

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 77678/2019

Date :

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(1)	REPORTABLE: YES/NO
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DATE	SIGNATURE

MIKAKOR CC

(Registration Number: 2005/150983/23)

PIETER JACOBUS WIESE

CHRISTO FLORIS WIESE

APPLICANT

HEINE JAN VAN NIEKERK

APPLICANT

HEINE JAN VAN NIEKER N.O.

(In his capacity as trustee of the Avalon Trust)

(Registration Number: IT7451/2003)

FIRST APPLICANT

SECOND APPLICANT

THIRD

FOURTH

FIFTH APPLICANT

And

LEXHELL 824 INVESTMENTS (PTY) LTD

RESPONDENT

(Registration Number: 2010/007434/07)

In re:

LEXHELL 824 INVESTMENTS (PTY) LTD

APPLICANT

(Registration Number: 2010/007434/07)

And

MIKAKOR CC

FIRST RESPONDENT

(Registration Number: 2005/150983/23)

PIETER JACOBUS WIESE

SECOND

RESPONDENT

CHRISTO FLORIS WIESE

THIRD

RESPONDENT

HEINE JAN VAN NIEKERK

FOURTH

RESPONDENT

HEINE JAN VAN NIEKER N.O.

FIFTH

RESPONDENT

(In his capacity as trustee of the Avalon Trust)

(Registration Number: IT7451/2003)

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1]This is an application for rescission of an enforcement order granted on 8 July 2020 by this court.

[2]The matter has a long and protracted history. On 12 July 2017 the High Court of Justice Queen's Bench Division Commercial Court in the United Kingdom (the Commercial Court) handed down an order to which the parties have consented. In terms of this order, the applicants were ordered to pay US \$ 10 239 483 (ten million two hundred and thirty - nine thousand four hundred and thirty-eight dollars) plus interest in the sum of US \$ 2 493 373.29 (two million four hundred and ninety-three thousand three hundred and seventy-three dollars and twenty-nine cents) to the respondent (Lexshell). The applicants were also ordered to pay further costs which was summarily assessed at £45 000 (forty-five thousand pounds), together with costs which was to be assessed. In this order the terms of payment were set out, as well as further terms of the settlement in full and final settlement of all the claims, demands and actions between the parties and related parties, in that jurisdiction and other jurisdictions.

[3]On 18 October 2019 Lexshell issued an application in this court, seeking recognition and enforcement of the aforementioned Commercial Court order (the enforcement application). On 8 July 2020 such an order (the enforcement order) was granted by default. The applicants delivered the rescission application on 5 November 2020.

[4]The following issues need to be decided, whether this application was brought within a reasonable time, or whether a reasonable explanation for any delay exists and whether the applicants have a *bona fide* defence.

[5]The litigation between the parties started during 2010 in the United Kingdom. For purposes of this application, it is not necessary to deal with whole history of the parties' engagement and litigation with each other and reference will be made to the historical facts only as far as it may be relevant.

[6]The applicants alleged that the delay in launching the rescission application, was a result of the failure of their erstwhile attorney, Mr Van Staden, who failed to attend to this matter timeously. They also raised a number of defences which will be dealt with.

THE RELEVANT BACKGROUND FACTS

[7]On 19 January 2010, the applicants, and a UK-based and incorporated Company, Rannerdale Limited (Rannerdale), concluded a written agreement (Downside Protection Agreement).

[8]Rannerdale and, *inter alia*, its affiliated companies had concluded other agreements with one or more of the applicants governing joint investments that the parties intended pursuing in South Africa and across the SADC region, in various companies that held mining licenses. One such company was Delta Mining Consolidated Proprietary Limited (DMC).

[9]By its structure and design, the Downside Protection Agreement's purpose was to ensure that if there ever was a sale or listing of at least 50% of the shares in DMC, Rannerdale would receive back at least US\$29 million of its initial investment and a cash injection of US\$35 million in DMC, and in some events more, depending on the sale price.

