequence the Bank refuses to allow the applicant to operate on its electronic banking system. The cancellation of the agreement has made it impossible for the applicant to render a service to its clients. The applicant accepts that the relationship between it and the Bank must come to an end, but avers that the Bank is obliged, in terms of an interim agreement concluded on 6 October 2010 between the parties, to extend the operation of the CPS and facility agreements for 30 days.

The CPS agreement contains the following provisions

regarding the breach and duration and termination of the contract. Clause 11 deals with breach and reads as follows:

"11. If either party breaches any term, or fails to perform any of the obligations in terms of this agreement, and such breach or failure is not corrected within five days of receiving written notice from the affected party calling on it to do so, the affected party shall be entitled, without prejudice to any other rights it may have:

11.1 To cancel this agreement with immediate effect.

11.2 To claim an order of specific performance and/or;

11.3 To claim damages."

Clause 12 is headed, duration and termination, and provides as follows:

12.1 This agreement shall commence on the date of signature of the party last signing and shall endure, for an initial period of one year (initial period). Thereafter the agreement shall be renewable on a month to month basis.

12.2 Notwithstanding the above, the agreement may be terminated at any time by Nedbank.

12.2.1 On giving not less than 30 calendar days written notice of termination to the client or;

12.2.2 In the event of any change in any law, or the application thereof, or in the event of any change in the client's financial position, which may have the effect of prejudicing should it continue to provide the service, in such case Nedbank shall be entitled to terminate this agreement on 48 hours written notice to the client.

12.3 The client shall be entitled to terminate the agreement only after the expiry of the initial period on giving at least 30 days written notice to Nedbank."

The facility agreement places a limit of R20 million on the value of all debit orders presented for collection to the Bank by the applicant for any one month and requires the applicant to lodge security of R2 million to be held in a call account with the Bank to cover any debit orders not honoured. This amount of security was based on the industry norm of 10% defaults. The facility agreement contains further clauses relating to termination, including a clause which lists certain 'events of default' and provides for termination pursuant thereto.

Clause 13 is headed, events of default, and provides as follows:

13.1 Notwithstanding the provisions as outlined, Nedbank shall be entitled to claim immediate repayment

of all amounts owing under the borrower facilities, should one or more of the events of default, set out hereunder, occur and should the borrower fail to remedy the matter within the period, if any, stipulated by Nedbank at such time."

Clause 13.2 then sets out a number of events of default which include the following:

"13.2.4 If the borrower commits a breach of any of the terms and conditions set out in any agreement entered into between Nedbank and the borrower.

13.2.13 If any material adverse change occurs in the financial position of the borrower, which will, in the opinion of Nedbank, prevent the borrower from performing or observing its obligations to Nedbank, or will impede its ability to do so."

Clause 13.3 provides as follows:

"Where an event of default occurs, Nedbank shall, without a diminution of any other right which Nedbank may hereby or otherwise acquire, be entitled in its sole discretion to;

13.3.1 Cancel the borrower facilities and all existing

agreements with immediate effect or;

13.3.2 Claim immediate repayment of all amounts owing to Nedbank from whatever cause arising, all of which amounts shall immediately become due and payable, or;

13.3.4 Restrict the borrower's access to the borrower's facilities to limits considered acceptable by Nedbank."

13.4, which reads as follows:

"13.4 Material/materially means of such nature so as to prejudice, at the sole discretion of Nedbank, Nedbank's rights under the borrower facilities and existing obligations of the borrower to Nedbank."

The CPS agreement contains certain provisions regarding the manner in which it would be implemented. These include that in terms of clause 3.7:

"The client (that is the applicant) shall not at any time operate or use this service in any manner that may prejudice Nedbank."

And clause 5, which is headed, 'client's acknowledgements', and provides as follows:

"The client acknowledges that:

5.1 Nedbank shall not be required to enquire into:

5.1.1 The authority of any person who uses, or has used the service, or;

5.1.2 The validity or integrity of any data or information provided by the client to Nedbank for the purpose of the service.

