

SOUTH AFRICA / JUDGMENT

Rosen and Another v Focus Genius (Pty) Ltd (38436/2012) [2017] ZAGPPHC 304 (11 May 2017) [2017] ZAGPPHC 304

COURT

North Gauteng High Court, Pretoria

BEFORE

Opperman

CASE / FILE NUMBER

38436/2012

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 38436/2012

Not reportable

Not of interest to other judges

Revised.

11/5/2017

In the matter between:

Rosen: Blyda
Anca First
Applicant
Rosen: Harold
Maurice Second
Applicant
and
Focus
Genius (Pty)
Ltd Respondent

JUDGMENT

OPPERMAN J

Introduction

- [1] On 10 April 2013 summary judgment was granted in favour of the Respondent against the First and Second Applicants, jointly and severally, for payment of R142 500 together with interest thereon at the rate of 15.5% per annum from date of service of summons until date of payment together with costs of suit ('the summary judgment'). The cause of action as against the second applicant was an acknowledgment of debt and the cause of action against the first applicant, a suretyship in terms of which the first applicant bound herself as surety and co-principal debtor for the debts of the second applicant in favour of the respondent. Both these agreements were contained in a single document ('the third agreement' as there were others before this one.) The matter was opposed and during such hearing, the Applicants were represented by counsel.
- [2] The application for rescission of the summary judgment ('the rescission application') was served on the Respondent's attorney on 24 May 2016. The rescission application was therefore served and filed 3 years and 1 month after the granting of summary judgment. The Applicants seek an order that the late filing of the rescission application be condoned.
- [3] At the heart of the application lies an expert report by Brigadier JF Hattingh who opines that the first applicant did not append her signature to the third agreement. The first applicant thus contends that her signature was appended fraudulently. She says she didn't sign the suretyship embodied in the third agreement. The correctness of the granting of the summary judgment is not being challenged. It is the inadequacy of the facts presented in the affidavit opposing the application for summary judgment, which is in issue.
- [4] The rescission application is grounded in common law, in terms of which a court may set aside its order. It is a discretionary remedy and must be sought within a reasonable period of time, see *First National Bank of Southern Africa Limited v Van Rensburg NO & Others: In re: First National Bank of Southern Africa Limited v Jurgens & Others*, 1994 (1) SA 677 (T) at 681 H and *Roopnarain v Kamalpathi & Another*, 1971 (3) SA 387 (D) at 391 B-D. What a reasonable period of time is, will depend on the circumstances of the case, see *Promedia Drukkers & Uitgewers (Eiendoms) Beperk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 421 F-H.
- [5] The Court may, upon good cause shown, set aside the summary judgment. The applicants have to (a) provide a reasonable explanation for their default, (b) show that their application is brought bona fide, and (c) be able to show that they have a bona fide defence/s to the respondent's claim which prima facie, has some prospect of success, see *Ferris and another v Firstrand Bank Ltd*, 2014

- [3] SA 39 CC at para [23]. (a) has no direct application in this matter as the judgment was not obtained by default. Counsel represented the applicants at the hearing of the summary judgment application. The applicants nonetheless need to explain why the defence, now raised, was not raised during the hearing of the summary judgment application. In that sense, their failure needs to be

explained and such explanation must be found to be reasonable.

- [6] The applicants' failure to have approached this court at the earliest opportunity, needs to be considered and if justified, condoned.

REASONABLE TIME PERIOD

- [7] The first question which falls for determination is the time period which would be considered reasonable under the circumstances of this case. The reason for a time limit is that there must be finality in litigation and prejudice can be caused if rescission is not sought promptly.
- [8] In *Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd*, 1977 (4) SA 25 (W) at 27, McEwan J held that guidance may be obtained from a similar rule. Prima facie, a reasonable time would be the same amount of time afforded to other litigants under similar circumstances. It is not prescriptive though, see *Promedia Drukkers* (supra) at 421 F – H. The 20 day period laid down in Rule 31(2)(b) thus provides guidance of what a reasonable time might be. The applicants approached the court within a period of 3 years and 1 month. This is an inordinately long period of time and most certainly not reasonable. It even exceeds the period of extinctive prescription. By virtue of the findings in this case, it is not necessary to make a ruling on what a reasonable time, within the context of this case, might have been.

