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

CASE NUMBER: 16376/12

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

_____ _____
DATE SIGNATURE

In the matter between:

MECHANOLOGY PROPERTIES (PTY) LIMITED	**1st Applicant / 2nd Defendant**
CRAIG ANTHONY SAVIDES	**2nd Applicant / 3rd Defendant**
MICHELINA SAVIDES	**3rd Applicant / 4th Defendant**
CRAIG ANTHONY SAVIDES N.O.	**4th Applicant / 5th Defendant**
MICHELINA SAVIDES N.O.	**5th Applicant / 6th Defendant**

and

STATE BANK OF INDIA LIMITED	**Respondent/Plaintiff**

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction.** The five applicants apply for a rescission of summary judgment that was granted by this court on 18 June 2012. In terms of that order, all the applicants, then defendants (together with the first defendant who is not part of the current application), were ordered to, jointly and severally, the one paying the other to be absolved pay (i) the amount of R10 568 199.64; (ii) interest on R2 416 732.81 calculated at prime lending rate (9 %) plus penal interest at the rate of 2 % per annum from the 30th April 2010 to date of payment; (iii) portion 21 of Erf 2 in the township of Prosequor, Registration Division JR; Province of Gauteng, measuring 3866 square meters, held by Deed of Transfer No. T151307/2003 was declared specially executable; and (iv) costs of suits on the attorney and client scale.

2. **Background.** The relevant background facts are that the respondent had entered into a loan agreement with the first defendant. Suretyship agreements were also entered into between all the applicants and the respondent for the debts of the first defendant up to R11 million. The first applicant also agreed to a hypothecation over the property referred to in the summary judgment, to serve as security over the said debt. Breaches of this agreement led to summons being issued against the applicants and the process culminated in the summary judgment being granted against them. The first applicant in this case was the managing director of the first defendant who as indicated above, is not part of the current application. The first defendant has since been liquidated. Summary judgment against the current applicants was granted based on these suretyship agreements.

3. This application is sought on the basis that the aforesaid summary judgment was erroneously sought and granted as envisaged by the provisions of Rule 42 (1) (a),

alternatively under common law. The applicants aver that they have a *bona fide* defence and a reasonable explanation as to their non-appearance (so they could give the said defence in court) on the day the judgment was handed down.

4. The reason advanced for their default on the date the summary judgment was granted is to the effect that the applicants were under the impression or understanding that there was an agreement between them and the respondent or their legal representatives that an application for summary judgment would not be proceeded with by the respondent. As for the *bona fide* defence, they allege that there was an oral agreement entered into between the first applicant and the respondent, represented by Mr. Panda that there would not be a court action brought against them.

5. Rule 42 (1) provides, "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary: An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby." The common law position has always been that the courts may rescind a judgment upon the applicant showing a good cause:

   a) by giving a reasonable explanation of his default,

   b) by showing that his application is made bona fide,

   c) and by showing that he has a bona fide defence to the claim which prima facie has reasonable prospects of success."[1]

6. It is common cause that the applicants were served with notice of set down for summary judgment application on 8 June 2012 which was set for 18 June 2012. It is also common

[1] See *Chetty v Law Society Transvaal* 1985 (2) SA 756 at p. 764-765 and *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at p. 476.

cause that before the summons were served on the applicants; the first applicant had been making attempts to reach a settlement with the respondent, efforts that did not stop even as the application for summary judgment was set down. No agreement reached (if any) was reduced to writing.

7. The allegation by the first applicant to the effect that there was an agreement not to proceed with the application for rescission is disputed by the respondent. In fact such an allegation is negated by the respondent's conduct who seemed determined to get a judgment even as the first applicant attempted to negotiate a settlement. This is evident in hat the notice for set down was issued by the respondent at the stage the first applicant was still trying to negotiate his way out. In fact, the applicants' attorney even contacted the respondent's attorney upon receipt of the notice of set down wondering why, since the first applicant was yet to make submissions. The response by the respondent's attorney is again disputed. Irrespective of the above, the applicants and/or their legal representative chose not to be in court on the 18th June 2012 even after being served with the set down.

8. **Issues**. Issues for determination by the court are whether the explanation by the applicants regarding their default is reasonable, and whether they have a *bona fide* defence which *prima facie*, has the reasonable prospects of success. The test is whether a reasonable person with the knowledge that the applicant had would have been of the impression that there was an agreement not to proceed with the application for summary judgment. Before judgment was handed down, the matter went through a number of stages. After summons was issued, there was an application for summary

judgment and the same had to be set down before a judgment was granted by the court. All these were served on the applicants.

9. There is no document, whether under oath or otherwise that suggests that there was an agreement between the applicants and the respondent to withdraw the application for summary judgment. All that can be shown is correspondence from the attorney of the respondent directed to the applicant's attorney wherein he denies there was ever such an arrangement. The e-mail correspondence from the applicant's attorney directed to the respondent's attorney reflects that the applicants were under the "impression" that the matter would not be proceeded with. Soon thereafter, in a follow up e-mail "the impression" is now upgraded to "an arrangement."

