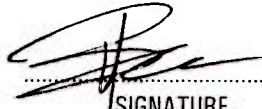


**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG**  
**(REPUBLIC OF SOUTH AFRICA)**

CASE NO : 13340/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES/NO	NO
(2) OF INTEREST TO OTHER JUDGES YES/NO	NO
(3) REVISED	
DATE 4/8/2011	 SIGNATURE

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA  
LIMITED**  
[Registration No : 1962/000738/06]

Applicant

and

**TELLINGER, MICHAEL JULIUS**  
[Identity No : ]

Respondent

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**JUDGMENT**

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**BAVA AJ:**

[1] The Applicant brings an application for an order seeking:

[1.1] Payment of the sum of R890 111,30 from the Respondent.

[1.2] Interest on the above amount at the legal rate of 15.5% per annum *a tempore morae*, alternatively interest at the rate of 9% per annum from 2 February 2011 to date of payment.

[1.3] Costs of suit on an attorney and own client scale.

[1.4] Declaring that the property described as 926 Somerset Extension 18, Midrand, approximately 450 square metres in extent, be (declared) executable.

[2] Applicant was represented by Counsel, Mr Chohan, and Respondent appeared personally.

[3] The Applicant's application is based on what it terms a written home loan agreement which was entered into between the parties on either the 26<sup>th</sup> of February 2007 or alternatively on the 16<sup>th</sup> of March 2007 in terms of which the Applicant advanced the sum of R828 015,00 to the Respondent.

[4] A continuing covering mortgage bond was registered over the property described as 926 Somerset Extension 18, Midrand, in favour of the Applicant on the 16<sup>th</sup> of November 2007.

[5] Applicant alleges that the Respondent failed to make any of the monthly instalments due under the home loan agreement since 2010.

[6] Applicant further alleges that the Respondent was in arrears in the sum of R56 862,48 as at 2 February 2011 and that as at the date of the Applicant's replying affidavit, the Respondent remained in arrears as at that date in the sum of R88 782,52.

[7] Applicant accordingly alleges that the Respondent is in breach of the terms of the home loan agreement and the mortgage bond which entitles the Applicant to the repayment of the full amount loaned to the Respondent and to an order declaring the property executable.

[8] The Respondent filed an answering affidavit in terms of which he avers:

[8.1] that the Applicant is a legal fiction created from the minds of man and has no jurisdiction higher than the living sentient human being;

[8.2] that the Applicant has committed a commercial crime in terms of public policy by applying an administrative process by which an attempt is made to collect money based on an implied agreement in law that has already been accepted and settled by applying the Bills of Exchange Act.

Furthermore the Respondent contends that the Applicant did not have any right to pass his contact details to any third party or to alter his credit rating without his consent.

[9] The Respondent further contends that he is not a member of the Law Society of South Africa and as such not bound by their rules or regulations and that the documentation on which the Applicant's claim is based was not in fact furnished to him.

[10] The Respondent also contends that at no stage did he give the bank permission to proceed against him. Furthermore the Respondent contends that it is as a result of his signature that the bank obtained the monies and therefore, despite paying for a period of 2 years, he is not obliged to pay the Applicant any monies as it was a self-financing transaction and that his signature created value and he further contended that in terms of the Bill of Rights and in terms of the Bills of Exchange Act, he is not obliged to continue paying the bank at all as he does not owe the bank any monies.

[11] At the hearing of the matter, the Respondent submitted what he termed a further affidavit which he then agreed was his head of argument and not a further affidavit.

[12] During the argument, I engaged both parties regarding the execution

of the property and I expressed particular concern regarding the execution of the primary residence. Respondent conceded that the property in question was not his primary residence and in fact he had let it out and was obtaining rentals from the said property.

[13] It is trite that an application not only takes the place of a declaration in an action but also of essential evidence to be led at trial. Accordingly, an application must include facts necessary for the determination of the issue in the Applicant's favour. **Bezuidenhout v Otto** 1996 (3) SA 339 (W)

[14] In terms of the Uniform Rules of Court and more particularly Rule 6(1) it indicates:

*"Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the Applicant relies for relief."*

[15] In the case of **Goodwood Municipality v Rabie** 1954 (2) SA 404 (C), De Villiers JP in quoting Bell, *Legal Dictionary* and Van Zyl's *Judicial Practice* states:

*"(A)n affidavit is a statement in writing sworn to before someone who has authority to administer an oath. An affidavit means a solemn*

*assurance of a fact known to the person who states it, and sworn to as his statement before some person in authority, such as a judge, or a magistrate, or a justice of peace, or a commissioner of the court, or a commissioner of oaths.”<sup>1</sup>*

[16] In considering an application before me, I need to consider the averments made to sustain a cause of action as well as the evidence in support of such a claim.