THE EXTENT OF THE EXPLANATION

- [9] In *Ethekwini Municipality v Ingonyama Trust*, 2014
- [3] SA 240 (CC), the Constitutional Court held that where the delay was lengthy, the explanation given must not only be satisfactory, but must also cover the entire period of the delay. The court further emphasized the necessity that an application for condonation must provide a full explanation for the delay, which explanation must be reasonable, see too *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae)[2007] ZACC 24; , 2008 (2) SA 472 (CC) at para [22]
- [10] In *Gqwetha v Transkei Development Corporation Ltd and Others*, 2006 (2) SA 603 (SCA), which admittedly was a decision dealing with review proceedings and delays in that context, Mpati DP referred with approval to the principles formulated in *Associated Institutions Pension Fund and Others v Van Zyl and Others*, 2005 (2) SA 302 (SCA) at para [46] in which Brand JA confirmed that the investigation into the reasonableness of a delay has nothing to do with a Court's discretion to condone the delay. It is an investigation into the facts of the

matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. Although this includes a value judgment it should not be equated with the judicial discretion involved in whether the delay should be condoned.

THE EXPLANATION

- [11] The reasons advanced why the late filing should be condoned are that the applicants had insufficient funds in order to instruct an attorney to represent them and that a handwriting expert could not be instructed prior to April 2016, as it was only then that the Applicants managed to get the R 2 200 necessary to secure his services. The reason for their impecuniosity, they contend, is in part due to the Respondent's conduct in obtaining an Anton Pillar Order against them during July 2012.

REASON FOR ABSENCE OF FRAUD DEFENCE IN AFFIDAVIT OPPOSING SUMMARY JUDGMENT

- [12] The reason why the fraud defence does not appear in the affidavit resisting summary judgment, is explained as follows:

‘In simple terms, the affidavit opposing summary judgment which was deposed to by the Second Applicant had been woefully drafted and was completely inadequate. At the time the Second Applicant and myself were compelled to utilise the services of an attorney appointed by the Legal Aid Board. We had no alternative but to leave our fate entirely in the hands of the Legal Aid attorney which is what we did.’

The alleged incompetency of the Legal Aid attorney is therefore to blame for the absence of the fraud defence in the affidavit opposing summary judgment

FACTS EXPLAINING THE DELAY AND THE ABSENCE OF FRAUD IN THE AFFIDAVIT OPPOSING SUMMARY JUDGMENT ANALYSED

- [13] The facts in respect of the reasons advanced for the delay and why the fraud defence was not raised in the affidavit opposing summary judgment, reveal the following:

13.1. Between the period 17 April 2012 and October 2012 the applicants were represented by Fairbridges Attorneys and in particular Mr Short who, on 26 June 2012 and in response to a letter of demand dated 11 June 2012, denied the existence of a credit agreement between the respondent and the first applicant. The applicants did not question the competency of Mr Short. Yet, he didn't raise the fraud pertinently or at all. He didn't expressly say the document does not bare his client's signature. Had this been communicated to him one would've expected to read this in the letter.

13.2. During the period August 2012 and 29 April 2013 and when the Anton Pillar proceedings were initiated, the applicants were represented by attorney Motaung and by attorney Van Schalkwyk in the summary judgment application, the latter attorney having been appointed by Legal Aid South Africa. Neither attorney raised the issue of fraud. Had this been communicated to either, one would've expected to read this in the affidavits prepared by them for their clients. It does not appear.

