IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

11/02/2016
DATE

SIGNATURE

12/2/2016

Case Number: 10508/2013

GOUWS, DIRK JOHANNES ALBERTUS N.O.	**1ST APPLICANT**
GOUWS, PHILIPUS ALBERTUS N.O.	**2ND APPLICANT**
BURGER, WILHYELMUS N.O.	**3RD APPLICANT**
and	
VRYSTAAT MIELIES (EDMS) BPK	**RESPONDENT**
***IN RE*:**	
VRYSTAAT MIELIES (EDMS) BPK	**APPLICANT**
and	
GOUWS, DIRK JOHANNES ALBERTUS N.O.	**1ST APPLICANT**
GOUWS, PHILIPUS ALBERTUS N.O.	**2ND APPLICANT**
BURGER, WILHYELMUS N.O.	**3RD APPLICANT**

JUDGMENT

STRYDOM AJ:

1. An application was brought to rescind a judgment which the Respondent obtained against the Applicants in their official capacity as representatives of the *Dirk Gouws Familie Trust* (hereafter ***"the Trust"***).

1.1. The Respondent obtained the judgment sought to be set aside, pursuant to an *application* which it lodged on **21 February 2013** against the Applicants, in their aforesaid capacity. In the *application* the Respondent sought payment of an amount of **R1, 173 685. 30**, interest thereon and perfecting of a Notarial Bond. [1]

1.2. The Applicants failed to give Notice of Intention to Oppose; neither did they file an Opposing Affidavit disputing the claims of the Respondent. However, on its own version, by month of the First Applicant, the Applicants had full knowledge of the legal steps which the Respondent took in order to secure judgement against them:[2]

> ***"Die applikante was bewus van die aansoek, die daaropvolgende plasing daarvan asook dat die respondent vonnis by verstek aangevra het."***

1.3. The Respondent's application was placed on the *unopposed* roll before his Lordship, Mr Acting Justice de Klerk, who granted judgement in favour of the Respondent on **24 May 2013.**[3]

2. The Trust, allegedly represented by the First Applicant, lodged an *Application for Rescission* of the latter judgment (the subject matter of this judgment), *just over a year after it was granted*, on **30 June 2014**.

2.1. The Respondent filed *Opposing Papers* in which they meticulously joined issue with the merits of the Applicants' Rescission Application.

2.2. The Applicants did not file a *Replying Affidavit.*

2.3. Since the Applicants apparently did nothing further to finalize the matter, the Respondent prepared the matter for hearing, by indexing and paginating the court file and serving its Heads of Argument on the Applicants during April 2015. The Applicants' Heads of Argument was only served on 22 May 2015. This is not in accordance with the practise of this Division. The Applicants was required to

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[1] See: *Ibid*, pp 139-140.

[2] See: Founding Affidavit, Record, p 10, par. 14.

[3] See: Opposing Affidavit, par. 5, Record p 55.

seek condonation for late and irregular filing of their Heads of Argument. However, since the Respondent did not make an issue of the irregular proceedings, I allowed the matter to proceed at the hearing without any reference thereto.

2.4. The latter facts are however indicative of the *appalling attitude* of the Applicants towards the Rescission Application and the Respondent's claim, which will appear from the discussion hereunder.

ABSENCE OF AUTHORITY

3. The Respondent disputed the ***Absence of Authority*** of the First Applicant to bring the Rescission Application on behalf of the Trust. Whether a person is authorised to act on behalf of other litigants or to bring proceedings is a *factual question.*[4] A trust is not a juristic person, but a legal institution.[5] However it can only act *jointly* through its trustees *vis-á-vis* outsiders.[6]

4. The following facts (and lack thereof) appears from the Applicants' Founding Papers pertaining to the Applicants *locus standi* to have brought the application on behalf of the Trust:

4.1.1. *Firstly*, the First Applicant explicitly states in his Founding Affidavit:[7]

> ***"Ek is behoorlik daartoe gemagtig namens die 2 de en 3 de Applikante om hierdie eedsverklaring namens hulle en die Dirk Gouws Familie Trust af te lê."***

4.1.2. I do not know how many trustees the Trust has, but *only* three trustees are mentioned as Applicants. Assuming that the Trust has only three trustees,

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4 Comp. *Eskom v Soweto City Counsel* 1992 (2) SA 703 (W) at 706C.

