

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

Case Number: 1787/2015

15/9/16

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

JOSEPH MAMPURU

First Respondent

THE SHERIFF OF THE HIGH COURT, MIBIBANE

Second Respondent

NOTHANDAZO MIRRIAM MAHLANGU

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant requests, *inter alia*, an order in terms of which the sale in execution of Erf [...] Vaalbank-A Township, Mpumalanga ("the property") to the third respondent on

30 November 2015 be cancelled.

[2] The third respondent opposes the relief claimed.

Background

[3] The applicant obtained default judgment against the first respondent and a warrant of execution in respect of the property.

[4] According to the Conditions of Sale of Immovable Property, the property was sold to the third respondent on 30 November 2015 for an amount of R 40 000, 00.

[5] I pause to mention that the outstanding balance at the time of the sale was R 244 980, 03, resulting in a shortfall after the sale of more than R 200 000, 00.

[6] Prior to the commencement of the sale in execution, the first respondent was granted an opportunity to pay the arrears on the account in order to prevent the property from being auctioned.

[7] From the documents attached to the founding affidavit it is clear that the arrears were paid at 10:02:48 on 30 November 2015, whereas the property was sold at approximately 10:19. The condition preventing the auction from proceeding was therefore met before *"the hammer fell"*.

[8] In the circumstances, the applicant requested the third respondent to consent to the cancellation of the sale. The third respondent refused, which refusal led to the present application.

Point *in limine*

[9] The third respondent opposed the application not only on the merits, but also raised several points *in limine*. Mr Coetzee, attorney on behalf of the third respondent, quite correctly conceded during argument that the third respondent could not succeed on merits of the application.

[10] Mr Coetsee, however, indicated that the third respondent persists with one of the points *in limine*, to wit that the founding affidavit does not set out sufficient facts to establish a *prima facie* case.

[11] In support of this contention, the third respondent relies on the fact that the founding affidavit consists mainly of hearsay evidence.

[12] The founding affidavit was deposed to by Belinda Ann Brauns. The paragraphs dealing with her authority and knowledge of the facts of the matter reads as follows:

"1. I am a Manager in the Home Loans Legal, Personal and Business Banking Credit Department, a division of the Standard Bank of South Africa Limited, Registration number 19621000738106 ("the Applicant"), with business address at 9th Floor, 5 Simmonds Street, Johannesburg, Gauteng.

2. I am a duly authorised to represent the Applicant herein and to depose to this affidavit.

3. I have access to the Applicant's ledgers, books of account and files and its attorneys' files pertaining to this matter and I have for purposes of deposing to this affidavit perused all relevant ledgers, books of account and documents.

4. I have specifically perused the contents of Annexure "SB01" attached hereto and to the extent that I have not been part of discussions recorded therein I respectfully refer the Honourable Court to the confirmatory affidavits of Niki Stander and Monica Dempers. Both of the aforementioned individuals are employed by the Applicant's attorneys of record and they confirm that the content of Annexure "SB01" is a true reflection of the conversations and e-mails which were exchanged between the relevant parties.

5. I can therefore in the circumstances state that the facts herein contained fall within my direct knowledge and the facts do not are allowable given the source of the information and the purpose for which it is placed before Court".

[13] From the contents of the court file, it appears that Ms Brauns also deposed to the affidavit in support of the default judgment and application for the issue of a warrant of execution. She therefore has personal knowledge of the fact that default judgment was granted and that a warrant of execution was issued.

[14] The payment of the arrear amount, the time of payment and the time of the sale appears from e-mail correspondence and letters attached to the founding affidavit that was sent or received by either Nici Stander or Monica Dempers. Both of them deposed to confirmatory affidavits confirming the correctness of the e-mails and letters.

Personal knowledge

[15] It is trite law that the contents of a founding affidavit constitute evidence that would have been led during a trial. In the premises and as a general rule, Mr Coetsee is correct in submitting that the deponent to the founding affidavit should have personal knowledge of the facts contained in the affidavit.

[16] There are, however, exceptions to the rule.

[17] In *The Master v Slomowitz* 1961 (1) SA 669 T, the court held as follows at 672 B - C:

"It may, however, be that, where an application is brought personally, there is an initial assumption in most cases that the facts are within the applicant's knowledge, whilst the converse is true in a case where it is brought in a representative capacity. In exceptional cases an application may be based on hearsay but then the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of the knowledge and belief and state the basis of the knowledge or belief. Such basis may also emerge from the papers as a whole."

[18] In the instant matter, the founding affidavit deposed to by Ms Brauns, complies with the test formulated in the *Slomowitz* matter.

[19] Consequently the allegations contained in the founding affidavit support the relief claimed by the applicant and the point *in limine* is dismissed.

ORDER

In the premises, I make the following order:

1. The sale in execution of Erf [...] Vaalbank-A Township Mpumalanga ("the property") to the Third Respondent on 30 November 2015 is cancelled.
2. The Second Respondent is ordered to refund the Third Respondent's payment of the purchase price forthwith.
3. The Third Respondent is ordered to pay the costs of this application.

N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant	:	Advocate Mollentze
Instructed by	:	LGR INCORPORATED
Counsel for the Third Respondent	:	Mr Coetsee
Instructed by	:	PAUL COETZEE ATTORNEYS