REPUBLIC OF SOUTH AFRICA

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

CASE NO: 39782 / 2019

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

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SIGNATURE **DATE:**11 November 2021

In the matter between:

SHEPERD BUSHIRI INVESTMENTS (PROPRIETARY) LIMITED	FIRST APPLICANT
BUSHIRI, SHEPERD HUXLEY	SECOND APPLICANT
BUSHIRI, MARY	THIRD APPLICANT
and	
JM BUSHA INVESTMENT GROUP (PROPRIETARY)	RESPONDENT

JUDGMENT

MANOIM J

[1] This is an application for rescission of a judgment granted on 23rd March 2020 by Vuma AJ.

[2] The judgment required the applicants to pay the capital and outstanding interest on a loan that they had obtained from the respondent. The terms of the order included provisions for the perfection of certain security held by way of bonds and declaring certain properties owned by the second applicant executable.

[3] The first applicant is the company to whom the respondent loaned the money and the second and third applicants are two of its shareholders who stood surety for the loan.

[4] But although the applicants had their legal representatives in court that day when the matter was heard on the unopposed motion roll, and despite these legal representatives having agreed to the content of the order, the applicants now claim that their legal representatives did so without a mandate and hence, on that basis alone, the judgement should be rescinded.

[5] They allege they have a *bona fide* defence. An acceleration clause in the loan contract they allege had been prematurely invoked and hence the cancellation was invalid. In addition, the interest claimed on the loan had been incorrectly calculated by the respondent and this error was repeated in the court order.

[6] The respondent disputes all these propositions

[7] Complicating the case further were additional facts. Since the rescission application was launched on 30 June 2020, the second and the third appellants, the Bushiris, a husband and wife, who were out on bail in a criminal matter, had skipped bail and fled the country to Malawi, the country of their nationality.

[8] Initially the respondent had challenged the *locus standi* of the Bushiris to bring this application because it alleged, they were fugitives from justice. The Bushiris appellants then filed a supplementary affidavit in which they explained that they had fled the country because of two reasons; threats to their lives and concerns that criminal proceedings brought against them were the product of corrupt officials. They claim that since arriving in Malawi their whereabouts are known, and they are co-operating with the extradition process.

[9] At the hearing, the respondent did not press this point, the reason given to the court was that the respondent wanted to bring this litigation to finality. In any event the proceedings in respect of the first appellant would not be terminated in respect of this point, even if it would have been successful against the Bushiris. Therefore, the approach of the respondent has been pragmatic. It wants a decision to bring finality to the litigation. I therefore find it unnecessary to consider this aspect.

[10] The second preliminary issue concerned another *locus standi* challenge in respect of Shepherd Bushiri, the second appellant. The court papers contain a provisional sequestration order obtained allegedly by the respondent against Bushiri. There is also correspondence between a firm of attorneys purporting to act for the provisional liquidators and the appellants' attorneys. This correspondence indicates no more than that the alleged provisional trustees have not made up their mind about the wisdom of the litigation. I say alleged trustees, because not only did the appellants not know anything about this order but nor, according to a Mr Botha who appeared for the respondent, did it, even though *ex facie* the order, it was obtained at the alleged behest of the respondent. Again, this was a point he did not pursue at the hearing after having received this instruction from his client about the alleged liquidation. For this reason, I sought from the respondent an affidavit confirming that it did not authorise this litigation. [1] However, on 28 October I received the affidavit. Since it arrived after I heard final argument in this matter I have not considered it except in one respect. Busha now confirms that he did instruct another firm of attorneys to bring the sequestration application due to the illness of his instructing attorney in this matter, but this fact was not known to his instructing attorneys and counsel when I heard the matter. I do not take this point any further and remain of the view that since the trustees have not intervened this does not affect Bushiri's right to be one of the applicants in this matter.

[11] Having disposed of these *in limine* issues I now deal with the basis for the rescission application.

Loan agreement

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[1] Ex facie the order it was obtained on 24 November 2020.