5 Comp. Joubert, *et al, LAWSA, Vol 31 (First Reissue), Trusts*, p 298, Par. 501; Par. 503 and authority quoted there; *Braun v Blann & Botha* 1984 2 SA 850 (A) 859 at 866; *Mariola v Kaye-Eddie* 1995 2 SA 728 (W) at 731; Commissioner for Inland Revenue v Friedman 1993 1 SA 353 (A) at 370E–G.

6 Comp. *Hoosen v Deedat* 1999 (4) SA 425 (SCA) at par [25], 432 D-E. Also see: Cameron, et al, *Honoré's South African Law of Trusts* (5th Ed), pp 419-421.

7 See: Record: p 6, par. 2.

only the Third Applicant filed a supporting affidavit and no resolution was filed authorising the Trust to institute the Application for Rescission and conferring authority on the First Applicant to act on behalf of the Trust.

5. Counsel for the Applicants *firstly* argued that the Respondent should have followed the provisions of Rule 7 of the Uniform Rules of Court (hereafter ***"the Rule(s)"***) if it wished to challenge the ***Absence of Authority*** of the First Applicant to bring the application on behalf of the Trust. Subrule 7(1) does not apply to the general authority of one litigant to act on behalf of other litigants. Only the mandate given to an attorney to issue formal court process is governed by Rule 7(1).[8] I find accordingly that there is no merit in this submission.

6. *Secondly*, Counsel for the Applicants submitted that the evidence of the First Applicant was sufficient to establish the necessary *locus standi* of the Applicants. This evidence would have been sufficient had the Respondent not taken the Applicants to task on the issue. The absence of *locus standi* was formally challenged by the Respondent in its Answering Affidavit.[9] When authority to act on behalf of a Trust is challenged the usual manner in which authority is established is by production of an affidavit (confirming or supporting) by all of the trustees and a copy of a resolution by the trust to institute an application and conferring authority on the a person or persons to act on its behalf.[10] This could have been done in a Replying Affidavit, notwithstanding the view of the Respondent to the contrary.[11] The Applicants however elected, as indicated above, not to submit such evidence.

7. The *Plascon-Evans rule*[12] applies to the present matter. According to this rule when factual disputes arise in motion proceedings, the Applicants can only succeed if the facts stated by the Respondent, together with the facts in the in the Applicant's

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[8] See: *SA Allied Workers' Union & Others, supra,* at 436 F-G; Mariola *v Kaye-Eddie* 1995 2 SA 728 (W).

[9] See: Record p 57, par. 8.

[10] Comp. *SA Allied Workers' Union & Others v De Klerk NO & Others* 1990 (3) SA 425 (E) at 434 F.

[11] See: Record p 57, par. 8.4.

[12] See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Affidavits, which the Respondent admitted, justify the finding. The Applicants failure to file a Replying Affidavit and address their *locus standi* is thus detrimental. The facts justify the conclusion that the First and Third Applicants failed to prove that they have the necessary authority to have brought this application on behalf of the Trust. It follows further by necessary legal implication that only the First and Third Applicants are before court. Reference in this judgment hereafter to *"the Applicants"* will be reference to *the First and Third Applicants only.*

8. This Application could have been dismissed on this ground alone. Counsel for the Respondent urged me however to consider the matter on the merits. Dismissing the application on lack of authority, so he argued, would ultimately leave the door open to the Applicants to again approach the court, at a later stage, in an attempt to remedy the defect. Such a possibility exists; hence I considered the merits of the Application for Rescission.

<u>APPLICATION I.T.O. RULE 42(1)(a)</u>

9. At the commencement of the hearing of this matter Counsel for the Applicants limited the Application for Rescission to the provisions of Rule 42(1)(a), notwithstanding that the Applicants in its application sought rescission *under every possible ground available to a party.*

10. In terms of the provision of the latter Rule a party is entitled to rescission of a judgment if the judgment was ***"erroneously sought or erroneously granted"*** in his, her or its absence.