13.3. The applicants contend that during July 2012 the Anton Pillar order was executed which resulted in the second Applicant having no income. As a result of this they also lost their home. The undisputed evidence is that during the execution of the Anton Pillar order, the sheriff took only copies of documents. The applicants contend that the Respondent manipulated the existence of the Anton Pillar order to defame both the applicants, which caused the second Applicant to become unemployed and to lose all his previous goodwill and reputation. The respondent vehemently denies this stating: 'The Anton Pillar order was not published anywhere and could not have affected the Applicants in any way whatsoever as only copies of their computers and documents were taken by the Sheriff for preservation'

13.4. During the application for leave to appeal the summary judgment (on 29 April 2013), the applicants had secured the services of a private firm of attorneys, Faber Goertz Ellis Austen Inc. This had occurred roughly 20 days after the summary judgment was granted. Of considerable significance is the fact that the applicants in their founding papers did not mention this event. It was also not explained why these new attorneys, whose existence wasn't disclosed and whose competency not attacked, did not bring an application to lead 'new' evidence when the application for leave to appeal was argued. The only plausible inference to be drawn is that the first applicant did not disclose the fraud to her new, competent attorneys.

13.5. From September 2013 onwards, the applicants contended that they did not have the funds to pay for an attorney to represent them in the ongoing dispute with the respondent. Again the applicants failed to disclose in their founding papers that they were in fact represented by a private firm of attorneys, N Maharaj Attorneys, since 31 March 2014 in a defamation case instituted against the applicants by, amongst others, the respondent.

13.6. In the founding affidavit deposed to on 17 May 2016, the first applicant stated: 'Over the past few months I have managed to accumulate modest funds sufficient to instruct another attorney on whose advice we in turn instructed a forensic document consultant to inspect the signature on the alleged suretyship'. The other attorneys referred to are the current attorneys of record, Dewey Hartzberg Levy Inc, who were not instructed 'Over the past few months' as alleged, but have been the attorneys of record since 20 March 2015, 1 year and 2 months prior to the founding affidavit having been deposed to.

- [14] The explanation furnished by the Applicants does not cover the entire period as required in terms of *Ingonyama Trust* (supra). The Applicants have also not satisfactorily explained the lengthy delay in seeking rescission, particularly in the light of their knowledge of the summary judgment and the First Applicant's contention that "throughout this period of time I have steadfastly believed that there is no personal suretyship ...".
- [15] Why the fraud was not alleged in the affidavits resisting summary judgment, is blamed on the incompetence of the legal representatives. Nowhere in the papers though do the applicants contend that they told their legal representatives that the signature was forged but the legal representatives intentionally or negligently omitted to raise this. Under these circumstances it is difficult to understand what it is the legal representatives, who are alleged to have been incompetent, failed to do (Attorneys Motaung and Van Schalkwyk) and why the alleged competent ones (Attorneys Fairbridges, Faber Goertz Ellis Austin and Maharaj Attorneys) also failed to disclose the fraud or act upon such information. Moreover, why did it take the current attorneys of record 1 year and two months to launch the rescission application?
- [16] The Applicants have failed to provide any detail as to the costs of a handwriting expert, other than in the replying affidavit stating that the actual cost amounted to R2200. They did not provide details of their income or assets for the period 10 April 2013, (the date of judgment), to 17 May 2016, (the date the founding affidavit was signed). It could reasonably have been expected that this information was provided to the applicants' previous legal aid attorneys and their current attorneys. No details were provided as to why the services of any pro bono attorney or institution could not have been procured if, indeed, their situation was as dire as now suggested. Details including dates of attempts made to obtain the services of pro bono organisations which had been approached, are lacking.
- [17] I find as a fact that the delay was unreasonable.
- [18] The next question which falls for consideration is whether, despite this factual finding, the applicants' conduct should be condoned.

WHETHER CONDONATION SHOULD BE GRANTED

- [19] In *Commissioner: South African Revenue Services, Gauteng West v Levue Investments (Pty) Limited*, 2007 (3) ALL SA 109 (SCA) Combrinck, JA refused to grant condonation, despite good prospects of success in favour of the South African Revenue Services, ('SARS'). SARS had filed a substantive application on notice of motion and sought condonation for the late filing of the record and, in principle, ascribed the delay to the transcribers who were instructed to compile the record. The attorneys on behalf of SARS claimed that they did everything in their power and control to expedite the compilation and filing of the record. SARS contended that condonation should be granted because they had reasonable prospects of success. SARS filed the record 10 months late.

[20] The Supreme Court of Appeal has warned repeatedly that a party seeking condonation cannot rely solely on prospects of success to entitle it to be excused from not complying with the Rules of Court. In *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Limited* 1980 (4) SA 794 (AD) where Muller JA, said the following at 799 D-E:

"In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be."