[12] In 2017 the first applicant and the respondent entered into a loan agreement in terms of which the first respondent loaned the first applicant R 200 million to renovate a property known as the Sparkling Waters Hotel. Initially the capital amount of the loan was to be repaid after one year, but the parties amended the agreement to roll over payment for a further year. This meant payment of the capital had to be repaid by 12 December 2019.

[13] Interest was payable monthly on the loan amount calculated at applicable rate. If any interest amount was not paid on time, there would be penalty interest calculated at the applicable rate plus 2%.

[14] The agreement also provided for a so-called default event. This arose if a payment was not paid in full on or before the due date and the first applicant failed to remedy the breach within 10 days of receipt of a demand from the respondent to do so. If the default remedy was not remedied within the requisite period, the respondent was entitled to cancel the agreement and demand full payment of all amounts then outstanding.

[15] The second and third applicants, who are shareholders of the first applicant signed as sureties for the obligations of the first applicant.[2]

[16] According to the respondent the first applicant did not make payment of the January 2019 interest instalment on due date. On 20 March 2019, the respondent sent a letter of demand to the first applicant calling upon it to remedy the breach within ten days. According to the applicant the breach was never remedied and so it cancelled the agreement on 16 September 2019.

[17] This then led to the respondent instituting proceedings against the applicants, claiming an amount of R 203 544 845 .81 together with interest at the rate of 15.25% from 5 October to date of final payment, as it asserted it was entitled to do in terms of the loan agreement.

[18] **Events after the service of the application**

[19] A notice of intention to oppose was filed on behalf of the applicants by their then attorney on 22 November 2019.

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[2] Between them the Bushiris own 80% of the shares in the first applicant.

[20] But thereafter Shepherd Bushiri contacted Busha, the managing director of the first respondent, in November, who said he was amenable to extending the date for the repayment of the capital sum. Although Bushiri also says his attorneys had told him that he had till 13 December to file his plea his understanding of his conversation with Busha was such that he was confident the matter could be resolved out of court.[3]

[21] Bushiri then says his erstwhile attorneys then sent him the respondent's notice of set down on 18th March 2019. This appears to have caught him by surprise given his earlier conversations with Busha. He was left with three days to file opposing papers, which he says would have been impossible in the circumstances.

[22] Here he attributes blame partly due to the failure of his erstwhile attorneys to send him the notice of set down timeously (they had apparently received it twelve days prior to advising him) and also on Busha with whom he thought he had an understanding.

[23] Whether the erstwhile attorney was negligent in this respect is something I cannot decide. He was certainly not passive in the face of the notice of set-down. There is a letter in the record dated 19 March 2020 (thus four days prior to the hearing) in which he asks the respondent's attorney to postpone the hearing for sixty days to allow his clients to access offshore funding which due to Reserve Bank requirements were not readily obtainable. There was an attempt to claim privilege over the content of this letter. The respondent denies it is privileged and this view is correct as I discuss more fully below.

[24] It seems this offer must have been rejected because the applicants then briefed their erstwhile attorney and counsel to attend court on that day. According to Bushiri their mandate was to *"...seek a postponement of the matter and to negotiate, if possible, a settlement of all issues between the parties."* But he says no brief was given to them to agree to the order sought *"... especially as we had (and still have) a good defence to the respondent's claim."*

[25] It is common cause that in court that morning the applicants' counsel and attorney appeared and negotiated a change to the order sought resulting in the order given by

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[3] As he put it in his founding affidavit in the rescission Bushiri states "given the assurances made to me by Busha I was happy to try and settle the matter out of Court." But these assurances could only relate to extending the payment dates given what is stated in paragraph 34 of the FA about his first conversation with Busha.

Vuma AJ on that day which is the subject of the present rescission application. Ex facie the order it is clear that the negotiations led to certain changes to the original order sought by the respondent. This is because certain paragraphs appear in the order in in manuscript. What they amount to is an extension period for the payment of outstanding debt in two instalments over a period of two months.