10.1. An order is *erroneously granted* if it was legally incompetent for the court to have made such an order;[13] or if there was an irregularity in the proceedings; or if the

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[13] See: *Athmaram v Singh* 1989 3 SA 953 (D) at 956D–E.

court was unaware of facts, if known to it, would have precluded it from making the order.[14] The error need not appear *ex facie* the record.[15]

10.2. A *classroom example* of a judgment which will be erroneously sought is, if judgment is sought where there was no proper notice to the absent party of the proceedings. If judgment is granted in such event the judgment would have been erroneously granted, irrespective of whether the judgment is otherwise correct.[16]

11. Counsel for the Applicants correctly submitted that in terms of Rule 42(1)(a) a party is not required to present a *bona fide defence* against the claim in respect of which the judgment or order was granted. Mr Ferreira further submitted that the only requirement to succeed with an application for rescission under Rule 42(1)(a) is that the judgment or order should have been *"erroneously sought or erroneously granted."* He is wrong in my view. Although Rule 42(1)(a) does not specify a time-limit, it is *a discretionary remedy*,[17] which requires that a rescission under this sub-rule must be sought within a *reasonable period of time*,[18] failing which condonation should be sought.[19] It is also required, in my view, that under Rule 42(1)(a) the application should be brought *bona fide* and not merely to delay or frustrate a creditor's claim. If an application lacks the necessary *bona fides*, it should be refused.

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[14] See: *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 4 SA 411 (C) at 417.

[15] See: *Colyn v Tiger Food Industries Ltd* [2003] 2 All SA 113 (SCA).

[16] Comp.: *Topol v LS Group Management Services* (Pty) Ltd 1988 1 SA 639 (W); *Clegg v Priestley* 1985 3 SA 950 (W).

[17] See: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) at Par. [5]; *Theron NO v United Democratic Front (Western Cape Region) and others* 1984 (2) SA 532 (C) at 536G; *Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and Other* 1992 (4) SA 852 (A) 862J - 863A.

[18] See: *First National Bank of Southern Africa Ltd v Van Rensburg NO: In re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) at 681B-G. *Nkata v Firstrand Bank Limited and Others* (14272/2010) [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC) at par. [27].

[19] I am aware of the judgment of Assheton-Smith AJ in the matter of *Smit v Olivier* [2011] ZAWCHC 414 at para 20, where the court appears to be of view that a party is entitled *"as of right"* to rescission once he shows that the judgment was erroneously sought and granted, regardless of delay. I am not convinced that his view of the legal position is correct. In any event I am not bound by it. See in this regards the remarks of Rogers, J in the matter of *Nkata v Firstrand Bank Limited and Others, supra* at par. [27]; and, Leveson J in the matter of *First National Bank of SA Bpk v Jurgens and Another* 1993(1) SA 245 (T) at p 246 to 247.

12. The Applicants relies on the following facts for their claim that the judgment was erroneously sought and granted against them:

12.1. The *First Applicant* stated that the Respondent granted extension to the Trust until **30 April 2013,**[20] to make payment on its outstanding debts. In support of his evidence, he placed reliance on a letter from the Respondent dated 12 June 2012.[21] The relevant portion reads as follows:[22]

> ***"Enige debietbalans op die uitkoopkosterekening is deur u betaalbaar voor of op 30 April 2013."*** (Hereafter referred to as ***"the extension"***).

12.2. On the premis of the extension the Applicants submitted that the Respondent prematurely instituted legal proceedings against the Trust when it lodged its application on ***21 February 2013***, because the *debt was due but not yet payable*.[23]

12.3. On the further premisses, so it was argued, the Judgment that was granted on 24 May 2013 was, due to the alleged premature institution of the proceedings, erroneously sought or erroneously granted in the absence of the Applicants.

13. The following uncontested evidence bespoke any suggestion that the judgment granted by his Lordship Mr Acting Justice de Klerk, was *erroneously sought or erroneously granted*:

13.1. It is *common cause* that the Applicants were absent when the judgment was granted by this Honourable Court on 24 May 2013. However, as indicated above, this was so by their own choice.

13.2. A proper reading of the extension indicates that it only applied to the ***"debietbalans op die uitkoopkosterekening"***. The extension did not apply to other advances to the Applicants in terms of the Loan Agreement that regulated the

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[20] See: Record pp 30-31, Annexure "DG1".

[21] See: Record, p 30-31.

[22] See: Record, p 31, par. 3.

