IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 2813/2010

In the matter between:

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| HENDRIK JOHANNES VAN JAARSVELD | 1st Applicant |
| HENDRIK JOHANNES VAN JAARSVELD N.O | 2nd Applicant |
| EMMERENTIA FREDERIKA VAN JAARSVELD N.O. | 3rd Applicant |
| JOHANNES MARTHINUS STEENKAMP N.O | 4th Applicant |

and

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| SAMUEL JACOBUS STRYDOM | 1st Respondent |
| LORETTA STRYDOM | 2nd Respondent |

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## JUDGMENT

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**SEEGOBIN J**

[1] This is an application for rescission of a judgment granted by Swain J on the 21 June 2010. It is accompanied by an application for condonation due to the fact that it was brought out of time. For the sake of convenience the parties herein will be referred to as in the action.

[2] The judgment in question was granted under the following circumstances. The first and second plaintiffs instituted an action against the first, second and third defendants ("the defendants") for payment of the sum of R383 462,88(three hundred and eighty three thousand four hundred and sixty two rand eighty eight cents) together with *mora*interest and costs. Summons was served on 22 April 2010. The action was duly defended by the first, second and third defendants. On 21 June 2010 summary judgment was granted *by consent* in terms of prayers 1, 2 and 3 of the application for summary judgment. Pursuant to a writ of execution payments totaling more than R300 000,00(three hundred thousand rand) were made to the plaintiffs. The present application for rescission was only instituted on 12 January 2011 i.e. more than six (6) months after judgment was granted.

[3] The application for rescission was brought in terms of the provisions of Rule 31(2)(b), *alternatively* Rule 42 of the Uniform Rules *alternatively* under the common law.

[4] It is quite clear that Rule 31(2)(b) does not apply as the judgment in question was not granted in terms of Rule 31. The defendants' reliance on Rule 42(1)(a) of the Uniform Rules is on the basis that the judgment was erroneously granted because the Trust was not properly joined due to the fact that the fourth defendant (who is cited for the first time in this application) was not previously cited by the plaintiffs in the action. It is well established that in order to succeed herein, the defendants bear the *onus* of satisfying the court, not only that the requirements of Rule 42(1) are present but also that the present application has been brought within a reasonable time[1].

[5] The legal requirements for the granting of condonation were succinctly set out in *Omar v Government of South Africa and Others*[2] in which condonation was sought for the late filing of an opposing affidavit. It was held that courts have a very wide discretion in respect of condonation applications. For condonation to be granted, however, it was incumbent upon the applicant to establish sufficient cause for

1 See First National Bank of Southern Africa Limited v Van Rensburg N.O. in re First National Bank of Southern Africa Ltd v Jurgens 1994(1) SA 677(T) at 681 B-G

2 [2005] 3 All SA 65(N)

condonation. A relevant factor to be considered was the degree of non-compliance with the rules. Additionally, the following must be taken into account in determining the reasons for such non-compliance: the length of the delay, the explanation for the delay, the importance of the case, the prospects of success, the respondents' interest in the finality of the judgment and the avoidance of delay in the administration of justice.

[6] It is common cause that the application was instituted more than six (6) months after summary judgment was granted by agreement between the parties. The question which arises is whether this application was brought "*within a reasonable time"*. The common law phrase "*reasonable time"* is generally applied in the context of contractual disputes and does not admit of a single legally determinative meaning. The determination of what constitutes a reasonable time is a fact-bound inquiry[3].

[7] In my view, the delay of more than six (6) months in this matter is unreasonable. The defendants, on their own version, were fully aware not only of the judgment (to which they consented) but also of the writ which came to their attention by at least 12 July 2010 or shortly thereafter. The only explanation provided by the defendants for the delay is that they were financially unable to afford an attorney. This explanation was only proffered when they were challenged in this regard by the plaintiffs. No such explanation emerges from their founding affidavit. Interestingly, the defendants have been unable to point to a single piece of correspondence to indicate that they had informed the plaintiffs, at an early stage, that they intended applying for a rescission of the judgment but that they were financially unable to do so at that time. Even more interesting is the fact that while they complain about their poor financial position, they somehow managed to find more than R300 000,00 (three hundred thousand rand) for payment towards the judgment debt. Significantly, the fourth applicant who is cited in these proceedings without a proper application for joinder, makes no mention of his financial position or whether the Trust was able to finance the litigation or not.

