IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 4002/2011

In the matter between:

Devron Royden Lewis	**First Applicant**
Denise Cheryl Lewis	**Second Applicant**

And

First Rand Bank	**Respondent**

JUDGMENT DELIVERED ON FRIDAY 21 SEPTEMBER 2012

Baartman, J

[1] On 13 February 2012 in the absence of the applicants, the respondent obtained summary judgment. This is an application to rescind that judgment.

[2] It was common cause that the respondent, a registered bank, had advanced money through a credit facility to the first applicant. The second applicant stood security for the loan. The first applicant fell

into arrears with his monthly repayments in respect of the money advanced.

Agreements prior to judgment

[3] The applicants alleged that they had entered into various agreements with the respondent, all directed at staying legal action against them. Relevant to this judgment is the agreement, on the applicants' version, entered into in February 2011. The terms of that agreement were that:

(a) the applicants would make monthly payments of R10 000; until

(b) the first applicant received R500 000 in VAT refunds.

(c) The arrangement would be reviewed in May 2011.

(d) The respondent would not take any further legal action prior to the review.

[4] The applicants allege that they met Mr Swanepoel (**Swanepoel**), an employee who represented the respondent in agreements relevant to this judgment, in May 2011 and reached the following further agreement:

"...13. ...it was agreed that we would continue with the said agreement reached during Feb 2011 referred to in paragraph 11 above. I accordingly requested that May's payment be made during June 2011 as a lump sum will be paid during July 2011 of which include May 2011's payment. Mr Swanepoel agreed to the latter arrangement."

[5] The applicants further allege that on 3 February 2012, 10 days before the summary judgment hearing, the parties entered into the following agreement:

(a) Swanepoel undertook to stay the pending legal proceedings for 2 months. The applicants relied on the content of an e-mail

correspondence from Swanepoel for that allegation. The correspondence (**the correspondence**) provides for:

*"Devron (**reference to first applicant**) we have not had a R10 000 payment in ages. SARS would have paid over R600k more than six months ago and by now you would have paid us in full via sale of house that you were renovating. Payment in full or guarantee for the full amount to be paid within two months will stay legal action."*

[6] Although the respondent denies the February 2011 agreement, it confirms that Swanepoel sent the correspondence. The interpretation of that correspondence is central to this judgment; I therefore do not propose any finding in respect of the events that preceded the correspondence. On the applicants' interpretation of the correspondence, they had 2 months in which to provide the guarantee, failing which the respondent would proceed with the pending legal action. The respondent disavowed that interpretation. Advocate van Reenen, the respondent's counsel, submitted that the correspondence did not lend itself to the interpretation that the applicants sought to place on it.

[7] Against the above background, I consider the provision of Rule 42 of Uniform Rules:

"(1) The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to the parties."

[8] In my view, the interpretation the applicants sought to place on the correspondence is not without substance, given the peculiar circumstances of this matter. The correspondence is at best ambiguous with reference to the following:

"...Payment in full or guarantee for the full amount to be paid within two months will stay legal action."

[9] The reference to 2 months just days before the hearing could reasonably have led the applicants to believe that they had been given yet another extension. The history of threat and then extension referred to above lends itself favourably to such an interpretation. Van Reenen J, in the matter of **Promedia Drukkers & Uitgewers (EDMS) BPK v Kaimowitz and Others** 1996(4) SA 411 (C) at 417 para G-I said:

"Relief will be granted under this Rule if there was an irregularity in the proceedings...and if the Court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order..."

[10] The applicants' counsel has submitted that instead of attending to the guarantee, they employed their resources to bring this application. Therefore, so the argument went, they have not had an opportunity to obtain the guarantee required in the correspondence. I am persuaded to grant the applicants an opportunity to defend that action.

ORDER

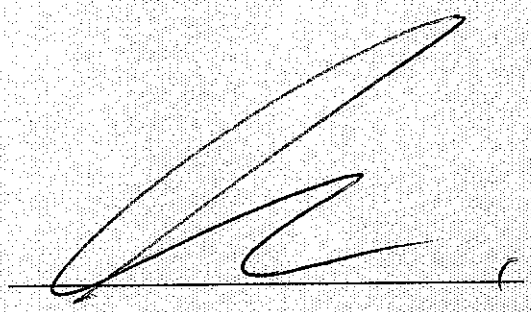
[11] I, for the reasons stated above make the following order:

(a) The application for rescission is granted;

(b) The applicants are granted leave to defend the action;

(c) The writ of execution issued on 27 February 2012 is set aside;

(d) Costs of this application stand over for determination at the trial.



Baartman J