[23] See: Record pp 14-16, par. 6.2; pp 27-28, par. 19.

relationship between the parties.[24] The total amount claimed by the Respondent from the Trust was **R1, 173 685. 30**, while the *"debietbalans op die uitkoopkosterekening"* amounted to **R804 575. 28**. It follows that on the Applicants version an amount of **R369 110. 02** was in fact due and payable ***21 February 2013*** when the Respondent instituted Application proceedings to collect the Trust's outstanding debts to it. Accordingly, at least in so far as it pertains to the latter amount, there is no room for an argument that the Respondent's claim was instituted prematurely. So much was conceded by Counsel for the Applicants at the hearing of the matter.

13.3. *Most importantly*, the Respondent was by agreement not bound by the extension of payment it granted to the Applicants. *Clause 30*, of the Loan Agreement between the parties, reads as follows:

> ***"TOEGEWINGS.***
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> ***Geen toegewing wat een party ("die eerste party") mag verleen aan die ander party ('die tweede party") sal geag word 'n afstanddoening van enige regte van die eerste party te wees nie, wie nie daardeur verbied of verhoed sal word om enige regte wat dit ingevolge hierdie Ooreenkoms teenoor die tweede party het, af te dwing nie."***

It follows that, notwithstanding the extension of payment on the *"debietbalans op die uitkoopkosterekening"*, the total outstanding amount was, by agreement between the parties, still due and payable at the time when the Respondent instituted its Application against the Respondent.

13.4. *Furthermore* the extension of payment in respect of the *"uitkoopkosterekening"* in any event became due and payable on ***30 April 2013***. Judgment was only taken, on 24 May 2013, against the Applicants after lapse of the extension to make payment.

[24] See: Record, p 78, par. 21.2.

14. There is no evidence of any procedural irregularity in this matter.[25] The Respondent's cause of action was completed when it lodged the application against the Applicants, as well as when the judgment was taken, since the outstanding amount of debt was due and payable to the Respondent on that date.

15. The unavoidable conclusion is that the judgment against the Applicants was not erroneously sought by Respondent nor erroneously granted by the Honourable Court.

COSTS AWARDED

16. The remaining aspect to consider is the costs to be awarded. Counsel for the Applicants submitted that costs should follow the result, while Counsel for the Respondent indicated that the Respondent will abide by my decision. The Respondent's Counsel however drew my attention to the fact that the parties agreed in the Loan Agreement, that in the event the Respondent had to institute legal proceedings in order to collect outstanding debts from the Applicants, costs were payable on an attorney and own client scale. The latter agreement is, in my view, only indirectly relevant to the present proceedings and do not convince me at all to make a higher cost order against the Applicants. The absence of *bona fides*, as indicated hereunder, in the application however demands a punitive cost order against the Applicants

17. At the hearing of this matter I indicate that I have tremendous sympathy with the farmers in our country. Our country needs farmers. Many farmers struggle to survive under the pressure of inflation and higher input costs, draught (which results in major crop loss) and under performance of harvest estimates, etc. Hence, I indicated, if there is any possibility to assist the Applicants, I will not hesitate to do so. No such possibility exits. This application was groundless and should never have been brought. The Applicants where ill advised.

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[25] Comp. *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at page 94 para [25] & [26].

18. The purpose of costs orders is to allow a party to recover funds where they have been unnecessarily expended in litigation. A punitive cost order is only granted in *exceptional circumstances* against a party. Courts are very reluctant to make such orders.[26] I consider the present circumstances as *highly exceptional*. This Application can be labelled as nothing less than extremely opportunistic, because it shines with absence of any *bona fides*. It is an essential requirement of an application for rescission that it should be brought *bona fide* and not merely to delay or frustrate a creditor's claim. This application is a *classic example* of a successful attempt by a debtor to frustrate the execution of a creditor's claim. The monstrous absence of *bona fides* in this application is demonstrated by the cumulative effect of following facts and considerations:

18.1. *Firstly*, according to the Applicants' Notice of Motion, they sought rescission of a judgment granted by this Honourable Court on **3 June 2013**.[27] *No judgment was granted against the Applicants on 3 June 2013*. It is clear from the evidence that the correct date upon which judgment was granted against the Applicants is in fact **24 May 2013**, as indicated above. No application for amendment of the Notice of Motion was brought. Although the Respondent did not take the Applicants to task on this issue, the application is defective in this regard. In my view, this mistake, and the absence of any reference thereto by the Applicants placed, already at this stage, a serious question on the *bona fides* of this application.

