IN THE SOUTH GAUTENG HIGH Court

JOHANNESBURG

CASE NO: 261/12

DATE: 30/08/2012

In the matter between

JONATHAN MOLYNE KILLIK APPLICANT

and

INVESTEC BANK LIMITED RESPONDENT

J U D G M E N T

WILLIS J:

[1] I have before me an application for leave to withdraw the notice of an application for rescission of judgment with a notice of withdrawal having been tendered. The applicant tenders costs on an attorney and client scale. This application is opposed by the respondent.

[2] In the 33 years that I have been a lawyer I have never come across an application for withdrawal (either on an application or for an action) that has been opposed where there has been a tender for costs. I say this without any sense of shame or embarrassment because as Kumleben JA said in the matter of *Levy v Levy* 1991 (3) SA 614 (A) at 620B:

> "The situation in such a case would be one difficult to visualise." (In his own words.)

[3] If, however, one may be permitted to corrupt the famous saying of Pliny, the elder and aver that *ex curia Johannesburgensis semper aliquid novi*, the ingenuity of the lawyers in this town seems to know no bounds.

[4] The immediate background to this particular application is that last week I was the senior judge presiding in the Motion Court. This matter was before me as an opposed application for rescission of a judgment, to which I shall refer later. The matter was set down by the respondent in the application for rescission of the judgment. The applicant applied last week for a postponement. I indicated in court last week that I believed that the matter should to reach some finality. There were squeals of protest from counsel for the applicant in this matter on the basis that he was in the invidious position in such an important matter in not having his learned leader with him.

[5] Accordingly, I agreed to stand the matter down in order for a date to

be agreed upon this week when his learned leader, Mr *Brett* SC would be in court to lead him in this matter. I specifically arranged for this matter to be heard today to accommodate Mr *Brett*. I may record that I am not sitting in an ordinary Motion Court week but specifically arranged for this matter to be heard because last week it seemed that, *prima facie,* it had dragged on for far too long.

[6] One can therefore imagine my surprise when, this morning, Mr *Brett* was not in court but Mr Kaplan was being led by Mr *Du Toit* SC who has been brought into this particular application.

[7] The reason advanced for why the applicant wishes to withdraw is that there is an affidavit by one Deborah Catharine Smart who testifies to the fact that she was employed by SSG, Security Services Group, and that she perpetrated a fraud of a signature. She refers to one Mr Pauli Simpson, the managing director of Forensic Investigations at SSG who, she says, called her to his office, showed her a signature and asked her to practice to see if she could copy it. Two days after he had given her the document, which had typing on it, he told her to sign the signature (which she had practiced signing before) on the document where provision was made for a signature. She says: “I did not have a chance to look at the document to see what I was signing neither did I know whose signature I was signing.”

[8] This forgery (as alleged) is contested by the respondent. The

applicant contends, in view of that protest of disagreement, that this whole matter should be referred to trial. That, so the argument goes, is why the application is now brought for the withdrawal of rescission of the application. That is now to explain the application for withdraw the application for rescission of the judgment that had previously been obtained.

[9] It is necessary to have regard to the facts in somewhat more detail. The applicant (Mr Killik) and a Mr Botha, were directors of the MKB Group Holdings (Pty) Ltd, ('MKB'). MKB carried on business as a property developer. It borrowed money from the respondent, Investec Bank Limited, ('Investec'), to finance its business. MKB owed Investec over R100 million. Investec made loans to MKB under six written loan agreements concluded between 2007 and 2008. Mr Botha signed the loan agreements on behalf of MKB. Mr Killik (the applicant) and Mr Botha stood surety for the repayments of the loans. It has never been in dispute (and is indeed common cause even today) that the loan agreements were concluded and that the funds under these loans were advanced by the respondent and the funds received by MKB.

[10] As I am delivering this judgment *ex tempore* and as it will therefore be riddled with points upon which greater clarity and greater finesse could be preferred, I wish to emphasise in big, bold, red capital letters the sentence that I uttered a few moments ago: it has never been in dispute that the loan agreements were concluded and the funds under

these loans were advanced by the respondent and received by MKB. This fact, to my mind, looms large and it looms larger than a number of other points that have been argued before me today. If I do not address all the different points that have been raised by counsel, both last week and today, I hope I may be forgiven for doing so because, as I say, I consider this one particular fact looms so large.

[11] In December 2008, Investec launched an urgent application for the winding up of MKB. The order, which was unopposed, was made final on 3 February 2009. In January 2009 Investec brought an application against the applicant (Mr Killik) and Mr Botha, predicated upon their suretyships for payments of the amounts MKB owed it (Investec) in terms of the six loan agreements. The applicant and Mr Botha opposed the application. At that time the applicant (Mr Killik) and Mr Botha, raised only one substantive defence *viz*., that Investec, the respondent, had breached the provisions of the loan agreements and accordingly had prejudiced them as sureties. In other words, at that time the applicant, (Mr Killik) and Mr Botha relied upon the provisions of the loan agreements precisely in order to escape their liabilities as sureties.

