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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 41357/2014

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

NEDBANK LIMITED

Applicant

And

**CHRISTOFFEL ANDRIES SCHOEMAN N.O.
(IN HIS CAPACITY AS TRUSTEE OF THE
VITRARINA TRUST, IT NO 1872/1999)**

First Respondent

CHRISTOFFEL ANDRIES SCHOEMAN

Second Respondent

J U D G M E N T

MASHILE, J:

[1] The Applicant and the First Respondent are a mortgagee and mortgagor respectively. The parties concluded three home loan agreements, which the Applicant subsequently secured by the registration of three distinct mortgage bonds over the immovable property of the First Respondent described as:

[Erf 1... R.....] Extension [1....] Township, Registration Division IQ., Province of Gauteng, situate at [1.....] [T....] Road, [R.....] Extension [1...] ("*the Property*").

[2] The Second Respondent is a surety having bound himself as such and co-principal debtor jointly and severally *in solidum* for the due payment by the First Respondent to the Applicant of any amounts which the First Respondent may be liable to pay to the Applicant under the various mortgage bonds.

[3] The First Respondent has failed to observe its obligations arising in terms of the loan agreements as read with the mortgage bonds by not adhering to payment of its monthly instalments. Its failure provoked the Applicant to launch these proceedings against it and the Second Respondent. The Applicant is now suing the Respondents for the following:

3.1 Payment of the amount of R1 730 868.71;

3.2 Payment of interest on the aforesaid amount at the rate of

7.40% per annum, calculated and capitalised monthly in advance, calculated from 31 August 2014 to date of payment;

3.3 An order declaring the property specially executable for the aforesaid sums plus costs;

3.4 An order authorising the Registrar of this Honourable Court to issue a warrant of execution for the attachment of the Property; and

3.5 Costs of suit on the scale as between attorney and client.

[4] The Respondents have raised a number of preliminary points. Of all of them, lack of *locus standi* of the Applicant to launch these proceedings brought about by the cession of the debt to Greenhouse Funding (Pty) Ltd ("*Greenhouse*") drew the attention of this Court. It is this Court's attitude to deal with this point first as it could be dispositive of the whole matter.

[5] The Applicant has admitted that Greenhouse is one of the companies to which it does intermittently cede debts for commercial reasons. However, Counsel for the Applicant assured this Court on the day of the hearing that the debt in the current matter had not been ceded to Greenhouse as is the case with the other debts. Reference to Greenhouse in the certificate of balance is simply a mistake of its employees who possibly inadvertently mingled the files resulting in this incorrect labelling.

[6] The founding affidavit is deposed to by Ms Pheladi Moagi (“*Moagi*”) and the mistake in the founding affidavit to which Counsel referred was made by her. Flagrant, as the mistake is, the certificate of balance bears Greenhouse as the current mortgagee. If that is correct, it certainly means that it, and not the Applicant, has the *locus standi* to bring these proceedings against the Respondents.

[7] In an attempt to resolve the mistake on the certificate of balance, which is an annexure to the founding affidavit, The Applicant simply prepared another certificate of balance wherein it cites itself as the mortgagee this time around. The corrected certificate of balance is annexed to the replying affidavit. To make matters worse, the deponent to the replying affidavit is Ms Sindisiwe Fortunate Sizakele Mhlongo (“*Mhlongo*”). Mhlongo confirms that the certificate of balance annexed to the founding affidavit is incorrect.

[8] It is trite that Mhlongo cannot in these circumstances change the evidence of Moagi. The latter is the only one who can alter her own evidence and possibly shed some light on how it came about that the mistake occurred. The point of Counsel for the Respondents is accordingly well-founded. No one party can alter the evidence of another. The party who made the mistake ought to explain the circumstances and manner in which it happened. Short of that the matter must be dismissed.

[9] As indicated earlier, a finding that the deponent to the replying affidavit cannot correct a mistake in the founding affidavit to which she was not a deponent is fatal to the Applicant's case. That being the case, I find no need to traverse any of the other defences raised by the Respondents as this alone is dispositive of the whole case.

[10] The application fails and I make the following order:

10.1 The application is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT	ADV D VAN NIEKERK
INSTRUCTED BY	HAMMOND POLE MAJOLA INC
COUNSEL FOR RESPONDENTS	ADV G M ANDERSON
INSTRUCTED BY	ANDERSON-KRIEL ATTORNEYS
DATE OF HEARING	9 MAY 2016
DATE OF JUDGMENT	24 JUNE 2016