See too *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) at 281D – 282A

[21] It has been held that where the applicant for rescission has provided a poor explanation for her default, a good defence may compensate for this. *Creative Car Sound v Automobile Radio Dealers Association* 1989 (Pty) Ltd 2007

(4) SA 546 (D) at 555C–D. However, in this regard the Supreme Court of Appeal in *Chetty v Law Society, Transvaal*, 1985 (2) SA 756 (A) at 765B-D has reiterated the basic principle that:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[22] The court went on to recognize that there may be certain circumstances when the question of the sufficiency or lack of sufficiency of the explanation of the default is finely balanced. In those cases, a good defence on the merits might tip the scale in favour of granting rescission. In the court's subsequent judgment in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003

(6) SA 1 (SCA) at 9F it held that a weak explanation for the default may well justify the refusal of rescission on that basis alone:

"... unless, perhaps the weak explanation is cancelled out by the defendant being able to put of a bona fide defence which has not merely some prospect, but a good prospect of success."

[23] Again, in *Chetty* (supra), at 768C the court emphasized that even in those particular cases where the question as to the sufficiency of the applicant's explanation for her default is finely balanced:

"... this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits."

- [24] As I understand the principles to be extracted from these dicta, the fundamental rule remains that an unsatisfactory explanation for the applicant's default cannot be cured by, or be approached more leniently, because she is able to show good prospects of success on the merits. An applicant cannot escape the obligation to provide a satisfactory explanation for her default, and rely instead on her prospects of success. The prospects of success will only tip the scales if there is an explanation that meets some basic threshold of acceptability, and the circumstances are such that the doubts that the court has over the sufficiency of the explanation are outweighed by the applicant's strong prospects of success.
- [25] The explanation tendered for the delay in this application is unconvincing and inadequate. The Applicants had knowledge of the judgment for more than three years and did nothing about it until May 2016. As the Applicants furthermore seek an indulgence, they must be bona fide.
- [26] The applicants were almost throughout this entire period (April 2012 to May 2016), represented by attorneys who, on their own version acted adequately and competently. They thus in fact had legal representation.
- [27] Their impecuniosity seems questionable. The First Applicant owned an immovable property situated at 75 Foxglove Street, Wilro Park, Roodepoort. The Applicants possessed and possess various luxury items such as rings, jewellery and had various business interests. The Second Applicant was a director and shareholder of Professional Bodies Assist and Education ('PBAE') and the First Applicant was employed. The Second Applicant inherited two properties from his mother during 2013. The Second Applicant drives a Hyundai sports Coupe. The Second Applicant disclosed an income of R40 000 per month from PBAE, (a salary advice having been presented to Standard Bank of South Africa for a loan application). The Second Applicant is also the consulting CEO of the South African Optometric Association ('SAOA'). I am not persuaded that from June 2012 until May 2016 the applicants did not have R 2200 (or did not have access to R 2 200) to employ the services of a handwriting expert.
- [28] It is apposite, at this juncture, to pause and consider the prospects of success in order to establish whether such prospects might tip the scales. This despite this court finding that the applicants did not reach that stage where there exists an explanation that meets some basic threshold of acceptability. This exercise is embarked upon insofar as this latter finding might be found to be incorrect.

PROSPECTS OF SUCCESS AND BONA FIDE DEFENCE

- [29] In *De Wet and Others v Western Bank Ltd* 1977 (4) SA 770 (T), Melamet J (with whom Boshoff J and Curlewis J concurred) summarised the principles applicable to rescission under the common

law at 776F as follows:

‘ Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which restitutio in integrum would be granted by our law such as fraud or justus error in certain circumstances. *Childerley Estate Stores v. Standard Bank of SA Ltd.* 1924 OPD 163 at pp. 166 - 168: *Seme v Incorporated Law Society*, 1933 (1) T.P.D. 213 at p. 215: *Makings v Makings*, 1958 (1) SA 338 (AD) at p. 343: *Athanassiou v Schultz*, 1956 (4) SA 357 (W).....