5.5 The client accepts full and complete responsibility for the accuracy and integrity of all instructions to Nedbank."

On 1 October 2010, the Bank gave written notice to the respondent of termination of the CPS agreement with effect form 5 October 2010. The Bank contends that the cancellation was justified by two events which took place during June 2009 (the first event) and 1 October 2010 (the second event) respectively. During June 2009, the Bank was instructed by the applicant to collect an amount of R5 million from the bank account of the Foschini Group, which account was held at FNB. The instruction was at the behest of a client of the applicant, described as "Advocate/Attorney Storey", represented by a Ms Bridget Storey. Fortunately it was established in time that Foschini had not authorised the debit orders in question and the funds transfer, which had already taken place, was reversed.

The second incident relates to four debit orders totalling R1,07 million which were forwarded by the Bank, on the applicant's instructions, for collection from an account held at FNB Bank by an entity known as Edcon. The instructions were that the money be paid to the applicant's client, Marbie Manufacturers, which entity held a bank account with the Bank. On 1 October 2010 FNB returned the request to the Bank on the basis that authority by Edcon was lacking. The bank sought to reverse the transfer of funds to Marbie's account, which had already taken place, but Marby, represented by the aforesaid Ms Bridget Storey, had by that time withdrawn almost all the funds which had been transferred.

It is common cause that the parties then, pursuant to this initial cancellation, on 6 October 2010 concluded the interim agreement in terms whereof their contractual relationship would continue on the same terms, but on certain further conditions insisted upon by the Bank until 5 November 2010. The day after the conclusion of the interim agreement, that is on 7 October 2010, the Bank, however, summarily terminated the contractual relationship it had with the applicant. The principal reason advanced by the Bank for doing so, is that the Bank became aware on that day that over the period February 2009 to 1 September 2010, fraudulent payments had been made without authority out of Edcon's FNB account into

Marbie's account at the Bank on the applicant's instructions.

The result for the Bank is that in terms of the PSA System, which operates between commercial banks, the Bank has a potential liability to FNB which has been increased by the aforesaid fraudulent payments which amounts to approximately R12 million, and that the security of R2 million (plus a further security in the form of bonds and a suretyship, the value of which is not clear) would not be sufficient to cover the Bank should it have a claim against the applicant for the anticipated loss which, as I have said, is said to be in the region of R12 million.

The Bank consequently contends that by reason of the clauses in the CPS and facility agreements referred to earlier, it was entitled to cancel the interim agreement, as well as the two main agreements summarily. In this regard reliance is also placed on the provisions of clauses 5.1.1 and 5.5 of the CPS agreement to which I referred earlier and in terms of which the Bank was entitled to rely on the applicant for the integrity of the instructions upon which the Bank activated the transfer of funds through its system and link with the other banks.

The applicant contends that it has, and is willing to continue to honour the interim agreement and the conditions imposed by

the Bank and that the Bank is not entitled to cancel the agreement on the basis of events which preceded the conclusion of the interim agreement. The applicant's case is that while it was aware of the investigation in regard to the fraud relating to the Marbie account since 2 September 2010, it doubts that the Bank was not also aware of the fraud before it entered into the interim agreement on 6 October 2010. In any event the applicant contends that since it is obliged to, and does comply with the further stringent conditions imposed by the Bank in the interim agreement, the Bank will not be at risk for the remaining period that the interim agreement will remain operative and that, therefore, there is no reason why the interim agreement should be cancelled at this stage.

The applicant is seeking final relief enforcing the terms of the contract it has with the Bank. The Bank contends that it has validly cancelled the contract, which in effect consists of three separate agreements and that the applicant has not made out a case for the enforcement of the contract. While it is true that the onus is on the Bank to prove a valid cancellation, the matter must, as far as factual disputes are concerned, be determined on the basis of the common cause facts, as well as those deposed to by the Bank's deponents. It must, therefore, be accepted that the Bank was unaware of the R12 million fraud when it concluded the interim agreement.

