REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

_____ _____
DATE SIGNATURE

CASE NO: 66991/2016

In the matter between:-

HANLIE JANSE VAN RENSBURG First Applicant/First Respondent

MARTHINUS JACOBUS JANSE

VAN RENSBURG Second Applicant/Second Respondent

and

CLOETE MURRAY NO. Respondent/Applicant

(In his capacity as duly appointed *curator bonis* of Petrus Johannes Uys Badenhorst ID No. [….])

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 28 October 2021.

JUDGMENT

SKOSANA AJ

[1] In this matter, the applicant seeks rescission of a court order dated 13 June 2017 granted by Justice Kubushi in favour of the respondent. The application is accompanied with an application for condonation for the late institution of the rescission application, the order having been granted over 3 years before rescission was sought[1].

[2] The applicants were the respondents in the application that resulted in the judgment in question while the respondent was the applicant therein. To avoid confusion, I refer to the parties as cited in the present rescission application.

Relevant facts

[3] The respondent was appointed as *curator bonis* for Petrus Johannes Uys Badenhorst ("Badenhorst") as a result of the Commissioner of the South African Revenue Service having brought an application in this court during September

[1] The rescission application was instituted on 06 October 2020.

2013 for a preservation order to preserve assets belonging to certain individuals in terms of section 163 of the Tax Administration Act 28 of 2011. One of the respondents in one of the preservation applications was the first applicant, being Ms Hanlie Janse van Rensburg. The first applicant is married out of community of property to the second applicant.

[4] Although not really relevant, the preservation order came as a result of the following circumstances:

4.1 Badenhorst had embarked on a business venture with Jacques Sassin and Benietha Beevoere (Pty) Ltd relating to the sale of raw material for animal and plant nutrition as well as commodity trading. A certificate had been issued by the South African Revenue Service (SARS) to Badenhorst relating to the payment of Value Added Tax (VAT) on certain conditions contained in the VAT Act. This certificate exempted Badenhorst from being charged VAT by SARS provided there was compliance with the conditions.

4.2 Later on SARS investigated and found that Badenhorst had transgressed the requirements of the relevant statutory provisions and consequently he became liable for huge amounts to SARS. As such SARS launched the urgent preservation application against Badenhorst.

[5] The first applicant's involvement was when he introduced an attorney by the name of Mr Vermaak to Badenhorst in respect of the sale of shares to the value of R30 million and for which she secured an agreement to be paid by Badenhorst a substantial commission of R5 million. It is common cause that the first applicant received from Badenhorst through attorney Vermaak an amount of R2 700 000-00 as a commission while she did not hold a fidelity fund certificate as required by section 36 of the Estates Agents Affairs Act 112 of 1976.

[6] After the respondent had been appointed as *curator bonis* of Badenhorst, he claimed the refund of the R2 700 000-00 from the first applicant. This led to the first applicant and her husband (the second applicant) signing with the respondent three acknowledgment of debt agreements during the course of 2014 and 2015 as well as the last one on 22 April 2016. The latter acknowledgement of debt agreement is the only relevant one as the earlier ones were superseded thereby. It is important to mention that all the three acknowledgement of debt agreements were concluded between the first applicant, the second applicant and the respondent in which the applicants acknowledged that they were indebted to the respondent in an amount of R2 600 000-00 and interest thereon at 8,5% per annum from date of signature to date of payment. At all material times during the conclusion of these agreements, the applicants were represented by an attorney and they had made several payments to the estate of Badenhorst as represented by the respondent. As stated above, the last acknowledgement of debt agreement was entered into on 22 April 2016 between

the applicants and the respondent. In that agreement the applicants acknowledged their indebtedness to the Badenhorst estate for the then outstanding amount of R1 290 000-00 together with interest thereon in respect of the monies that they had received from Badenhorst. Following several breaches of this last agreement and after several indulgences had been extended to the applicants, an application for payment based on such acknowledgement of debt agreement was launched on 26 August 2016 against the applicants and an order for payment in the amount of R1 290 000-00 together with interest thereon calculated at 13,25% from 28 July 2016 until date of payment, was obtained. The application for such payment had been opposed by the applicants who had filed an opposing affidavit in that regard. Therefore, the application was heard in the opposed motion roll. However, there was no representation for the applicants at such hearing.