The position as set out above recognises the finality of a judgment once delivered or issued (vide, *Estate Garlick v Commissioner for Inland Revenue*, 1934 AD 499 at pp. 502 - 503).

Under the common law a judgment can be altered or set aside only under limited circumstances and the additional relief extended by the Rules of Court is intended to modify such rigid provisions but within the confines of such Rules. The Court is empowered to grant relief in certain additional circumscribed circumstances.'

[30] It should of course be borne in mind that the judgment under consideration was not granted by default. The applicants were duly represented. In terms of the common law, the rescission of final and definitive judgments can only occur on limited grounds. In *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (AD), Trengove AJA commented as follows at 1041C:

'The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default

judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf *Athanassiou v Schultz* 1956 (4) SA 357 (W) at 360G and *Verkouteren v Savage* 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being *functus officio*, and judgments could only be set aside on the limited grounds mentioned in the *Childerley* case.'

At 1040E Trengove AJA held as follows:

'In the *Childerley* case, DE VILLIERS JP was primarily concerned with the Court's jurisdiction to set aside a final and definitive judgment, on the merits of the dispute between the parties, after evidence had been led. The issue in that case was whether the Court was empowered to set aside a final judgment on the ground that it was subsequently discovered that the judgment had been obtained as a result of fraudulent and false statements made by a witness during the course of the trial. Referring to a number of authorities, which

had been quoted in support of the proposition that judgments could be set aside, under Roman-Dutch law, on the ground of justus error, DE VILLIERS JP remarked at 166:

"It is evident that these cases and also the other cases of similar nature mentioned by Voet in (4.6.10, 11) are rather instances of purging default or granting extensions of time such as are still recognized by our modern Rules of Court in cases in which judgments are entered for default and not on the merits of the dispute"(my italics).

Then, after discussing the exceptions to the rule that a judgment could not be set aside on the ground of the discovery of new documents after judgment, the learned Judge said at 168:

"We arrive at this position then that so far as justus error is concerned default judgments may in some cases be set aside under the Roman-Dutch law on the ground of justus error, and that judgments, whether by default or not, may be set aside in the seven exceptional cases above-mentioned on the ground of

instrumentum noviter repertum, though evidently some of those cases are nowadays obsolete and inapplicable; there are, further, the exceptional cases of setting

aside a judgment in a matrimonial suit on the ground of justus error... There may be other exceptional instances. But I must say that I know of no such further general application of the doctrine of justus error to judgments as would entitle the vanquished party to bring an action to set aside a judgment on the ground that the court gave the judgment in error, even if such error was just and was induced by a non-fraudulent misrepresentation made by the other party to the case. And no attempt has been made by plaintiff's counsel in this case to produce any authority which would justify such an extensive application of the doctrine. On the contrary it seems clear that Voet, in stating that judgments may be set aside on the ground of fraud, and (in exceptional cases) on the ground of instrumentum noviter repertum (42.1.28) intends impliedly to exclude any other grounds ejusdem generis for setting aside judgments delivered in defended cases after both parties have been heard and the action has been fought to a finish. (my italics). ‘

[31] In *Nyingwa v Moolman* N.O. 1993 (2) SA 508 (Tk GD) White J summarised the principles succinctly as follows at 511J:

"It follows that any judgment, including a summary judgment, can be rescinded under the common law. If the merits of the dispute were considered before summary judgment was granted, rescission can follow only on the grounds set out in the *Childerley* case; if the merits were not considered and the judgment was granted by default, the grounds for rescission are virtually unlimited, and the only prerequisite is that 'sufficient cause' therefor must be shown. It follows that, if an answering affidavit, or evidence, has been considered by the Court before it grants summary judgment, the Court would then have considered the merits of the case and its judgment cannot then be held to be by default, even if there was no appearance for the defendant when the application was heard.'

[32] In *Schierhout's* case, the Court stressed the fact that a final judgment of a court of law should not be lightly set aside and in *Makings* (supra) (quoted in *De Wet* (above)), Steyn JA emphasised that where the appeal procedure is not exhausted, the legal position between the parties will be honoured regardless of how judicially flawed such position is, as it is in

the public interest that a final judgment be afforded the authority that compliance with it will be guaranteed. The unusual procedure of restitution should be kept in check by strict constraints. It is essential that there should be finality to a trial.