[10]By April 2010, a sale transaction contemplated in the Downside Protection Agreement involving DMC occurred. This triggered the applicants' obligations under that agreement to deliver, or procure the delivery of shares having a value, at the "*Sale Price*", of the shortfall between the price payable to Rannerdale for its DMC shares and the "*Agreed Amount*" (as these terms are defined in the Downside Protection Agreement). Despite their obligations under the Downside Protection Agreement the applicants failed to honour their contractual undertakings.

[11]In June 2010, Rannerdale ceded all its rights and interests under the Downside Protection Agreement to Lexshell under a written assignment agreement dated 1 June 2010. Each of the applicants were notified of the cession and/or assignment on 20 August 2010.

[12]This resulted in Rannerdale and Lexshell launching proceedings to enforce the rights under the Downside Protection Agreement before the Commercial Court during December 2010.

[13]After several unsuccessful attempts by, *inter alia*, Lexshell and the applicants to reach a negotiated settlement and an aborted attempt by the applicants to challenge certain admissions they had made in a statement of defence they had filed before the Commercial Court had failed, Lexshell, and the applicants reached an agreement to settle the litigation before the Commercial Court.

[14]This settlement agreement was reached while all the applicants were represented by recognised law firms and barristers practising in London. It was under these circumstance that the Commercial Court order was obtained.

THE DELAY

[15]On 18 October 2019 the enforcement application was launched in this court. A notice of intention to oppose was filed during December 2019. The applicants failed to file an answering affidavit. A notice of set down was delivered by e-mail. No answering affidavit was filed and on 8 July 2020 the enforcement order was granted. The applicants delivered the rescission application on 5 November 2020.

[16]The applicants state that they became aware of the enforcement application on 31 October 2019. From 1 November 2019 to 8 July 2020, they failed to file an answering affidavit. The explanation given indicates that on 12 March 2020 the deponent requested a meeting with their attorney Mr. Van Staden's clerk, as he was apparently struggling with his health. From this it can be gleaned that from 1 November until 12 March, a period of three months, the applicants did nothing to pursue their opposition to the enforcement application. It seems to be a case where clients failed to keep in contact with their attorney, under circumstances where they should have.¹ Subsequent to this, the National State of Disaster apparently led to a failure to act. Reliance on the National State of Disaster, for a failure to act, does not satisfy as the attorneys of the applicants is a prominent firm and they themselves are clearly astute business people, who would have had access to electronic means to communicate with their lawyers. If Mr Van Staden was incapacitated there would certainly have been someone else in the firm who could have dealt with the matter. Our courts have pronounced on the tendency of litigants to attempt to rely on the State of Disaster under circumstances that do not justify it, in particular if no reasons are provided to explain why they were unable to act.² Seeing that the courts were functional from 1 May 2020. The applicants on their own version waited until 3 August 2020 to request a meeting with Mr Van Staden. During that meeting that took place on 12 August 2020, they were informed about the enforcement order that was granted.

¹ Bristow v Hill 1975(2) SA 505 (N) at 507 E- G.

² Ocular Technologies (Pty) Ltd v A I Limited Consulting (Pty) Limited [2022] ZAGPJHC 62 para 14, Siantha (Pty) Ltd v Khumalo [2022] JDR 0545 (GJ) para 45.

[17]On 25 August 2020 Mr Van Staden, via WhatsApp informed the applicants about his unavailability to attend to their matter and advised them to obtain the services of another attorney. On 29 September 2020 Mr Van Staden sent an e-mail to the applicants' newly appointed attorneys explaining the reason for the delay. It must be noted that the content of this e-mail differs from the explanation given initially by the applicants. In this e-mail he explained that his brother-in-law fell ill during December 2019, which apparently caused difficulties for him to attend to the applicants' case.