[26] It is common cause that the manuscript additions to the order were the fruit of the negotiations between the respective legal teams before the order was granted. What is not common cause is whether the two representatives of the applicants had a mandate to settle the matter and on these terms.

[27] According to Bushiri his lawyers whilst having a mandate to *"... buy time"* did not have a mandate to negotiate a settlement which would constitute a millstone around his neck especially as he has a good and bona fide defence to the claim.

[28] The respondent's version is based on the recollection of his attorney, who unlike Bushiri, was in court on that day. He recalls that the applicants' legal team had made three calls to a Mr Kajia Kantumoya who is described as the first applicant's wealth and asset manager. It was only after these calls that agreement was reached on the terms of the order put to the court. Bushiri admits that Kantumoya was in contact with the legal team on that day. He however says neither Kantumoya nor the legal team had the mandate to settle the matter on the terms that did.

[29] What of Bushiri that day? Bushiri states that although he was contactable that day he was never contacted. His position is that his legal team had exceeded their mandate on the day.

Events after the order was granted.

[30] Bushiri says that on the 3rd April Kantumoya contacted Busha and says the latter agreed to put things on hold pending such discussions. Busha denies this.

[31] On 6 April Bushiri fired the erstwhile attorney and instructed Clifford Levin who represents him in this matter. Levin then instructed counsel. The following day Levin wrote to the respondent's attorney to say he had been instructed to apply for a rescission of the judgment. The basis for rescission is not made out in the letter. The respondent's attorney replied that the judgment had not been made by default and that the applicants had representation in court on the day.

[32] Levin after receiving this letter then advised on an appeal but sought advice from counsel. This consultation took place only in June. Counsel after obtaining an explanation from Kantumoya about the mandate of the legal team on the day, recommended that an application for rescission was the way to go. But even this advice, reversing that earlier given by Levin, was advanced hesitantly and counsel sought the advice of a senior colleague to confirm that this was the preferred avenue.

[33] The rescission application rests on three points. That the legal team had no mandate to agree to the order, that the breach provision had been improperly activated and that the interest amounts were incorrectly calculated premised on the wrong prime rate.

[34] I will first consider these defences on then go on to the issue of the attorney's mandate.

The defences based on contract

[35] The first applicant admits being late for the January payment but alleges that the breach was remedied by a payment it made in March 2019 within the 10-day period provided by the notice of default letter for rectification and hence it alleges the breach was purged. Although it also admits being late on other payments later that year, these were never followed by notices of breach. But the respondent denies the default was ever purged as it alleges that despite the March payment the first appellant has always been one payment short in his obligations. This too is disputed.

[36] What all this amounts to is that the appellants argue that although they have been dilatory payers of the interest instalments at no stage did an event of default arise which they did not remedy and hence there was no legal basis to cancel.

[37] The second basis to their defence is that the respondent has relied on the incorrect prime rate. They allege the respondent consistently sought interest payments at a higher, but incorrect, rate. This error then found its way into the court order where the prime rate is recorded, in parenthesis, as 10,25% at a time say the applicants when it was 10% per annum.

The defence based on mandate

[38] Both parties placed most of their attention on the question of the mandate. From the applicants' point of view this was based on a passage in the leading case of *Moraitis* which dealt with whether a single trustee could settle a matter for the trust when there had not been a resolution to approve from the all the trustees. The court there stated:

"... the court can only grant a consent judgment if the parties to the litigation consented to the court granting it. If they did not do so, but the court is misled into thinking that they did, the 'judgment must be set aside."[4]

[39] But this is not the only holding in *Moraitis*. If it was, the court would have not held the trust had consented to the judgment despite the trustees' denial. Rather the approach was to state two issues. First that the onus rests on the party claiming rescission to establish the lack of authority.[5] Second, Wallis JA refers to an earlier decision which had held that once a court is satisfied that a party has not consented to a judgment it must be set aside. But he went on to state:

" .. *while lack of authority is a preponderant factor, on its own it may not suffice unless there is a reasonable explanation for the circumstances in which the consent judgment came to be entered."*[6]

[40] The case for the respondent is that there is no reasonable explanation for why the consent had not properly been given.