[33] In order to succeed on a claim that a judgment be set aside on the ground of fraud, it is thus necessary for the Applicants to allege and prove the following

33.1. That the successful litigant was a party to the fraud;

33.2. That the evidence was in fact incorrect;

33.3. That it was made fraudulently and with intent to mislead; and

33.4. That it diverged to such an extent from the true facts which had been placed before the Court, that the Court would have given a judgment other than that which it was induced by the incorrect evidence to give.

33.5. It must be alleged and proved that, but for the fraud, the Court would not have granted the judgment.

See too *Rowe v Rowe* [1997] ZASCA 54; 1997 (4) SA 160 (SCA) at 166 H, *Motor Marine (Eiendoms)Beperk v Thermatron* 1985 (2) SA 127 (E) at 130 F-H and *Minister of Local Government v Sizwe Development* 1991

(1) SA 677 (TK) at 680 B

[34] Requirements (b) and (c) of the Ferris (*supra*) test, are interwoven and the facts underpinning these requirements are perhaps best unpacked with the use of a chronology

prepared by Mr van der Merwe who, with his usual industrious commitment, provided the court with a most useful document which revealed how the Applicants' version evolved during the course of the rescission application:

34.1. On 16 January 2012 the third agreement was signed containing the contested suretyship;

34.2. First version – 'In simple terms, this report confirms the Second Applicant and my own belief throughout that the signatures appearing on the alleged suretyship are not mine.' (own emphasis) The report is a reference to the handwriting expert. The applicants are saying that they have, since receipt of the summons, believed the signatures appearing on the suretyship is not that of the first applicant.

34.3. On 24 April 2012 (3 months after the third agreement containing the suretyship was concluded), payment was demanded from both applicants – from the first applicant as a surety and from the second applicant in terms of the acknowledgment of debt. On 12 June 2012 the sheriff served a section 129 of the National Credit Act notice on the first applicant, who refused to sign for it but in its heading refers to a suretyship. On 26 June 2012 the FIRST applicant's attorney, mr Short, responded to the letter and did not raise the fraud at all. Instead, he raised the validity of the credit agreement.

34.4. During July to September 2012 the respondent brought an Anton Pillar application. An answer was delivered wherein the first applicant's signature of the suretyship contained in the third agreement was admitted (more about this later).

34.5. On 12 October 2012 the summons was served personally on the second applicant. In her founding affidavit in the rescission application she said: 'I could not recall having signed any written documentation or the like with or on behalf of the Second Applicant in relation to the Respondent'. This statement by the second applicant, under oath, makes it clear that she read the summons upon receipt.

34.6. Second version – In the first applicant's replying affidavit, she contended that she did not read nor apply her mind to the summons in 2012 and was unaware of the forgery, even for a period of months after execution of the Anton Pillar order.

34.7. On 25 March 2013 the second applicant deposed to an affidavit seeking criminal investigations against, amongst others, the respondent and its attorney. There was no suggestion of the fraud in such affidavits. The failure to raise the fraud of course confirms the second version (or the fact that she had signed the suretyship agreement).

34.8. Third version – First Applicant contended in her founding papers that during September 2013 she believed that there was no personal suretyship and that the signature is a forgery. She thus became aware of the forgery in September 2013.

34.9. Fourth Version – In her replying affidavit, the first applicant explained that at the end of 2015, she had studied the pleadings in the action giving rise to the summary judgment and realised that the signature on the suretyship was not hers.

[35] The court when granting summary judgment found that the Second Applicant had defaulted on payments, was in arrears with R142 500 and the First Applicant had bound herself as surety and co-principal debtor. Neither the First Applicant nor the Second Applicant have explained why the fraud was not raised in the affidavit opposing the summary judgment application prior to the granting of summary judgment and why the affidavits opposing summary judgment did not contain a simple denial that the First Applicant had in fact signed the suretyship. Much was made of how inadequate the legal representation was but nowhere in the some 535 pages of the application do the applicants say we told our legal representatives but they failed to include such version into the affidavit.