[18]The applicants did not explain the full period of the delay in opposing the enforcement application, and such failure cannot merely be condoned. There is an obligation on a party to give a full and reasonable explanation for the whole duration of the delay.³

[19]Furthermore, especially in the light of the applicants clearly being experienced business people and the magnitude of the claim against them, their failure to keep in contact with their attorney and to follow up regarding this matter is inexplicable. They have been litigating extensively over a protracted period of time. Litigants, especially sophisticated business people, cannot merely blame their legal representative, they have a duty to follow up

³ Mashego-Dlamini v Dlamini 2020 JDR 2607 (GP) para 5.1 & para 5.2 (Dlamini), Basson NO & Another v Ocrest Properties and two related matters, 2016(4) ALL SA 363 (WCC).

on their matters, within a reasonable period of time, it can certainly not be said that they are free from any blame for the delay.⁴

[20]I am accordingly not satisfied that the applicants gave a reasonable explanation for their failure to either oppose the enforcement application, or the delay in bringing this application. It is trite that condonation is not merely a formality.⁵ It is also well established that condonation could be granted if it would be in the interest of justice.⁶ The Court, in doing so considered whether the applicants are bona fide and have raised defences with some prospects of success. A court is enjoined to examine whether the defence raised by the person who seeks relief shows the existence of an issue which is fit for trial. It is while keeping the aforesaid in mind that the defences raised were considered.

THE APPLICANTS' DEFENCES

[21]What distinguishes this matter from other rescission applications is that the defences raised, were not raised in the Commercial Court. In so far as certain defences were initially raised, they were withdrawn and a settlement was reached. The appropriate forum where these defences should have been raised was the Commercial Court as that court had been seized with the litigation between the parties since at least 2010.

⁴ Bristow (*supra*), see also Chetty v Law Society, Transvaal 1985(2) SA 756 (A) at 765 D-F, Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, corruption and Fraud in the Public Sector Including Organ of State [2021] ZACC 28, para 74, para 76.

⁵ EH Hassim Hardware (Pty) Ltd v Fab Tanks [2017] ZASC 145 para 17 – 18, Breitenbach v Fiat SA (Edms) Bpk 1976(2) SA 226 T at 227 H – 228 B

⁶ S v Ndlovu [2017] JOL 38060 (CC), Government of Republic of Zimbabwe v Fick & Others 2013(5) SA 325 CC (Fick), Melane v Santam Insurance Co Ltd 1962(4) SA 531 (AD) 532 B-G, Minister of Police & Another v Phungula 25067/2017 (GJ)

(a) Lack of jurisdiction of the Commercial Court

[22]The applicants aver that they were neither *domiciled*, nor resident in the United Kingdom at the time of the commencement of proceedings, or when judgment was granted. They furthermore aver that the Commercial Court merely assumed jurisdiction pursuant to clause 29 of the Downside Protection Agreement, which on the face of it constitutes a submission to jurisdiction by the first, second, fourth and fifth applicant. The parties had been litigating in the United Kingdom since 2010 and no evidence was provided that they ever objected to the jurisdiction of the Commercial Court. The 2017 consent order was the result of a settlement which was negotiated and which should have resulted in the end of litigation between the parties. It is undisputed that the applicants had at all times been represented by solicitors with a global presence, including in South Africa.

[23]The applicants, through their solicitors, accepted that the Commercial Court had jurisdiction to adjudicate the parties' dispute by advising that court that they intended to defend Lexshell's claim. The "*Acknowledgment of Service*" expressly warned them that:

- (a) *"If you file an acknowledgment of service but do not file a defence within ... 36 days ... of the date of service of the particulars of claim, and you have not indicated that you intend to contest jurisdiction, judgment may be taken against you";*

(b) *“If you do not file an application to contest the jurisdiction within 28 days of filing an acknowledgment of service, it will be assumed that you accept the court’s jurisdiction”.*

[24]It is clear that the applicants submitted to the jurisdiction of the Commercial Court by participating in the proceedings of that Court.⁷ “Once a litigant has chosen specific grounds for impugning the jurisdiction of a court it may not in later proceedings attack the jurisdiction of the first court on new or fresh grounds”.⁸ The applicants litigated in the United Kingdom without ever raising an objection to jurisdiction, if they had any qualms about jurisdiction, they should have raised it in the Commercial Court. There is accordingly no merit in this defence.