[7] The applicants raised the defence of duress in their opposing affidavit to the application for payment and have also done so in the present rescission application. The applicants had however signed the acknowledgement of debt agreement in the absence of the respondent.

[8] After the court order had been granted, a warrant of execution was issued on 27 June 2017 to attach the assets of the respondent at their residential address as provided in their opposing affidavit, being 1438 Breyer Avenue Waverley, Pretoria but the Sheriff provided a return of non-service as the

premises were found vacated and locked. According to the respondent, several attempts were made to locate the applicants and/or to serve the warrant of execution with a view to attach property but to no avail. This included the use of tracing agents and trying to serve at other places indicated to be their place of residence, which all proved fruitless and eventually resulted in the Sheriff issuing a *nulla bona* return.

[9] There are currently pending applications for the sequestration of each of the applicants.

Condonation

[10] As stated earlier, the period of delay exceeds 3 years, i.e. from 13 June 2017[2] to 06 October 2020[3]. The applicants contend that they only became aware of the court order on 06 March 2020 and therefore ought to account for a period of only about 7 months. The respondent refutes this and states that the applicant having opposed the rescission application on 14 October 2016 ought to have been aware of the court order which was granted the following year. In particular, the respondent pointed out that on 30 September 2019, in a letter from the applicants' erstwhile attorneys to the respondents' attorneys, it is apparent that the applicants were aware of the sequestration applications as well as the court order of 13 June 2017 which is the primary basis of the sequestration application.

[2] Date of order.
[3] Date of institution of the present rescission proceedings.

[11] It is also important to note that the applicants did not file a replying affidavit and therefore the facts alleged in the respondents' opposing affidavit are unchallenged. The same correspondence also reflects that the applicants confirmed the receipt of documents but again began to complain that they did not receive the documents in April 2020. It was further pointed out that the notice of intention to tax bill of costs to which the court order of 13 June 2017 had been attached, was received by the applicants on 11 September 2019.

[12] I am inclined, in view of the above, to accept that the applicants knew of the order of 13 June 2017 at least during 2019, if not earlier. They elected to stand on the ground that they only became aware of such order in March 2020 soon before the commencement of the lockdown period in the country. It follows therefore that the period before that has not been accounted for and no explanation has been proffered for the portion of delay. The judgment of the Constitutional Court is clear in that regard, in ***Van Wyk v Unitas Hospital & Another***[4] that the explanation must cover the entire period of delay. This, the applicant has failed to do.

[13] Further, it is trite law that the question of condonation involves the assessment of the prospects of success which translate to a *bona fide* defence in the present case. I also take into account the principles laid down in the case of ***Darries v Sheriff, Magistrates' Court, Wynburg & Another***[5] to the effect that

[4] 2008 (2) SA 472 (CC).
[5] 1998 (3) SA34 (SCA) at 40I-41E.

condonation must be sought as soon as the applicant becomes aware of the non-compliance and that fragrant and gross non-observances of the rules may lead to the refusal of condonation regardless of the good prospects of success. In the presence case, the non-compliance is fragrant and gross and the applicant failed to seek condonation at the first opportunity. However, since the issue of prospects of success is closely linked to the merits of the case, I deal therewith under the merits hereunder.

Merits

[14] First, the respondent's counsel, Mr Basson, contended that since an opposing affidavit had been filed before the order of Kubushi J was granted on 13 June 2017 and the application had been heard in the opposed motion roll, then this court has become *functus officio*. In other words, the defence that is being raised by the applicants in this rescission application had already been raised in such opposing affidavit and considered by Kubushi J in granting the order. I disagree. The full hearing of an opposed motion includes the submission of heads of argument by a party and the appearance by either a duly qualified legal representative or the party in person at the hearing of such opposed motion. In ***Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd***[6]. It was held that:

[6] 1973(1) SA 627 (A); Also reported as [1973] 2 ALL SA 148(a) p.149.