[12] The applications against the applicant (Mr Killik) and Mr Botha, were argued in a single application before Van der Walt AJ who granted six separate judgments against the applicant (Mr Killik) and Mr Botha, jointly and severally on 10 November 2009. The effect was an order for payment by them jointly and severally to Investec (the respondent in the

present application) of an aggregate amount of around R103 315 684.00, together with interest and costs.

[13] At that time, the applicant (Mr Killik) and Mr Botha did not dispute the authenticity of the six loan agreements in the money judgment application. The applicant (Mr Killik) and Mr Botha applied to the High Court for leave to appeal but this application was dismissed with costs. The applicant (Mr Killik) and Mr Botha, applied to the Supreme Court of Appeal for leave to appeal by way of petition but this petition was also dismissed.

[14] In September 2010 the respondent (Investec), launched an application for the sequestration of Mr Botha's estate. Although answering and replying affidavits were filed, Mr Botha consented to a provisional order of sequestration, which was granted on 22 February 2011. The return day was 5 April 2011. On 4 April 2011 Mr Botha launched an application to extend the return day so that he could file a further affidavit in the sequestration application. In January 2011 the respondent in this application (Investec), launched an application for the sequestration of the applicant (Mr Killik).

[15] In June 2011 Mr Botha launched an application seeking to rescind the money judgment that had previously then obtained against him. Mr Botha's ground for rescission was that his six signatures on the relevant deeds of suretyship upon which Investec relied were all forgeries. Mr

Botha at that time neither denied signing the loan agreements nor has he ever questioned the authenticity of his signatures thereupon. Mr Botha's case was based entirely on the reports of handwriting expert, Mr J F Hattingh, who in his first report ventured the opinion that Mr Botha's signatures on all six deeds of suretyship were forged. The hearing of Mr Botha's application for rescission took place before my brother, Moshidi on 21 May 2012. Moshidi J then handed down a written judgment on 24 July 2012 in which he dismissed Mr Botha's application for rescission.

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[16] On 3 November 2011 Mr Killik launched his proceedings in which he seeks to rescind the judgment obtained against him. Mr Killik seeks to rescind the money judgment on the ground Mr Botha's signature was forged on at least one of the loan agreements in question. On 8 December 2011 the applicant (Mr Killik), Mr Botha and the two trusts controlled by them instituted an action against the respondent, (Investec), under case number 2011/47058 in which they claimed the sum of R243 016 542.00. In that action, the plaintiffs' cause of action was founded on the allegation which was made on behalf of Mr Killik,
20 (the applicant in the present matter), that Investec (the respondent in this particular application) had acted unlawfully in relying on certain corporate suretyships that were fraudulent and/or unsigned and thereby Investec unlawfully procured the winding up of MKB.

[17] In paragraph 18 of the particulars of claim in that action the

plaintiffs alleged that the respondent (Investec) and MKB had concluded a number of written loan agreements and specified 18 such agreements by a deal number. In paragraph 20 thereof, the plaintiffs relied upon a quote from the terms of each of the loan agreements. This is in paragraph 18 thereof. The plaintiff relied upon the provisions of the written loan agreements to substantiate their damages claimed against Investec. In other words, the plaintiffs in that action sought to rely precisely upon the loan agreements which the applicant (Mr Killik), today wishes to have held in question.

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[18] On 16 February 2012 Investec served a notice in terms of rule 35 (12) in which it requested an opportunity to inspect the 18 written loan agreements referred to in the particulars of claim. On 25 March 2012 the plaintiffs filed a response to the notice and on 2 May 2012 the applicant (Mr Killik), set down this rescission application for hearing on 8 May 2012. The application was postponed by agreement in terms of a court order which provided, *inter alia*, that the rescission application was postponed *sine die* and that the applicant (Mr Killik), undertook not to set the rescission down for hearing until such
20 time as an application to compel compliance with Investec's 35 (12) notice in the action had been determined.

[19] On 8 May 2012 the respondent (Investec), served a rule 30A notice on the plaintiffs, calling upon them to comply with the rule 35 (12) notice. In response, on 23 May 2012 the plaintiffs, (including obviously

the present applicant, Mr Killik), filed a notice withdrawing the action and tendering Investec's costs.

[20] The affidavit in question, namely the affidavit by Ms Smart upon which the applicant relies in seeking to obtain the withdrawal of this particular application is so appallingly bad that I believe that no regard need be had to what it says. It is unusual for a court to express such a view but I need only repeat the sentence that I mentioned earlier:

> "I did not have a chance to look at the document to see what I was signing neither did I know whose signature I was signing."

The deponent to this affidavit asks the court to believe that she was asked by one Mr Pauli Simpson to practice a forgery and then, two days later, she was given a document to forge and, 'hey, presto', this signature appeared thereon which it is now claimed is a forgery. Even if I have committed a serious solecism in criticising an affidavit *ex facie* as document itself, even if it is accepted that Mr Botha's signatures on the loan agreements were forged, the undisputed and unchallenged evidence of certain persons whose evidence has been put before the courts by way of an affidavit namely, Ms Penny, Ms Cross and Ms Curry makes it clear that the forgeries must have been made before Ms Cross received them from MKB and forwarded them to Investec. The latter (viz. Investec) could not have played any part in the forgery. In any event, in the affidavit that is presented in support of the application for referring the whole matter to trial and in allowing the withdrawal of the

application it is clear that SSG (which is not the respondent) was the party to the fraud.