[8] All in all, I consider that there has been an unreasonable delay on the part of the

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3See: Strachan & Co Ltd v Natal Milling Co. (Pty) Ltd 1936 NPD 327 at 333
also Cardoso v Tuckers Land and Development Corporation (Pty) Ltd 1981(3) SA 54 (W) 63 E

defendants in instituting these proceedings and their explanation for the delay just does not have the ring of truth about it. The delay caused by the defendants has adversely affected not only the plaintiffs' interests in the finality of their claim but also the administration of justice.

[9] It is trite that an application for rescission of judgment under the common law must:

(a) be brought within a reasonable time, after obtaining knowledge of the judgment;

(b) set out reasons for the default; and

(c) set out a *bona fide* defense.

[10] The findings that I have already made with regard to the delay and the explanation therefore apply with equal force to the first two (2) requirements in terms of the common law. The only question that remains is whether the defendants have established that they have a *bona fide*defense to the claim.

[11] In his heads of argument and in argument before me, Mr*Dredge* who appeared on behalf of the plaintiffs, conceded that if it is found that the defendants are *bona fide* and have satisfied all the other requirements for rescission, then in that event the allegations raised by the defendants constitutes issues which should be determined by a trial court.

[12] In their opposing affidavit the plaintiffs aver that the defendants have paid, **without protest**(my emphasis), an amount exceeding R300 000,00 (three hundred thousand rand) in respect of the judgment. They further allege that the defendants signed two acknowledgments of debt in respect of the first and second plaintiffs. These acknowledgements of debt are annexures C1 and C2 to the opposing affidavit. Annexure C1 dated 12 July 2010 is for an amount of R383 462,88(three hundred and eighty three thousand four hundred and sixty two rand and eighty eight cents) and annexure C2 which is dated 26 July 2010 is for an amount of R481 100,71 (four hundred and eighty one thousand one hundred rand and seventy

one cents). Both these documents acknowledge indebtedness to the plaintiffs and in respect of which the first and second defendants undertook to pay the sum of R15 000,00 (fifteen thousand rand) per month with the first payment due on 15 August 2010.

[13] Dealing with these factual allegations in their replying affidavit, the defendants aver that the acknowledgements of debt were signed under duress ["*onderdwang"*] and were not accepted by the plaintiffs. They accordingly aver that no contract came into being between them and the plaintiffs. They further aver that neither acknowledgement of debt is in the name of the Trust. In my view, these allegations fall tobe rejected for the reasons that follow. First, these allegations were not made by the defendants in their founding affidavit. Second, there is no factual basis for the defendants claim that the acknowledgements of debt were signed under duress. Third, the payments made by the defendants were appropriated by the plaintiffs towards the debt owed [*Macrae v National Bank of SA 1927 AD 62* at 67]. Nowhere is it alleged by the defendants that they owe a separate personal debt for exactly the same capital amount as the debt that gave rise to the present proceedings. In my view, the defendants have, until the launch of this application, created the impression that they accepted the judgment as being correct (after all, they consented to it) and complied therewith by allowing the execution of the writ to proceed without any legal interference or objection on their part. If they believed that they were not liable for the debt or that the judgment was granted erroneously, nothing stopped them applying for a stay of the writ pending an application to rescind the judgment. The only reason advanced for not taking steps sooner is a lack of funds. This explanation, in my view, is so flimsy so as to be rejected as being improbable in the circumstances. In my view, the conduct of the defendants after the judgment amounts to nothing more but an express acquiescence in the judgment[4]. Additionally, I consider that the failure of the plaintiffs to cite the fourth defendant as a trustee in the action has not rendered the summons defective in any way. Such failure has not resulted in any prejudice being caused to the Trust. This is a technical defect which was never raised before. I accordingly conclude that the defendants have failed to establish that they have good prospects of success so as

4See: Hlatswayo v Mare &Deas 1912 AD 242 at 259
also Schmidlin v Multisound (Pty) Ltd 1991(2) SA 151 (C) at156 B

to persuade me that condonation should be granted.

[14] For the reasons set out herein, I grant the following order:

> The application for condonation and consequently for rescission, are dismissed with costs.