IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO.: **2011/13340**

In the matter between:

TELLINGER, MICHAL JULIUS APPLICANT

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED RESPONDENT

APPLICANT' APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTE that on a date to be determined by the register of this Honourable Court, the applicant intends to apply for leave to appeal to the Supreme Court of Appeal, alternatively to a full bench of the above Honourable Court, against the whole of the judgment and order of the Honourable Judge M M Mabesele, handed down in the Johannesburg South Gauteng Division of the High Court on 2 February 2012.

TAKE NOTICE FURTHER that this application for leave to appeal is brought in terms of section 20(4)(b) read with section 20(1) of the Supreme Court Act 59 of 1959 and rule 49(1) of the Uniform Rules of Court.

TAKE NOTICE FURTHER that the applicants' ground of appeal are the following-

1. The Court erred in finding that the 'written loan agreement' between the parties are sound in money (*liquid*) for the following reasons-

    1.1 The Respondent challenged the Applicant to show, intern alia, that it was the possessor of such 'money' to afford the loan to the Respondent, whereupon the Respondent failed to answer or dismounted its obligation to present such proof and only tendered argument, that it is irrelevant to these proceedings by reasoning that a benefit had been received by the Applicant in terms of a written agreement. The opposite is more predominant, as it is tried law that one cannot lend which one does not possess. Thus, being the argument presented to Court;

    1.2 It is a financial truth that financial institutions, like the Respondent, had acquired financing through securitisations or similar processes. This fact is supported by referencing that the Respondent is and has been affiliated to the "South African Securitisation Forum", SASF; membership to SASF are open to "*all professional participants in the securitisation industry (whether individuals or institutions), including issuers, originators, dealers, arranging banks, underwriters and other financial intermediaries, investors, servicers, guarantors, rating agencies, trustees, information technology specialists, lawyers, accountants and academics.*"[1]. The Respondents, though its membership to SASF is or has utilised these alternative methods of financing loans through promissory notes;

[1] http://www.sasf.co.za/membership.htm

1.3 A material fact placed before the Court by the Applicant was, that the Respondent show that it had acted as the true lender of money, sounding in notes, and that it was the owner or possessor of such money prior to subsequent agreements with the applicant;

1.4 Having regard to the facts contained above, the Responded acted throughout the loan procedure, its written agreement and records before this Honourable Court as the owner to such monies lent to the applicant. Given the facts so presented before the Honourable Court of first instance were never allowed to be tested, in so far the learned Judge mentions in his judgment that "*What the bank does with its documents and payments made to the seller should not be the concern of the respondent.*" and further "*With regard to the third ground, which is denied by the applicant, the respondent failed to produce any proof of payment as stipulated in the agreement.";*

1.5 Within the premises, the Court had erred in considering that the Respondent could have acted as an intermediary between the Applicant, the Respondent and another, therefore in violation of its premises as being the one that loans and fiduciary owing to the Applicant. This notwithstanding that such third party securitisation attracts expenses and possible profiteering from "documents" dealt with by the Respondent in cart-blanch;

1.6 A further point that fails entry into the Courts judgment, considering the aforementioned, is that the Respondent had a duty to inform the Applicant that its loan does not derive from its safes, but rather from the compounding of securitisations of the Applicant's personal loan application;

1.7 Lastly, whether there arises an obligation between the Respondent and another though securitisation raises serious concerns as to what effect, implication or financial impact it might have in the overall interest rate, cost and/ or recovery of the loan unto the Applicant.

2. The learned Judge failed to consider that the freedom of contracting finds its limitations in the dictates of public policy, especially as manifested in the Constitution. Agreements that are contrary to public interest, as in this regard, are founded on the false perception that banks, like the Respondent, allude through its public advertisements and press media that it loans what it possesses and negates to inform the borrower that it will retain what is loaned from another at a price that could effectively equate to expensive borrowing.