18.2. *Secondly*, the Applicants did not even deem it necessary to ascertain the correct date on which judgment was granted against them, but only made vague reference in their Founding Affidavit to a judgment that was granted in their absence.[28] More in particular the Applicants left it to the Respondent to inform the court on which date it took judgment against them.

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[26] See: *Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 at 807 C – E; *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574.

[27] See: Notice of Motion, record p 2.

[28] See: Record, p 7A vague reference was made in paragraph 5.

18.3. *Thirdly*, the application was brought *under every possible ground available to a party* which seeks rescission of judgment. In the words of the First Applicant it is stated as follows:[29]

> ***"Die huidige aansoek om tersydestelling van vonnis word gebring ingevolge Reël 31, alternatiewelik Reël 42 van bogemelde Agbare Hof asook verder alternatiewelik ingevolge die Gemenereg."***

18.4. *Furthermore*, Adv Ferreira, who appeared for the Applicants at the hearing of the matter, persisted in his *heads of argument* with the grounds raised by the Applicants for rescission, calling the Respondent to answer thereto. It was only at the commencement of the hearing that Counsel for the Applicants indicated that the Applicants abandons their application under Rule 31 and the Common Law and solely rely for their relief on the provision of Rule 42(1)(a). In such circumstances he argued, the Applicants need not seek condonation for late lodging of their application. I am of view that Counsel is wrong in this regard, there are also other requirements that needs to be met for an application to succeed in terms of Rule 42(1)(a), as indicated above. Be that as it may. The Applicants did not apply for Condonation and did not advance an explanation for their delay to bring the application timeously. However, they did submit that they where not in *wilful default* to Oppose the Respondent's Application.[30] I cannot ignore consideration of the Applicants evidence in this regard, merely because it did not suit Counsel for the Applicants' to rely on it at the hearing of this matter.

18.4.1. *Wilful default* comprises knowledge that proceedings were instituted; a deliberate refraining from entering Notice of Opposition, though free to do so; and, a certain metal attitude towards the consequences to default.[31] When a party with full knowledge of the circumstance and of the risks

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[29] See: Record, p 7, par. 7.

[30] See: Record, p 10, par. 13.

[31] See: *Van Loggenberg, et al*, Erasmus, Superior Court Practice, p B1-202.

attached to his or her default, takes a decision to refrain from taking action, the necessary legal conclusion is that such a party is in wilful default.

18.4.2. The Applicants were aware of the Respondent's application and the enrolment thereof for judgment.[32] The Third Applicant, who filed a supporting affidavit, had at all relevant times been a practising attorney of the High Court.[33] The unavoidable necessary inference is that the Applicants should reasonably have been aware of the risks attached to their failure to take opposing steps, but deliberately decided not to give Notice of Intention to Oppose or file Opposing Papers. Similarly, the Applicants elected not to file a Replying Affidavit, when challenged on this particular issue by the Respondent.

18.4.3. Although the First Applicant states that before, during and after each legal procedure taken by the Respondent, they engaged the Respondent, no particulars are furnished in respect thereof. The court is left with the following sweeping statement:[34]

"Hierdie sal ook duidelik blyk uit die korrespondensie"

It is trite law that it is insufficient for a party to refer to attached correspondence and expect the court to seek the relevant portions thereof.[35] The Applicants failed to direct the court's attention to any specific portion in the correspondence in support of the allegation. The following facts appear from a perusal of the attached correspondence between the parties:

18.4.3.1. The Respondents attorneys of record as far back as ***15 January 2013*** demanded payment from the Applicants and surrender of the

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32 See: Founding Affidavit, record, p 10, par. 14.

33 See: Record, p 56, par. 6.8

34 See: Record, p 11, par. 14.

35 Comp. *Swissbourgh Diamond Mines (Pty) Ltd v Government of of the RSA* 1999 (2) SA 279 at 324. Also comp. 315E-F per Joffe J.

moveable assets in terms of the Notarial Bond.[36] There is no evidence of any engagement by the Applicants or the Trust with the Respondent in respect of the demand.