[41] It is worth stepping back and looking at the context in which these events happened. The appellants first had a one-year period to repay the capital amount of the loan. By agreement, this period was extended by another year to the end of 2019. This agreement was contained in an addendum to the original agreement. At the end of December 2019, Bushiri's personally intervened with Busha to obtain an extension of time for repayment. It is also common cause that the appellants struggled to pay the interest and were generally late in making these payments. Even once the

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[4] *Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd and others* [2017] 3 All SA 485 (SCA) / 2017 (5) SA 508 (SCA) at paragraph 17.
[5] Ibid paragraph 21.
[6] Ibid paragraph 20

judgment had been granted the first response of the appellants was to gain an extension beyond the period set out in the order.

[42] This context suggests that throughout the period, the appellants' real problem was their ability to repay the capital for what probably was too large a loan for them to repay. Busha who had been generous in allowing some latitude for the repayment of the capital was by December 2019 (the date for the repayment of the capital) under pressure to recover the money. This was not his own money he explains in his answering affidavit but pension fund money for which he was accountable. Unsurprisingly he was forced to recover the money by instituting action.

[43] Once litigation had commenced Bushiri's first instinct was not to defend the case but again to buy an extension of time which, as he turns out he mistakenly believed, Busha had given him.

[44] All this suggests that on the day the judgment was sought the applicants legal team were briefed to do their best to obtain an extension for the repayment of the capital which by virtue of the manuscript changes on the order they achieved. That the appellants may have hoped for a better bargain than they got does not detract from the fact that the legal team carried out their mandate as best as they could. Even in the founding affidavit Bushiri states that negotiation was part of their mandate. The mandate here is distinguishable from those cases where the attorney settles the quantum in a damages claim. The mandate here would have been much narrower suggesting that the scope for settlement was more limited to getting the best terms for the period of repayment; a mandate that was at least fulfilled given the limited prospects open to the appellants on the day.

[45] It is also clear from the answering affidavit that the three phone calls to Kantumoya on the day indicate that the lawyers were not on a frolic of their own. Whilst there is no detail about the content of these conversations (Kantumoya does not refute this in reply nor deal with what was discussed) they were taking instructions from a senior employee of the first applicant who had been dealing with the loan agreement both prior to the litigation and then subsequently as well.

[46] Granted the lawyers were fired shortly after the litigation but Kantumoya continued to correspond with respondent making it unlikely that he was the one who had mishandled the issue with the lawyers.

[47] Nor was there any affidavit from the erstwhile attorneys or any communication from the appellants to them. The appellants claim such communications would have been privileged. But that is not the case. The recent decision by Tolmay J in *Myeni v Organisation Undoing Tax Abuse NPC and Others* confirms the practice in this regard. The learned judge stated:

"Our Courts have on various occasions held that "when a client alleges a breach of duty by the Attorney, the privilege is waived as to all communications relevant to that issue."[7]

[48] The court went on to state:

"I am of the view that Ms Steinberg's submission that the Applicant could not on the one hand accuse her former Attorney of failing to follow her instructions, but on the other hand attempt to suppress evidence to the contrary, was correct."[8]

[49] The failure to adduce any evidence to this effect in relation to the erstwhile attorneys nor whether a complaint had been made to the Legal Practice Council in this regard is telling.

[50] But most improbable of all is Bushiri's own conduct. He was he states in reply contactable but never contacted. This seems highly unlikely. The size of the judgment debt and the fact that he and his wife were also personally liable (apart from the fact that they jointly held 80% of the shares in the first applicant) make it unlikely that he was uncontactable on the day in question. If he was not contacted it is because it is probable that the mandate given to the legal team and Kantumoya was to do the best you can on the day.