(b)The alleged fraud on the SARB defence

[25]The applicants alleged that a rescission is warranted, because Lexshell did not inform the Commercial Court that the suspensive condition (approval by the SARB) had not been fulfilled and consequently, the Downside Protection Agreement had lapsed and was of no force and effect.

[26]The applicants originally sought to raise the alleged lack of the SARB approval defence before the Commercial Court by applying to amend their pleadings to incorporate such a defence. This application was however withdrawn and they entered into the aforementioned settlement agreement.

⁷ Government of the Republic of Zimbabwe v Fick 2013(5) SA 325 (CC) par 43 -49 (Fick).

⁸ Fick para 46.

[27]The contention that the SARB's initial refusal to consent to a proposed transaction in April 2010 was fatal to the Downside Protection Agreement as of 28 April 2010 is not borne out by the provisions of clause 35 of the Downside Protection Agreement. That clause provides that the Letter of Agreement shall be of immediate force and effect and is subject to the approval of the SARB and all parties will use their best endeavours to procure it at their joint costs.

[28]There was no definitive final date by when the SARB approval had to be obtained, failing which it would cease to be of further force and effect. The agreement stated that the parties would *"use their best endeavours to procure the satisfaction at their joint costs, of the Resolutive Condition no later than the earlier of the Trigger Date or the Listing Trigger Date."*

[29]On perusal of the correspondence from the SARB, it is clear that the SARB's refusal of 28 April 2010 was primarily directed at declining to approve the terms and conditions of the transaction that the applicants contemplated implementing at the time of swapping their effective shareholding in DMC for shares in Sable Mining Africa Limited (Sable Mining) coupled with those of the Downside Protection Agreement. The SARB warned that the proposed transaction would create a loop structure, which is prohibited by section 10 of the Exchange Control Regulations.

[30]The 10 April 2010 refusal by the SARB made it clear that a loop structure would have resulted in the applicants, who are South African residents, being compensated with shares in Sable Mining as part of the acquisition transaction of DMC. It is accordingly not the conclusion of the Downside Protection Agreement, or the cession that would have resulted in a loop structure. Rannerdale was an English incorporated company.

[31]The applicants fail to disclose in their affidavits that they themselves made a further application to SARB in May 2010 for approval of, *inter alia*, the Downside Protection Agreement. As part of the litigation that ensued before the Commercial Court, the second applicant, delivered a witness statement dated 17 May 2017 in support of an application to withdraw admissions previously made by the applicants in those proceedings. He is also the deponent to the applicants' founding affidavit in these proceedings. In that witness statement, he asserts on behalf of all applicants—

“In fulfilment of their Clause 35 Downside Letter obligation, Avalon and Mikakor applied (via their bank, FirstRand Bank Limited) to the Exchange Control Department of the SARB on the 16 April 2010 for approval of the agreement in the Downside Letter. ...”

[32]Following the SARB's rejection of this application, on 12 May 2010 Avalon applied (via FirstRand) to the SARB for the SARB to approve the Downside

Protection Agreement as a stand-alone request, without reference to the Sable share transaction. Having considered that request, the SARB on 18 May 2010 declined to immediately approve the Downside Protection Agreement, but instead requested Avalon, Mikakor and DMC, to attend a meeting with the SARB to discuss the matter. No meeting was ever held and the matter did not progress any further.

[33]The fact that the applicants themselves made a further appeal with SARB in early May 2010 for approval of the Downside Protection Agreement contradicts the allegation by the applicants that when Rannerdale, subsequently in July 2010 applied to SARB for approval its representative, failed to inform the SARB that the agreement had by that time already lapsed.