It is common cause that as at 2 September 2010 the applicant, as I have said, knew of the investigation in regard to the unauthorised payments to Marbie and that it did not inform the Bank of this fact at the time they negotiated the conclusion of the interim agreement. The Bank, therefore, contends that its cancellation of the agreement is valid for a number of reasons. These include, firstly, intentional misrepresentation by the applicant, which occurred when it failed to inform the bank of the Marbie fraud investigation The context in which this occurred is that the Bank had initially given notice of cancellation on 1 October 2010 on the basis of it having found out about the second event referred to earlier, namely the R1,07 million unauthorised debit orders. Pursuant to the Bank establishing this fact, it gave notice of cancellation and the parties then entered into negotiations and concluded the interim agreement.

It would appear to me that in these circumstances, the applicant was obliged to inform the Bank of the further investigation regarding Marbie and the 12 million suspected fraud. Mr Alwyn Swart who deposed to the answering affidavit on behalf of the Bank, says, on behalf of the Bank, that if the Bank had known of the further allegations of fraud regarding the Marbie account, it would not have concluded the interim agreement. In the context of the negotiations and the facts

known to the parties at that stage, it seems to me that this statement cannot be disputed. In any event, it is not clearly untenable and it must be accepted for purposes of deciding this matter.

I turn to the second point raised by the Bank. In terms of clause 11.1.3 of the facility agreement, the applicant was obliged to inform the Bank forthwith on it becoming aware of any occurrence which may adversely affect any security provided in terms of the facility agreement. The investigation regarding the unauthorised debits came to the applicant's notice on 2 September 2010. It is certainly an occurrence which might affect the security held by the Bank. The applicant, in my view, contravened this provision by not informing the Bank of the investigation.

Thirdly, in terms of clause 9 of the CPS agreement, the applicant indemnified the Bank against any loss in relation to the service provided by the Bank to the applicant. There is presently a risk that the Bank will be held liable for the transfer of approximately R12 million. This money is no longer in Mabie's account and the likelihood of recovering the money from Mabie is said to be remote. The applicant's position, *vis-à-vis* the Bank, is that it is potentially liable for the R12 million. This constitutes a material change in the applicant's

financial position.

Clause 13.3.1 entitles the Bank to cancel forthwith "all existing agreements with immediate effect" if an event of default, as defined in the agreement, should occur. The default events that are relevant here and which are set out in the agreement, are those referred to in clauses 13.2.4, namely:

> "If the borrower commits a breach of any of the terms and conditions set out in any agreement entered into between Nedbank and the borrower."

And 13.2.13 which reads:

> "If any material adverse change occurs in the financial position of the borrower, which will, in the opinion of Nedbank, prevent the borrower from performing or observing its obligations to Nedbank, or will impede its ability to do so."

In my view, on these papers, the Bank has shown that it was entitled to cancel the interim agreement because of a material misrepresentation and also the breaches of the agreement referred to above. The first requirement for a final interdict is a clear right. The question is whether the applicant has proved

facts which establish on a balance of probabilities, a clear right as a matter of substantive law. It matters not that there is an onus on the respondent bank. The rule in applications remains that in respect of a genuine dispute of fact, the applicant is bound by the respondent's version of the facts. In my view the applicant has not established a clear right for the enforcement of the interim agreement and it follows that the application must be dismissed as far as the enforcement of the interim agreement is concerned.

Further relief is sought, which relates to the applicant's bank account held with the Bank. The applicant seeks an order, directing the Bank to allow the applicant full and unrestricted access to the funds held in bank account number 1186086807 of the respondent Bank, being the applicant's bank account. In this regard the Bank has stated in its answering affidavit that there has been no interference with the applicant's right to operate on that bank account. To the extent that there is some dispute in this regard, it is recorded herein that the Bank has no objection to the applicant continuing to operate freely on this account. In the light thereof, the applicant has not made out a case for an order that it seeks in regard to the bank account. As far as the issue of cost is concerned, these must follow the event.

In the result I make the following order, the application is dismissed with costs.

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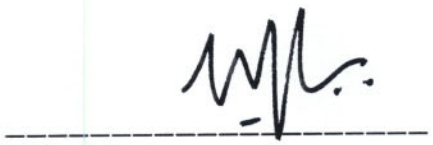

LOUW, J