> "...*neither the Courts nor litigants should normally be deprived of the benefits of oral arguments in which counsel can fully indulge their forensic ability and persuasive skill in the interest of justice and their client."*

[15] Counsel for the respondent was present Before Kubushi J and therefore would have advanced argument in favour of the granting of the order. The applicants were not represented at such hearing nor were they present in person. In my view, to regard such proceedings as fully opposed and to exclude the judgment resulting therefrom from the description of 'default judgment' would be subversive to our legal system, the interest of justice and the constitutional right of access to court. Rule 31(2)(b), by stating that "*a defendant may within 20 days after acquiring knowledge of such judgment...*", implies that such party will not have been present at the hearing of such application. Similarly, Rule 42 is direct in that it requires that the order or judgment must have been erroneously sought or erroneously granted in the absence of such party. I am consequently in disagreement with the proposition that this court has become *functus officio* by virtue of the mere fact that the order was granted after an opposing affidavit had been filed on behalf of the applicants.

[16] The main defence raised by the applicants against the order is that they were threatened by the respondent when they signed the acknowledgement of debt agreement, particularly the final one. In ***Arend v Astra Furnishers (Pty) Ltd***[7] it was held as follows:

[7] 1974(1) SA 298 (c) at 311A-B.

"Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or contra bonos mores.

(iv) The moral pressure used must have caused damage."

[17] In my view, the applicants have not met any of the requirements referred to above. The defence raised by the applicants seems to be artificial and contrived. In my view, the allegations of duress in this case seems to fall under the category described in ***Plascon Evans***[8] as allegations that are so far-fetched or clearly untenable that a court would be justified in rejecting them merely on the papers. It must also be kept in mind that "*'a person who signs a contractual document thereby signifies assent to the contents of the document, and if these subsequently turn out unfavourably there is no one to blame but him- or herself*"[9].

[18] The applicants were legally represented at the time of signing of the acknowledgement of debt agreements. It has also been shown that, while they allege to have been threatened at the meeting where the acknowledgement of

[8] Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 A at 634-635.
[9] GB Bradfield: Christie's Law of Contract South Africa 7ed (2016) at 205.

debt was concluded, they started paying off in line therewith prior to that date. The final acknowledgement of debt agreement was also signed in the absence of the respondent.

[19] The applicants rely on allegations of threat of criminal prosecution, imprisonment and so forth. Such threats do not qualify as either threats of physical violence nor could it be said that there were unlawful or *contra bonos mores*. If a statement to that effect was made by the respondent at all, it would have been made as a consequence of his reasonable belief that the money received by the applicants emanated from the proceeds of crime. Moreover, the applicants were represented by an attorney and therefore their fear, if any, could not be reasonable in the circumstances. Further, the question of whether the first applicant was in possession of the fidelity funds certificate is irrelevant. The acknowledgement of debt agreement was sufficient for the court to have granted the order.

[20] The other aspect raised by the applicants was that they did not receive a notice of set down. However, the letter from their attorney dated 16 September 2020 reveals that the notice of set down was properly served at their offices. The fact that there could have been an oversight of such notice by the applicants' attorney does not constitute a procedural defect which could ground an application for rescission either under Rule 31 or Rule 42.

[21] It has also been established that the applicants did not only sign the acknowledgment of debt agreement but also paid under those agreements over a substantial period of about 2 years. It is inconceivable that the applicants could have been labouring under the alleged duress for that lengthy period and in the circumstances where they had access to legal advice.

[22] In the circumstances, I am convinced that the application ought to fail both in respect of condonation as well as the merits thereof. Consequently, I make the following order:

1. The application is dismissed in respect of both condonation and rescission.
2. The applicants are to pay the costs of the application.

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DT SKOSANA
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 26 October 2021

Date of judgment: 28 October 2021

Appearances:

For the First and Second Applicant:	Adv W. Steyn Instructed by M.W Nothnagel Attorneys Benchmark Office Park 1 Larch Nook Centurion Pretoria
For the Respondent:	Adv A. Basson Instructed by J.I Van Niekerk Inc. Attorneys 270 Main Street Waterkloof Gardens, Suite 101 Brooklyn Pretoria