[17] In **Bayat and Others v Hansa and Another** 1955 (3) SA 547 (N), Caney J, in quoting **Mauerberger v Mauerberger** 1948 (3) SA 731 (C) cited and summarised the principle in respect of what the Applicant has to produce in its affidavits and he stated as follows:

*“..., that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the Respondent, and is not permitted to supplement it in his replying affidavits less make a new case in his replying affidavits.”<sup>2</sup>*

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<sup>1</sup> **Goodwood Municipality v Rabie** *supra* at 406 B-C

<sup>2</sup> **Bayat and Others v Hansa and Another** *supra* at 553 C-G

[18] After hearing argument and on closer examination of the application, it is noted that the Applicant's founding affidavit is deposed to by one Jakob Jan Dekker who indicates that he is :

*"I am an adult male Senior Manager in the Complaints Area of the office of the Chief Executive Officer of the Applicant and I am more commonly known as Joop Dekker."*

[19] At paragraph 3 of the founding affidavit, Mr Dekker indicates that the facts are within his personal knowledge. However, it is not apparent how Mr Dekker, being a senior manager in the complaints area of the office of the Chief Executive Officer of the Applicant has any knowledge in respect of:

[19.1] the agreements concluded;

[19.2] the workings or operations of the home loan department;

[19.3] the knowledge of the debt situation of the Respondent;

[19.4] the agreements concluded between the parties;

[19.5] the interactions between the home loans department of the Applicant and the Respondent.

[20] In the case of **The Master v Slomowitz** 1961 (1) SA 669 (T), Jansen J states:

*"In general an application must be based on proper evidence (not e.g. hearsay) and it must appear from the petition and annexures as a whole that the foundation for relief is so evidenced – it is not merely a question of the petitioner stating that the facts are within his personal knowledge. The very nature of the papers may belie such a statement even though it does appear; or make it unnecessary where it is absent. 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."*<sup>3</sup>

[21] In considering the affidavit and before I can take the evidence into account, I have to be satisfied that the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter. I cannot accept that *any* employee of the Applicant bank is able to testify to the facts in the matter. This will lead to an absurdity. The deponent has to allege the necessary facts in order to allow a court to conclude that the information that he presents to court are within his knowledge.

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<sup>3</sup> **The Master v Slomowitz** *supra* at page 672 B



[22] Affidavits by branch managers of a bank and the branch manager's assistant have been held to be sufficient in that such persons are people who would ordinarily have knowledge of the relevant facts. Persons from the home loan department and indeed Mr Dekker would also have personal knowledge if he is able to indicate in his affidavit what his relationship is to the home loans department or the department dealing with the institution of actions against defaulters of such loans. However, for Mr Dekker to simply indicate that he is a Senior Manager in the Complaints Area of the office of the Chief Executive Officer does not, in my view, go far enough and Mr Dekker does not make any further allegations in the affidavit indicating the basis on which I am to hold that he does indeed have knowledge of the facts to which he is attesting.

[23] In having considered the matter, I am not convinced that the Respondent has made out a proper defence. The Respondent has attempted to articulate a reason for not paying the Applicant with which reasoning I am unable to agree. However, before I am to interrogate the Respondent's defence in detail, I need to be convinced that the Applicant has made out its case. In this regard, I do not find that the Applicant's witness had sufficiently qualified himself and accordingly I am unable to take into account the evidence of the Applicant.

[24] Accordingly, I have to consider what would be just in the

circumstances. I make no determination on the merits of the matter or to the rights of the Applicant to proceed by way of application in the particular circumstances. However, on the other hand the Respondent has not provided a proper defence to a home loan agreement. In being faced with the situation where I am unable to have regard to the evidence of the Applicant and where there is no proper defence, I am of the view that it would be just, in the circumstances, to allow the Applicant to supplement its founding affidavit in order to remedy the defect. Accordingly I make the following order:

**The order**

1. The Applicant is allowed leave to supplement its founding affidavit;
2. The Respondent is afforded the opportunity of answering thereto within 15 (fifteen) days of the supplementary affidavit being served on him;
3. The Respondent is afforded the opportunity of replying to such answer within 10 (ten) days of the answer being served on it;
4. The issue of costs is reserved for determination by the Court ultimately hearing this application.

AB2032a/JH

BAVA AJ :

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a series of loops and a horizontal line extending to the right.