[34]Consequently there is no merit in the claim that, had the SARB been made aware of the fact that the Downside Protection Agreement had lapsed it would not have considered the application at all. It must in any event be noted that the rescission application was served on the SARB. The SARB advised the applicant on 21 January 2011 that it would not withdraw the approval for the Downside Protection Agreement which was granted in August 2010. Furthermore, the applicants abandoned any reliance on fraud on the SARB defence before the Commercial Court, and can hardly be seen to revisit it in this application.

[35] On 17 May 2017 the applicants withdrew their application for the Commercial Court's leave to allow them to withdraw their admission and to rely on the illegality defence pertaining to the Downside Protection Agreement and SARB's approval of 10 August 2010. The applicants subsequently signed a consent order agreeing to withdraw their application for leave to amend on 28 June 2017. Applicant's solicitors in correspondence informed Lexshell that they did not continue to contest the entitlement to judgment. In the replying affidavit the applicants do not deal at all with the aforesaid assertions, which renders it uncontested.

[36] In **Eke v Parsons**,⁹ the Constitutional Court stated as follows regarding the status of settlement agreements that have been made by consent an order of court:

“Where the parties themselves, through a settlement agreement reached with legal representatives present on each side, prefer to dispense with the strictures of a rule and request that the court recognise this preference by means of a consent order, for one party suddenly to perform a volte-face and demand strict adherence with that self-same rule borders on the ludicrous. Justice between the two litigants demands that their settlement agreement, which was made an order of Court, must be given effect. After all, a court's duty is to do justice between litigants....”¹⁰

⁹ 2016(3) SA 37 (CC) (Parsons)

¹⁰ Parsons para 41.

[37]Once parties have come to an agreement, especially when they are represented by legal representatives, and in the absence of fraud or justus error, they should be held to that agreement.¹¹ There is no indication at all that the agreement was tainted by fraud or justus error.

[38]The applicants never sought to appeal or set aside the order of the Commercial Court on any basis. This is telling and underscores an inference that an attempt is made, to belatedly avoid the consequences of the settlement.

[39]In **Moraitis**¹² it was held that the approach also differs depending on whether a judgment was granted by default, or in the course of contested proceedings. The test is more stringent in contested proceedings and such a judgment can only be set aside in the case of either fraud or justus error.

[40]The applicants furthermore alleged that the cession and/or assignment of rights under the Downside Protection Agreement by Rannerdale to the respondent was a simulated transaction, purely intended at circumventing exchange control laws. The applicants were notified of the cession and/or assignment on 20 August 2010 and they did not take issue with this and admitted it in their original defence and their amended defence statement in the Commercial Court.

¹¹ Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978(1) SA 914 (A).

¹² Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd 2017(5) SA 508 (SCA) para 10 – 13 & 16 (Moraitis)

[41]The deed of assignment makes it clear that the assignment is conditional on written approval from the Exchange Control Department of the SARB, without such approval the assignment would have been ineffective. There is accordingly no merit in this defence, it neither has merit nor can it be *bona fide* in the light of the facts set out above.

(c)The defence that third applicant, Rannerdale and/or Lexshell did not sign the Downside Protection Agreement.

[42]Lexshell was not an original party to the agreement in January 2010. Rannerdale assigned its rights, title and interest under the Downside Protection Agreement to Lexshell in August 2010. Rannerdale did sign the Downside Protection Agreement.

[43]The answering affidavit and annexures thereto indicate that the third applicant had also conceded in sequestration proceedings that he did sign the Downside Protection Agreement. The conclusion and validity of the Downside Protection Agreement was never in dispute before the Commercial Court. The applicants did not take issue with any of the aforesaid in the replying affidavit, which must result in this court accepting the veracity of these allegations. Consequently, there can be no merit in this defence. The fact that the third applicant contradicts his own previous statement also illustrates a lack of *bona fides*.

(d) The Suretyship Defence

[44]The applicants made the bold allegation that the Downside Protection Agreement is a suretyship, without laying any factual basis for the allegation.