[51] The defences now raised, it is clear from the record, are an afterthought that emerged from the new legal team consulted in June 2019. There was no indication

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[7] (15996/2017) [2019] ZAGPPHC 565 (2 December 2019) at paragraph 31.

[8] Ibid paragraph 34.

until then that the appellants believed they had any defence or at least not the ones now raised.

[52] Moreover, although I need not go into detail on these defences, they are at best on the facts dilatory in nature. One (relating to the repayment of the capital) is now moot, because it is common cause that by now the loan is repayable even if, arguably, the acceleration clause was prematurely invoked. [9] This then leaves the issue of the interest rate calculation error. As far as the interest rate stated in the judgment is concerned this it is common cause is an error as the interest rate at that time was not 10.25% but 10%. But the use of the brackets indicates that the reference to it is descriptive not binding. If this was the appellants main concern a rectification of the order would have been the best course for them. This leaves the question of the historic interest charged. This may have been calculated at an incorrect rate which was higher than provided in the agreement. But this point has not been clearly established nor does it require rescission to remedy it but could be remedied through the execution process.

Conclusion

[53] The appellants bear the onus to establish that their legal team did not have a mandate to consent to the judgment of Vuma AJ on 23 March 2019. For the reasons given I am not satisfied that the version they have offered constitutes in the language of *Moraitis* "a reasonable explanation for the circumstances judgment came to be entered" The factual context both proceeding and succeeding the date of the order suggest otherwise. Moreover, the late invocation of the defences raised, and the fact that their success is open to some doubt based on the documents in the record, is further suggestive that on the day in question the probabilities are that they did not consider they had any bona fide defence to the claim. Moreover, by that time it is common cause that the full amount of the capital was now due, as it had to have been repaid by the end of December 2019.It is thus more probable that their legal team was instructed to negotiate additional time for the repayment of the capital, a concession they obtained, albeit not on as generous terms as they may have hoped to gain.

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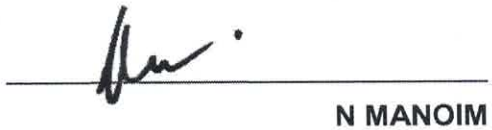
[9] The loan capital was repayable by the end of 2019. The cancellation was invoked in September 2019 thus three months prior to the date of repayment.

[54] Accordingly, I find the appellants had given their attorney a mandate to consent to Vuma AJ order. On this ground alone they are not entitled to rescission. I have therefore not needed to consider whether the contractual defences on their own amount to a bona fide defence, although as I alluded to earlier, I am in some doubt if the applicants could have discharged their onus on these points either.[10]

[55] The application falls to be dismissed. The respondent is entitled in terms of the loan agreement to costs on an attorney-client scale.

ORDER

1. The application is dismissed.
2. The appellants jointly and severally the one paying the others to be absolved to pay the costs of the respondent on an attorney client scale.
3. The respondent is to submit an affidavit by no later than 29 October 2021, as to whether it made an application to obtain the sequestration of the second appellant on 24 November 2020 or some other date.



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[10] Note as to the courts discretion when it comes to granting rescission what was stated by the Supreme Court of Appeal in *EH Hassim Hardware (Pty) Ltd v Fab Tanks* CC 2017 JDR 1655 (SCA):

"Regarding the last-mentioned requirement, it is trite law that an applicant for rescission of judgment is not required to illustrate a probability of success, but rather the existence of an issue fit for trial. Equally trite is the principle that even when all the requirements set out above have been met, it is still within the discretion of the court whether or not to rescind the judgment. That discretion must be exercised judicially in light of all the facts and circumstances of the case." See paragraph 12-13. (My emphasis)

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 11 November 2021.

Date of hearing:	15 October 2021
Date of judgment:	11 November

Appearances:

Counsel for the Applicant:	Adv A Campbell
Attorney for the Applicant:	Clifford Levin Inc
Counsel for the Respondent:	Adv J G Botha
Attorney for the Respondent:	Kevin Schaafsma Attorneys