2.1 The aforementioned is best presented by following the processes explained by SASF on their website, of which the Applicant is a member:

2.1.1 "Step1: - The lender, also called the originator (typically a financial institution), makes a loan to a borrower (the obligor). AND - The loan amount is transferred to the obligor and the obligor directs all repayments of the loan to the originator."

2.1.2 "Step 2: - The loan is "warehoused" or kept by the originator, until the originator has a sufficient volume of similar loans."

2.1.3 "Step 3: - The originator sells the loans to a special purpose vehicle (SPV) – a legal entity created by the originator."

2.1.4 "Step 4: - The special purpose vehicle (SPV) pays for the loans by simultaneously selling - certificates, representing ownership of the loans, to investors. - The funds obtained from investors are passed to the originator. - A credit rating agency rates the securities issued by the SPV."

2.1.5 "Step 5: - A servicer is appointed, which provides administration for the duration of the issue. - The duties of the servicer include servicing the loans in the SPV and servicing problem loans. - In many cases, the originator performs the role of servicer. - A trustee can also be appointed to ensure that investors are paid in accordance with the terms of the securities and to monitor the performance of the servicer."

2.1.6 "Step 6: - In this final step, the borrower is instructed to make payments to the servicer and direct all inquiries to the servicer if the originator does not perform the role of servicer."

2.2 From the aforementioned, consideration should be given that there are several steps in these procedures and therefore attract additional cost and expenses, unbeknown and hidden to the borrower.

3. The Court ought to have held that, in view of the Mortgage Bond, ad paragraph 1.1.3 and annexure to the Respondent's founding affidavit, promissory notes, bills of exchange (accepted or endorsed), do form part of acceptable payment instruments and the Court should have given consideration or abbreviated on its finding in this regard, as opposed to outright dismissing the Applicants reference to these structures and payment.

4. The Court erred in finding that because the Applicant's "*defence raised is baseless*", its considerations fall aside and therefore had dismissed all material facts irrespective of its technical involvement or difficulty to voice. Further examination of these facts would have disclosed the very nature of the Applicant's defence and articulation of what seems to be the norm, is in fact against public policy.

5. It is a material fact that when debt arises, one expects to be treated in full transparency; in fact legislation proscribes such requirements, so much so, to assist the public to make informed decisions and not be profiteered on. Case law in this regard shall be presented at trial.

6. The Court ought to have held that the affidavit of Jacob Dekker, wherein testimony is made that he has personal knowledge of the Applicant's conduct be tested, in its alternative be examined as this averment was contested, in that Jacob Dekker does not nor could have had any first-hand knowledge of the Applicant's application, correspondence and alike; not withstanding that Jacob Dekker could have abbreviated on his knowledge of the Applicant's written agreement or its securitisation. A ruling by Acting Judge Bava had concluded that the averments by Jacob Dekker be supported by additional evidence, that to date under these proceedings have not been attained.

7. The Court ought to have taken passages of the fact there exists a real possibility that the Respondent could lack locus standi due to the allotment that the Respondent could have surrendered its real right, cessioned and/ or alternatively securitised their rights as security for the loan it took out on behalf of the Applicant. This matter has been raised and found to be the position where financial

institution like the Respondent loses such right to act as Plaintiff similar to these proceedings. Submissions to this statement were annexed as "O" to the Applicants affidavit in the court file.

8. The learned Judge failed to adhere to procedure requirements where the Applicant had requested from the Respondent that it produces statements, accounts of settlement and certificate of balance, had never been produced or presented to the Applicant or the Court.

9. These proceedings could have best been addressed by hearing the matter in a trial, wherein the full scope of applications and submissions could have been tested by calling of expert witnesses, and cross examination of such evidence.

TAKE NOTICE that the applicant submits, with respect, that there is a reasonable prospect that another Court might come to a different conclusion in respect of all the above-mentioned issues.

DATED AT JOHANNESBURG ON THIS THE 22ND DAY OF FEBRUARY 2012.

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BY THE COURT

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