



**IN THE NORTH GAUTENG HIGH COURT PRETORIA**  
**(REPUBLIC OF SOUTH AFRICA)**

CASE NO. 41263/11

Reportable	YES
Of interest to other judges	NO
Reviewed on 10/4/2014	
JUDGE P.Z. EBERSOHN	

*11/4/2014*

In the matter between:

**ABSA BANK LIMITED**

**Applicant**

and

**JAN HARM JANSEN VAN RENSBURG**

**1<sup>st</sup> Respondent**

**ALETTA CATHARINA JANSEN VAN RENSBURG**

**2<sup>nd</sup> Respondent**

**THE SHERIFF OF THE HIGH COURT, WONDERBOOM**

**3<sup>rd</sup> Respondent**

**CORAM EBERSOHN AJ**

**MATTER HEARD ON 18 SEPTEMBER 2013**

**JUDGMENT HANDED DOWN ON 11 APRIL 2014**

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**JUDGMENT**

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**EBERSOHN AJ.**

[1] The applicant is a bank. It obtained judgment on the 4<sup>th</sup> October 2011 against the first and second respondents and the court authorised the sale in execution of their fixed property. The respondents are not opposing the application.

[2] The property was attached and the sale in execution was scheduled for the 7<sup>th</sup> September 2012.

[3] The applicant's attorney arranged for a bidder on the applicant's behalf to "safeguard" the applicant's interests at the sale in execution.

[4] In this instance the attorney received instructions from the applicant to bid up to R35 615,00 at the sale. The attorney instructed a clerk to attend the sale and do the necessary bidding, if necessary.

[5] At the sale there was, besides the clerk, one other bidder. The bidding opened at R10 000,00 and according to her report she "incorrectly" heard a bid for R25 000,00 whilst the correct figure was indeed of R125 000,00. For some inexplicable reason, she panicked and then bid and bought the property for R125 000,00 on behalf of the applicant.

[6] The applicant is now saddled with the property and has to pay R125 000,00 for the property. The applicant applies that the sale be set aside as the clerk acted outside the terms of her mandate and is prepared to pay all wasted costs and any other costs for the future sale that may be attributable to this sale.

[7] As the two debtors, the first and second respondents, did not oppose the application and as the court had reservations about the matter the Chairperson of the Pretoria Bar Council was requested to appoint counsel to act as *amicus curiae*. Two counsel were in fact appointed by him and the court is indebted to them for their input.

[8] It is the applicant's case that no party will suffer any prejudice should rescission be granted. Of that this court is not so sure. What the applicant did not disclose was that the property, according to documents in the court file, was already sold on the 17<sup>th</sup> February 2012 for an amount of R190 000,00 to one Mojapelo. As she did not make the requisite payments the Sheriff, in terms of the provisions of Uniform Rule 46, applied to a judge in chambers for the cancellation of the sale, which application was granted by the judge on the 12<sup>th</sup> June 2012.

[9] Paragraph 8 of the prescribed conditions of sale (Form 21 of the First Schedule to the Uniform Rules) which Me Mojapelo signed read as follows

*"8. If the purchaser fails to carry out any of his obligations under these Conditions of Sale, the sale may be cancelled by a Judge summarily on the report of the Sheriff after due notice to the purchaser, and the property may again be put up for sale; and the purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the Sheriff's distribution account, be recovered from him under judgment of the Judge pronounced summarily on a written report by the Sheriff, after such purchaser shall have received notice in writing that such report will be laid before the Judge for such purpose; and if he is already in possession of the property, the Sheriff may, on 7 days' notice, apply to a Judge for an order ejecting him or any person claiming to hold under him there from."*

[9] Added to that was a subparagraph which read as follows:

*“8.2 In the event of the sale being cancelled as aforesaid the deposit shall be retained by the Sheriff in trust for such period that is stipulated in the judgment in terms of Rule 46(11) or if no such period is stipulated therein then until such time that the property has been sold to a third party and the plaintiff's damages have been quantified and judgment has been granted in respect thereof.”*

[10] The applicant did not deal at all with the financial aspects of the sale to Me Mojapelo in so far as may have played a role.

[11] The court now deals with the question whether the applicant is entitled to rely on the lack of authority on the part of its agent; and if not, is the agent entitled to put up her mistake as a ground for vitiating the agreement; and if not, is the court entitled to cancel the agreement on the grounds advanced by the applicant?

[12] In the present case, the applicant does not complain that it did not appoint attorneys Snyman de Jager Inc. to bid at the auction on their behalf. The applicant stated that its agent only had authority to bid up to a specified amount. The applicant's counsel, Mr. Krige, argued that the clerk acted beyond the scope of the mandate and that she could not bind the applicant.

[13] However, in *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd.*, 2012 (5) SA 323 (SCA) the court stated as follows (par [24] at 332H-333A) (per Mpathi P):

"[24] Actual authority may be express or implied. In *Hely-Hutchinson v Brayhead Ltd.* (1968] 1 QB 549 (CA)) ; ([1967] 3 All Eng ER 98]) at 553 A-G) (referred to with approval in *NBS Bank Ltd. v Cape Produce Co. Ltd* (2002 (1) SA 396 (SCA)), Lord Denning expressed himself thus:

'[Actual authority] is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.'

[14] In *Monzali v Smith* 1929 AD 382 at 385 Stratford JA stated as follows:

*"Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have."*

[15] By appointing its attorneys to bid on its behalf at the auction, the applicant represented to third parties and to the third respondent in particular that its agent had

unlimited authority to bid at the auction. The following remarks in *Southern Life Association Ltd v Beyleveld* NO 1989 (1) SA 496 (A) at 503B are also relevant in this regard:

*“Van Zyl was designated a “financial adviser” by the first defendant [the insurance company] and allowed to hold himself out as such. Whatever the private limitation on Van Zyl’s actual authority may or may not have been, a principal in the position of first defendant can hardly in my view, be heard to complain if one of its employees who, although the purpose of his employment is to effect policies of insurance, is styled and held out to the public as a financial adviser, gives financial advice. What otherwise is the purpose of holding out an employee as a financial adviser?”*

[16] The third respondent acted upon the representation that the clerk had the requisite authority to bind the applicant and it is clear that she had ostensible authority.

[17] The applicant also cannot rely upon the mistake the clerk made. In *National & Overseas Distributors Corp’n (Pty) Ltd v Potato Board* 1958 (2) 473 (A) at 479 Schreiner JA summed up the position as follows regarding the question whether a contracting party may put up his or her unilateral mistake in order to escape liability under a contract:

*“our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. .... At least the mistake (error) would have to be reasonable (justus) and it would have to be pleaded.”*

[18] Christie *The Law of Contract in South Africa* (6<sup>th</sup> ed) at 329 points out that, no matter how material the mistake, the mistaken party will not be able to escape from the

contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract.

[19] It is clear that the court cannot set aside the sale on the basis the application was brought and the applicant must pay the costs of the application and of the *amici curiae*

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20] The following order is made:

1. The application is dismissed and the applicant must pay its own costs and also that of the *amici curiae*.

  
EBERSOHN AJ

ACTING JUDGE OF THE HIGH COURT

The applicant's counsel

Adv. H.A.A. Krige

The applicant's attorney

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Amici curiae

Adv. B.C. Stoop, with him

Adv. L. Vilakazi.