[21] I agree with counsel for the respondent, Mr *Antonie* that the applicant (Mr Killik), like Mr Botha in his rescission application cannot succeed in this application because an applicant for rescission, relying on the ground of fraud must establish by unequivocal evidence that the successful litigant (*i.e*. Investec in this case), was a party to the fraud. See *Makings v Makings* 1958 (1) SA 338 (A) at 344 to 345; *Rowe v Rowe* 1997 (4) SA 160 (SCA) 166.

[22] There is a further and more important reason why I believe the applicant cannot succeed and that is the fact which I emphasised right at the beginning of this judgment in big, bold red luminous letters *viz*., that it has never been in dispute that the loan agreements were concluded and that the funds under these loans were advanced by the respondent and the funds received MKB. Anyone who has the most slender acquaintance with banking will know that a loan between a banker and a customer does not come into existence purely by reason of a written document signed by the parties. There need not even be a written document. There is a whole complex web of transactions: in particular, either a transfer of money into a loan account or an allowance by a bank that cheques may be drawn or other withdrawals may be made from the account in question. An allowance made by the bank that these withdrawals may be made, where

a customer, in the position of MKB genuinely transacts thereupon. In other words, there can be no room for any doubt in this matter that MKB did borrow money from Investec and that the applicant in this matter stood suretyship for that debt. I wish to emphasise, there can be no room for any doubt about this.

[23] Accordingly, I can see no basis whatsoever on which this document, to which I have already alluded, an affidavit deposed to by one Smart can in any way be relevant. I did also emphasise that the judgment that was obtained against Mr Killik was not a judgment obtained by default. It was a contested application. This also colours the whole background to the matter. As I said at the very beginning of this judgment, it would normally difficult to visualise a situation where a court would not allow an application for withdrawal of an application. But, in that judgment of *Levy v Levy* Kumleben JA, delivering the unanimous judgment of the court referred to the case of *Hudson v Hudson & Another* 1927 AD 259 at 268 where De Villiers JA observed that:

> "Where a Court finds that an attempt had been made for ulterior purposes to abuse the processes of the Court it was the duty of the Court to prevent such abuse. In other words, an abuse of Court process will justify a Court dismissing an application for withdrawal."

I am satisfied in this instance that there quite clearly has been an abuse of the court's processes. If one has regard to the history of this matter it is

quite obvious that all that has been done is that the court's rules and processes have been abused with a view to buying time for the applicant in this particular matter.

[24] In question arises whether, if I dismiss the application for withdrawal of the application for rescission, I should also dismiss the actual application for rescission of judgment which was one of the matters that was enrolled last week and which I expected to hear today. Mr Antonie argued that there should be a 'package deal' order because, in the end, the whole question of whether there should be a rescission and whether or not there should be a withdrawal of the application depends on the simple point whether the affidavit of Deborah Smart has such a potent effect as to justify a trial action to determine whether judgment was correctly obtained against the applicant in this matter (Mr Killik).

[25] The postponement application made yesterday is really is of consequence because, if anything, the matter was postponed to today in the expectation that it would fully argued. I therefore, am of the view that Mr *Antonie* is entirely right in his submissions. I afforded Mr *Du Toit* an opportunity to address me on this aspect (the dismissal of the application for rescission of judgment). I am not sure whether I can fairly say he did or he did not but, be that as it may, it is quite clear that everything stands or falls in this particular matter on the status, the momentum, the gravity, the power, the impetus, of Ms Smart's affidavit.

[26] Mr *Antonie*, counsel for the respondent, has argued that the costs of

two counsel should be allowed. There really can be no serious opposition to this request, given the scale of magnitude of the matter. I did not understand Mr *Du Toit* to object thereto. After all, two counsel have been employed on behalf of the applicant in the matter.

[27] It should be noted, in order to avoid any confusion, that the judgment on 11 November 2009, to which reference is made in the order that follows is annexure A to the founding affidavit of the applicant in the application for rescission of the judgment. It is the judgment of Van der Walt AJ delivered on 11 November 2009.

[28] The following are the orders of the court:

1. The applicant's application for leave to withdraw the application for rescission of the judgment granted against him in this matter on 11 November 2011 is dismissed with costs.
2. The application for a postponement of the application for rescission of the judgment granted against the applicant in the above matter on 11 November 2009 is dismissed with costs.
3. The application for rescission of the judgment granted against the applicant in the above matter on 11 November 2009 is dismissed with costs.
4. The costs orders made above are to include the costs of two counsel.

Counsel for applicant: Adv *S F du Toit* SC (with him, Adv *J L Kaplan*)

Counsel for respondent:	Adv *M Antonie* SC
Attorney for applicant:	Laurencik Attorneys
Attorney for respondent:	Farber Sabelo Edelstein
Date of hearing:	30 August 2012
Date of judgment:	30 August 2012