[45]A perusal of the agreement makes it clear that all of the applicants are bound as principal debtors. On a perusal of the agreement, none of them seems to have a right of recourse against a principal debtor, if they settle any part of the obligations in the Downside Protection Agreement.

[46]It is trite that a contract of suretyship is an accessory contract, by which the surety undertakes to the creditor of the principal debtor to, if and in so far as the principal debtor may fail to do so, to indemnify the creditor.¹³

[47]In this instance there is no such indemnity. They all warrant compliance as principal debtors.

e)Lack of Authority Defence

[48]The applicants alleged that Avalon trust lacked authority to sign the Downside Protection Agreement. On the pleadings the Downside Protection Agreement is not the only written agreement that the Avalon Trust signed with Rannerdale. The answering affidavit points out that Mr Van Niekerk (the fourth applicant) had transacted business through the Avalon Trust with Rannerdale and its principals since July 2008. From that time, the Avalon Trust concluded various written agreements with

¹³ Nedbank v Van Zyl 1990 (2) SA 469 (A), see also Liberty Group (Pty) Ltd v Illman 2020(5) 397 (SCA)

Rannerdale and its then principals. These include, on the applicants' own version, Restated Heads of Agreement, Loan and Subscription Agreement and a funding agreement.

[49] The applicants do not explain how it is that only the Downside Protection Agreement is affected by lack of competency. Furthermore, in the founding affidavit, the applicants conceded that the Avalon Trust considered itself bound by the provisions of the Downside Protection Agreement. Surprisingly, in the light of the alleged lack of authority the trustees of the Avalon Trust, applied to SARB for approval of the transaction, which they now allege was never authorised to do so.

[50] In terms of the Downside Protection Agreement, each signatory also warranted in Rannerdale's favour that they had the required corporate power and authority. It is unclear why Mr Van Niekerk in this one instance lacked authority to sign on behalf of the Avalon Trust. The evidence accordingly does not support the defence that Mr Van Niekerk lacked authority. Accordingly in the light of any factual evidence this defence should be rejected.¹⁴

(e)The Protection of Businesses Act Defences

¹⁴ Moraitis, par 21 – 22, 25, 32 -34.

[51]It is alleged by the applicants that the enforcement of the Commercial Court's order is prohibited by virtue of section 1 of the Protection of Businesses Act 99 of 1978, as the Commercial Court granted punitive damages against the applicants. A perusal of the papers reveal that the applicants' affidavit does not make out a case that punitive damages were awarded. It was a consent order made as a result of a negotiated settlement.

[52]Section 1(1)(a) of the Protection of Businesses Act states, among others, that – notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs – no judgement, order and/or delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in section 1(3) shall be enforced in the Republic.

Section 1(3) reads—

“In the application of subsection (1) (a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.”

[53]It was held that the Protection of Businesses Act ought to be applied and interpreted in a manner that respects and advances constitutional rights, that is important due to its dubious origin as protectionist legislation which found its roots in the apartheid regime and in the light that our law recognizes and enforces foreign judgments in general.¹⁵

[54]In **Trademore**¹⁶ it was recognized that a party who obtains judgment and seeks to enforce and execute it in South Africa seeks to invoke section 34 of the Constitution, that guarantees access to Courts and section 39 and 233 which require the Minister to facilitate the International Principles of Comity, reciprocity and orderly conduct and exigency of international trade.¹⁷

[55]The Downside Protection Agreement does not govern terms and conditions amongst its parties for the sale or export of raw materials, or substances from which physical things are made, it is simply a financial agreement ensuring that a foreign based investor who had apparently assisted shareholders of DMC from their funding obligations and DMC itself would be rewarded for taking such risks. In the light of the facts there is no merit in this defence.