18.4.3.2. The Respondent's Application of ***21 February 2013*** was served on the Applicants. There is no record of any engagement with the Respondent by the Applicants or the Trust at this stage.

18.4.3.3. The Respondent's Application was initially enrolled for hearing on ***26 March 2013***,[37] in respect of which the Applicants received notice. The matter was apparently removed from the roll on the latter date. There is however no evidence of any response by the Applicants to this application.

18.4.3.4. On ***8 May 2013***, the Respondent gave Notice to the Applicants that their Application is enrolled for hearing on ***24 May 2013***.[38] This Notice is prior to judgment being granted but after lapse of the extension. This Notice also did not prompt any response from the Applicants.

18.4.3.5. On ***3 July 2013***, the *moveable assets* of the Trust were attached by the Sheriff. Again there is no evidence of any response by the Applicants.

18.4.3.6. The ***first correspondence*** of the Applicants to the Respondent in respect of the judgment was on ***17 July 2013*** by their attorney of record. This is about *two months after judgment* was granted in favour of the Respondent.

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[36] See: Record p 71, pp 124-125, par. 18.2.

[37] See: Record p 72, par. 18.3.

[38] See: Record pp.134-138.

18.4.4. It is accordingly a blatant lie that the Applicants engaged the Respondent before, during and after each legal procedure taken by the Respondent in order to secure judgment against them.

18.4.5. The following further evidence is indicative of the *mental attitude* of the Applicants towards the judgment that was taken against them:

18.4.5.1. After the Sheriff attached the Trust's moveable assets on ***3 July 2013***, the First Applicant met with the Respondent's attorneys on ***5 July 2013***. During this meeting the First Applicant received answers to the Trust's enquiries. The First Applicant also made an undertaking on behalf of the Trust to make a payment offer to the Respondent in respect of the judgment.[39] There is no evidence that the Trust at a later stage made the said offer.

18.4.5.2. It is clear from the letter of the Applicants' attorney of record, dated ***17 July 2013***, that the Applicants were aware of the Respondent's Application to Court on 24 May 2013. Instead of a rescission application the Applicants merely directed a further letter to the Respondent on ***29 July 2013***.[40]

18.4.5.3. On ***12 August 2013*** the Respondent's attorney of record directed a letter to the Applicants' attorney of record, in which he stated that the Respondent had already obtained judgment for payment and perfecting of the notarial bond against the Applicants. He further indicated that the Respondent accordingly need not accommodate the Applicants' further enquiries and disputes.[41] The Applicants still did not lodge a rescission application.

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[39] See: Record pp77, par. 20.14-20.13; pp 141-142.

[40] See: Record, p 34.

[41] See: Record, p 37-42, vide p 37 par 3 in particular.

18.4.5.4. It is further clear from the correspondence of ***25 November 2013***[42] and ***5 May 2014***[43] that the Trust was aware of execution steps being taken by the Respondent pursuant to the judgment. It was only after a auction for the Trust's moveable property was arranged and the Applicants informed thereof on ***19 June 2014***,[44] that the Application for Rescission was lodged.

18.4.6. On the Applicants own version, as indicated above, it had knowledge that the Respondent took judgment against them on ***24 May 2013***.[45] According to Rule 31(2)(b) a party, against whom default judgment was taken, may within 20 days after he or she has knowledge of a judgment apply to court (upon notice to the other parties) to set aside such judgment. The common law requires that an application should be brought within a *reasonable time*.[46] What is reasonable will depend on the circumstances of the case,[47] but the 20-day period laid down in rule 31(2)(b) provides some guidance as a starting point. The reason for a time-limit is that there must be finality in litigation and that prejudice can be caused if rescission is not promptly sought. There is no reason in principle why a litigant should have more time when seeking rescission under rule 42(1)(a) than under rule 31(2)(b).[48] It is trite that a party who fails to lodge an application within the prescribe time period is required to seek Condonation, as *sine qua non,* for the Application to be entertained by the court.[49]

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42 See: Record p 43.