[36] The question that has not been answered is why none of the attorneys employed since 29 April 2013, whose competency has not been questioned by the applicants, did not launch the rescission let alone raise the fraud. The ineluctable conclusion from these facts is that they were never told of the fraud.

[37] This conclusion is supported by the following admission: Prior to the action forming the subject matter of the summary judgment application having been instituted and during approximately July 2012, the Respondent applied for (and obtained) a preservation order under case number: 28854/2012, ('the Anton Piller order') which was granted on 2 August 2012. In the founding affidavit in the Anton Pillar proceedings the following statement was made:

'The first respondent's wife.....signed a suretyship in favour of the first applicant for the repayment of the aforesaid

monies and in writing undertook to register a covering mortgage bond over her property. All this appears from the contract ("I").'

[38] Reference to the 'first respondent's wife' is the first applicant in these proceedings. The contract, "I", is the third agreement. To this the second applicant responded:

'The content hereof is admitted but a suretyship was presented to the second respondent under extreme duress by myself, having been lured to join the first applicant under false pretences and then facing unemployment for the first time in my career at the age of 59 years.'

[39] The second applicant thus stated that he had presented the third agreement containing the suretyship to his wife, the first applicant. The defence seems to be that it was signed under duress, not that it was not signed at all. The second applicant in reply stated that he was referring to the second agreement when he made this admission. The difficulty with this version is that the second agreement does not contain a suretyship. It is only the third agreement which contains a suretyship. Moreover, it is for the first

applicant to say what she meant when she confirmed the version of the second applicant in the Anton Pillar proceedings. She has not done so.

[40] The signature initially analysed by Brigadier Hattingh, the findings of which are contained in the initial report and contained in the founding affidavit, relate not to the suretyship in question, but to additional security the first applicant undertook to provide by way of registering a mortgage bond over certain property. This undertaking is also contained in the third agreement. This error was picked up by the applicants and remedied in the replying affidavit. Brigadier Hattingh concluded in his supplementary report that the suretyship was not signed by the person who signed the specimen signatures. A myriad of criticisms were raised against his opinions and the facts upon which he based his findings. This court need not rule on these issues. The fact that the first applicant effectively made out her case in the replying affidavit is also something this court need not spend too much time

on.

[41] This court is faced with a number of conflicting versions, the most striking being, on the one hand, that the suretyship was signed under duress by the first applicant and on the other, that the suretyship was not signed by the first applicant at all (Brigadier Hattingh's report).

Perhaps the existence of the duress affected the way the first applicant appended her signature and this emotional turmoil influenced her handwriting on the day. It is not for this court to speculate on why Brigadier Hattingh's opinion is at variance with the four other versions advanced by the applicants or why such opinion contradicts the version advanced in the Anton Pillar proceedings. The existence of these numerous and contradictory versions is sufficient to conclude that the applicants are not bona fide.

- [42] It was also incumbent upon the applicants to show, assuming this court were to accept Brigadier Hattingh's opinion above the other versions of the applicants, that the respondent was complicit in the forgery, see *Minister of Local Government v Sizwe Development* (supra) at 680B. They did not do so.
- [43] This court retains a discretion to grant rescission but this discretion should be exercised having regard to all the facts and circumstances of the case.
- [44] This is not a case where this court should come to the assistance of the applicants. I cannot conclude that this application is bona fide. Moreover, this is not a case where the prospects of success tip the scales in favour of the applicants and condonation should accordingly also be refused.
- [45] There is one final matter - I need to commend both counsel in this matter, Mr Bishop and van der Merwe. They argued this matter in the highest traditions of the Bar and I thank them both for their invaluable contributions.

ORDER

[46] I accordingly grant the following order:

46.1. Condonation for the late filing of the application for rescission is refused;

46.2. The application for the rescission of the judgment obtained by the respondent against the first and second applicants on 10 April 2013, is dismissed with costs.

I Opperman

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 21 April 2017

Judgment

delivered: May 2017

Appearances:

For Applicant: Adv A Bishop

Instructed by: Dewey Hertzberg Levy Inc

For Respondent: Adv C van der Merwe

Instructed by: JJ Badenhorst & Associates

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