¹⁵ International Fruit Genetics LLC v Redelinghuys 2019 (4) SA 174 (WCC) (International Fruit) para 16, see also Fattouche v Khumalo [2014] ZAGPJHC 102 para 29 -30, Tradex Ocean Transportation SA v Silvergate 1994 (3) SA 119 (D) and Chinatex Oriental Trading Co v Erskine 1998(4) SA 1057 C at 1095 I – 1096 C, Richman v Ben-Tovim 2007 (2) SA 283 (SCA) para 11, Danielson v Human 2017 (1) SA 141 (WCC) para 15, Balkan Energy Limited v Government of the Republic of Ghana 2017 (5) SA 488 (GJ) (Balkan).

¹⁶ Trademore (Pty) Ltd v Minister of Trade & Industry [2019] ZAGPPHC 591 (Trademore)

¹⁷ Trademore paras 40, 47.

(f)The defence that the Commercial Court order violates Public Policy

[56]On a perusal of the founding affidavit it is not clear on what basis this defence is raised, it is essential that the basis of the case be set out properly in the founding affidavit.¹⁸ It is required of parties who wish to raise issues that implicate constitutional values and public policy considerations to do so clearly.¹⁹ In the absence of a factual matrix to substantiate it there cannot be any basis for such a defence, to the contrary it is imperative that as part of the international community and with due deference to the Constitution legitimate foreign orders should be respected and enforced.²⁰ This defence is farfetched and ignore all principles of comity of nations and international trade.

(g)The Defence that the Downside Protection Agreement is Prohibited by Section 52 OF The Close Corporation Act

[57]In the affidavits the applicants did not clarify how this provision find application in the present matter. A perusal of the section leaves one confused as how this section could be applied. In any event no factual matrix is set to explain how and why it should find application. The reference to this section of the Close Corporation Act is made in a total vacuum and it does obviously not constitute a *bona fide* defence.

¹⁸ Minister of Land Affairs and Agriculture v D& F Wovell Trust 2008 (2) SA 184 (SCA).

¹⁹ Prince v President of the Law Society of the Cape of Good Hope 2001 (2) SA 388 para 22.

²⁰ Society of Lloyds v Price, Society of Lloyds v Lee [2006] ZASCA 88 para 28, Fick para 54 - 57

CONCLUSION

[58]The applicants did not satisfy the requirements for a rescission of the enforcement order to be granted. The delay in bringing this application was not satisfactorily explained, and the defences raised is not *bona fide*, nor are they borne out by the facts. Importantly they were never raised in the Commercial Court, when an order by consent was obtained. Despite the plethora of pleadings in this Court and the Commercial Court, there is no objective evidence to support any of these defences in the applicants' affidavits.

[59]The applicants have no defence, let alone a *bona fide* defence. The manner in which the defences were raised in the founding affidavit and the paucity of information and the inadequate replying affidavit can only point to a total lack of *bona fides*. The Court has a wide discretion to grant a rescission application, in this instance however, to grant such an application will not constitute a proper exercise of such discretion.

[60]Courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest, *mala fide*, vexatious conduct or conduct that amounts to an abuse of the process of court. In my view this rescission application is nothing but an abuse of the process of the Court. The conduct of the applicants is also severally prejudicial to Lexshell, in the light of a court order that was obtained during 2017.

[61]In this instance, the applicants clearly brought their application to subvert the course of justice. Theirs was an application merely intended to further delay and frustrate Lexshell in ensuring that the applicants comply with the terms of a monetary judgment handed down by the Commercial Court more than five years ago. In the light of all the above the applicants should be penalised with a punitive costs order.

[62]The following order is made:

62.1 The application is dismissed; and

62.2 The applicants must pay the costs of the respondent, jointly and severally the one paying the other to be absolved, on an attorney and client scale.

R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: 23 JANAURY 2023

DATE OF JUDGMENT: 20 MARCH 2023

ATTORNEY FOR APPLICANTS: JULIAN KNIGHT & ASS INC

ADVOCATE FOR APPLICANTS: ADV D P VILLER

ATTORNEYS FOR RESPONDENTS; FASKEN ATTORNEYS

ADVOCATE FOR RESPONDENTS: T R SEROTO