43 See: Record p 44.

44 See: Record pp 156- 158.

45 See: Founding Affidavit, record, p 10, par. 14

46 See: *Roopnarain v Kamalapathy & Another* 1971 (3) SA 387 (D) at 391B-D.

47 Comp.: *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996 (4) SA 411 (C) at 421F-H.

48 See: Footnote 17, *supra.*

49 The bar is, in my view, against the admissibility of the evidence contained in the application. Until condonation is granted, the evidence in the Application is inadmissible.

18.4.7. The application for rescission was lodged just over a year after judgment was taken. This goes beyond the scope of a *reasonable time*. The time period is both substantial and extensive. I am accordingly of view that the Applicants were required to seek Condonation for the late filing of their application, whether rescission was sought under Rule 31, Rule 42 or the Common Law. The Applicants failed to do so ostensibly because they were in wilful default. The Applicants denial that they were in wilful default is ridiculous and again demonstrates the absence of *bona fides* in their application. In any event they did not apply for Condonation at all.

18.4.8. Apparently, in an attempt to avoid the aforesaid findings, Counsel for the Applicants only relied at the hearing of this matter on the provisions of Rule 42(1)(a). The evidence being present, the Applicants cannot avoid the consequences of their demonstrated absence of *bona fides*.

18.5. *Lastly*, the Applicants raised *several defences* against the merits of the Respondent's claim.[50]

18.5.1. It is clearly demonstrated by the evidence of the Respondent that none of these defences have any merit. No evidence in rebuttal was presented. It follows that there is no prospects of success with any of these defences.

18.5.2. Since the Counsel for the Applicants abandoned reliance on any of the defences at the hearing, he was ostensibly of view that they have no merit. I accordingly do not deem it necessary to deal with all of the defences in detail. The absence of *bona fides* in the Applicants' defences is however

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[50] Save for the *"premature defence"*, the following four major defences can be identified: (1) Respondent took judgment but undertook not to take any execution steps until the parties settled the Applicants enquiries and disputes. (2) The insurance which the Trust took out in respect of the crop should have covered the full outstanding amount of debt of the Applicants (Trust) towards the Respondent. (3) The agreed price of the products was not achieved on the market; hence the Applicant is exempted from payment of the loan amount. (4) To the extent that the Loan Agreement between the parties is in conflict with the latter defences the Applicants will apply for rectification thereof at the trial after the judgment has been rescinded.

ultimately demonstrated by the defence of a *future intended action for rectification* of the written Loan Agreement between the parties.[51]

18.5.2.1. It is trite law that a party that seeks rectification must allege and prove:[52] (1) an agreement between the parties which were reduced to writing; (2) an intention by both parties to reduce the agreement to writing; (3) that the written agreement did not reflect the common intention of the parties correctly and accordingly that was a mistake in drafting the document.[53] The common intention of the parties, as it existed when the agreement was reduced to writing, must be established by the party claiming rectification. In this regard the alleged correct wording of the agreement is required to be stated on trial. In my view it would have been sufficient for the Applicants to have given a general import of the common intention with reference to specific paragraphs of the agreement.[54]

18.5.2.2. The evidence which the Applicants presented in respect of the alleged intended rectification of the Loan Agreement is vague and devoid of any detail. The following sweeping statement was made in conclusion:[55]

> ***"Ek aanvaar dat daar sekere van die fynskrif terme, van die skriftelike ooreenkoms is, wat strydig mag wees met bogemelde. Ek sal, namens die applikante, tydens aksieprosedure aansoek doen vir rektifikasie van die skriftelike ooreenkomste tot die mate wat dit nodig mag wees."***

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[51] Defence four (4) referred to in the pervious footnote.

[52] See: *Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* [2007] 3 All SA 18 (SCA).

[53] See: *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) at 674.

[54] The matter of *Levin v Zoutendijk* 1979 (3) SA 1145 (W) is authority that a party on trial cannot seek rectification with reference to a general import of the common intention. The Applicants seeking rescission is only required to lay the basis for reasonable prospects of success with their defence. They need not prove it at this stage.

[55] See: Record p 10, par 12.