10. Even if the parties were to agree and reduce the agreement in writing, such does not absolve one from being present in court if they need to make sure that the agreement would be honoured. One would be willing to accommodate a party who laboured under the impression that the matter would be removed from the roll to the extent that he did not attend to court proceeding, if he relied on a written undertaking to that effect. To stay away while there was no such undertaking in writing is unacceptable in my view. Even if the version by the applicants was to be accepted as true, the mere reason that the respondent went on to set the matter down for hearing while they were still negotiating; is in my view sufficient for them to have acted cautiously since the respondent is painted as having not negotiated in good faith (setting the matter down while negotiations were still underway). There cannot be any reasonable justification for the default of the applicants when one looks at the facts as a whole.

11. **The *bona fide* defence.** It is important to note that the applicants do not dispute their indebtedness to the respondent. They however allege that the oral agreements they had with Mr. Panda would be a successful defence against the respondent's claim. The said agreement was the *pactum de non petendo* which clearly negated the original agreement. It is worth noting that Mr. Panda is not the respondent, but an employee of the respondent who represented it when the loan and suretyship agreements were signed with the applicants. His role is merely that of being a representative just as the current representative of the respondent, Mr. Rajasekharan is doing. There is no need for the respondent to have personal dealings with the applicants when the respondent is a corporate entity.[2] The applicants knew very well that they did not enter into suretyship agreements with Mr. Panda, but with the respondent, as much as they knew that the loan granted to the first defendant came from the same respondent, not Mr. Panda. The first applicant wants the court to believe that the corporate entity in the person of the respondent entered into an agreement wherein they vary the written contracts, but such variance was not reduced in writing. The court is called on to evaluate if there are reasonable prospects of success based on this defence.

12. The applicants did not attach an affidavit by Mr. Panda to confirm the allegation of an oral agreement as one would have expected of them. It is the respondent who secured the said affidavit (the second one) and served the same on the applicants' attorney some seven months back. This was after the applicants had raised concerns over the commissioning of the affidavit by Mr. Panda which was done outside of the Republic of South Africa. The applicants oppose the filing of the second affidavit because it comes after they had filed their replying affidavit. While the court takes note of the decision of

[2] See *Standard Bank of South Africa v Secatsa Investments (Pty) Ltd and Others* 1999 (4) SA 229 (C) at p. 235.

the Supreme Court of Appeal in *Hano Trading CC v JR 209 Investments (Pty) Limited and another*,[3] the facts in this case are distinguishable in that the *Hano* decision deals with the fresh affidavits which were only collected after the replying affidavits had been filed, in an attempt to counter the contents of the said replying affidavits.

13. The current application relies on oral agreements with a person who has since emigrated. The respondent attached his affidavit so the court would hear his side of story regarding the alleged agreements he may have entered into with the applicants, but concerns are raised regarding the commissioning of the statement thereof. The only thing that happened after the replying affidavit was to have the same statement the applicants had long before filing their replying affidavits, re-commissioned afresh and served again on them. I am persuaded by the reasoning in *Pangbourne Properties Ltd v Pulse Moving CC & another*[4] in the finding that it cannot be concluded that when affidavits are filed out of time that they are not, without more, before the court. I come to this conclusion having evaluated the prejudice that the applicants could suffer in the acceptance of this affidavit by the court. In my view, the only prejudice the applicants can suffer would be in the court knowing the truth which unfortunately is not in line with their version. I am as such prepared to accept the said affidavit.

14. Even without the affidavit by Mr. Panda, the suggestion that the applicants have a *bona fide* defence is a far from convincing and falls short of the requirement that it should be a defence that carries reasonable prospects of success. On this point again, the applicant's case stands to be dismissed.

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[3] [2012] JOL 29725 (SCA).

[4] [2010] JOL 26475 (GSJ)

15. **Application to be made bona fide.** It appears in my view that the whole purpose for this application is to delay the execution of the summary judgment. The summary judgment was granted in June 2012. The correspondence by the applicant's attorney by e-mail contains requests that the execution of the judgment be stayed. Even after the notice of motion for this application, the applicant did not set the matter down for hearing until the same was done by the respondent. The applicants' counsel suggested that the matter be postponed to a future date in that there was now an affidavit that the respondent was to rely on, referring to the affidavit that was served on them some seven months back. Another requirement for the rescission in terms of Rule 42 (1) is that the application should be made *bona fide*. I am not convinced that the application as a whole was brought *bona fide*.

16. The applicants have therefore failed to show that there is a reasonable explanation for their default when summary judgment was handed down. They knew of the date since it was served on them. They also failed to show that they have a *bona fide* defence that has prospects of success. The application as a whole also seems to be a delaying tactic not brought *bona fide*.

17. I therefore make the following order:

The application is dismissed with costs.

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T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Date Heard:	**08 May 2013**
Judgment Delivered:	**31 May 2013**
For the Applicants:	**Adv. F Vaccaro**
Instructed by:	**David Bayliss Attorneys** **Pretoria**
For the Respondent:	**Adv. Y Alli**
Instructed by:	**Edward Nathan Sonnenbergs** **c/o Friedland Hart Solomon & Nicolson** **Pretoria**