18.5.2.3. Before making the latter statement, the First Applicant attempted to elevate a *historic relationship* between the parties in which the Trust (represented by the Applicants) borrowed money form the Respondent *to an Agreement* between the parties.[56] In the description of the alleged historic Agreement, under the heading ***"Agtergrond"***, the First Applicant gives a *general description* of the working of Loan Agreements *which farmers in general* obtain from the Respondent in order to finance their production costs.[57] The Loan Agreement between the Applicants (as representatives of the Trust) referred to as an example ("by wyse van voorbeeld").[58] No reference is at all made to specific clauses of the Loan Agreement between the parties.

18.5.2.4. It is common cause that the parties entered into a written Loan Agreement. The Applicants were called upon to identify the specific clauses of the written agreement they seek to rectify. It was insufficient to merely state that *"sekere van die fynskrif terme"* may be in conflict with the alleged *historic agreement*. The Applicants should further at least have given an explanation how it came about that a mistake was made in the wording of the written Agreement.

18.5.2.5. Although it is *common cause* that there was a *historic relationship* between the parties in which the Respondent borrowed money to the Trust, the relationship was throughout regulated by different written Loan Agreements. There is no evidence that any of the previous *Loan Agreements* entered into between the parties, differed from the one upon which the Respondent took judgment. It surpasses logic

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[56] See: Record p 7-10, para 9-11.

[57] See: Record p 8, par. 9.

[58] See: Ibid, p 8, par 10.

how a *historical relationship,* during which time the Respondent borrowed money to the Applicants in terms of written agreements, can be equated to *a written Loan Agreement.* It is further illogic how a *historical relationship* can be used as a basis to rectify a written agreement. The allegations in respect of the defence of rectification are so sketchy that it cannot, with any stretch of imagination, be regarded as *bona fide*.

18.5.2.6. In any event, the Respondent adamantly denied that the Applicants (or the Trust) are entitled to rectification and in fact relies on the terms of the written Loan Agreement to enforce their contractual rights.[59]

18.5.2.7. The written Load Agreement between the parties contains a *prohibition* against rectification thereof. The Applicants conveniently refrained from dealing with this clause. It reads as follows:[60]

> ***"Dit word op rekord geplaas dat hierdie dokument die geheel van die ooreenkoms tussen die partye daarstel. Geen voorafgaande voorstellings, insluitend kennisgewings, aankondigings of waarborge, hetsy mondelings of in skrif, is deur een party verskaf wat tot die ontstaan van hierdie Ooreenkoms aanleiding gegee het nie, behalwe in soverre dit in hierdie Ooreenkoms vervat is. Die partye bevestig dat die voorwaardes van hierdie Ooreenkoms die bedoeling van die partye korrek weergee, en dat gee party derhalwe geregtig sal wees om om rektifikasie daarvan aansoek te doen nie, nog sal die voorwaardes daarvan onderhewig wees aan mondelingse afstanddoening of estoppel."***

[59] See: Record, p 70, par 16.8.

[60] *Ibid.*

18.5.2.8. There is adequate authority that an agreement of the latter nature is legal and binding on the parties.[61] The Applicants failed to indicate any reason why they are not bound to the latter term of the written Loan Agreement between the parties. In my view, there are absolutely no prospects of success with this defence. It follows that there is no *bona fides* in this defence.

CONCLUSION

19. I have already concluded that the First and Third Applicant lacked the necessary *locus standi* to have brought the application for rescission on behalf of the Trust. I have further concluded that the judgment given by his Lordship Mr Acting Justice de Klerk was *not erroneously sought* by Respondent *nor erroneously granted.*

20. The necessary implication is that the First and Third Applicants are liable in personal capacity for the costs of the Respondent in having to oppose the Application for Rescission.

21. As indicated above the Application is devoid of any *bona fides* and should be visited with a *punitive cost* order.

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[61] See *inter alia: Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 231 (W) at 273A; Christie, *The Law of Contract in South Africa* (4th Ed) p 389.

ORDER

The following order is made:

1. The Application for Rescission is dismissed.

2. The *First Applicant* and *Third Applicant* are ordered, in personal capacity, to pay the Respondent's costs on a scale as between attorney and client.

J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:	
Counsel for the Plaintiff:	*Adv. EJ Ferreira*
Instructed by:	*Inc. Helmut Burger Prokureurs*
Counsel for the Defendant:	*Adv. JJ Pretorius.*
Instructed by:	*Gerrit Coetzee Ing*
Date of Trial:	20 October 2015
Date of Judgment:	______________