

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/40442

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

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N. REDMAN

01 DECEMBER 2022

In the matter between:

KESHIA MOHAMED-PADAYACHEE

Applicant

and

RAEES LEROTHOLI MOHAMED

First Respondent

ANGELIQUE JUSTINE MOHAMED

Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 10h00 on 01 December 2022.

JUDGMENT

REDMAN AJ:

[1] The applicant's claim is based on two Acknowledgements of Debt namely -

- (1) an Acknowledgement of Debt signed by both the first and second respondents in terms of which they acknowledged that they were jointly and severally liable to the applicant in the sum of R400 000,00 and undertook to pay this amount to the applicant on 31 May 2020.

- (2) An Acknowledgement of Debt signed by the first respondent in terms of which he acknowledged being liable to the applicant in the amount of R133 000,00 and undertook to repay this amount by 21 May 2020.
- [2] Both Acknowledgements of Debt were signed on 18 March 2020 and provided that in the event of default the signatories would be liable for legal costs incurred on the scale as between attorney and client. The Acknowledgements of Debt also made provision for payment of default interest at the prime rate per annum calculated and capitalised on the same day of each month in arrears on the outstanding balance.
- [3] The applicant and the first respondent are brother and sister. The second respondent is the first respondent's wife. It is common cause that the Acknowledgements of Debt do not constitute arms-length transactions and the provisions of the National Credit Act, 34 of 2005 are not applicable.
- [4] The applicant seeks condonation for the late delivery of her replying affidavit. I am satisfied that the applicant has provided a reasonable explanation for her delay and I do not believe that the respondents have suffered any prejudice as a result thereof. The respondents did not oppose the application for condonation. In the circumstances condonation for the delivery of the replying affidavit outside the time periods prescribed by the Rules of Court is granted.
- [5] In their answering affidavits the respondents admit having signed the Acknowledgements of Debt but contend that this was done under duress. They further allege that certain payments had been made by them which have not been taken into account by the applicant.
- [6] The respondents aver that on the day when the Acknowledgements of Debt were signed, sister (the applicant and her husband arrived at the respondents' house and demanded that he sign the Acknowledgements of Debt. This demand was purportedly made in the presence of the respondents' daughter and the second respondent's grandmother. The highwater mark of the respondents' defence is their suggestion that the first respondent recalled that the applicant's husband carried a firearm which "*he could have been carrying with him*". The respondent avers that he signed the document out of fear for his daughter and his wife's life and solely on the promise that the applicant and her husband would leave the house.

- [7] The elements of a defence of duress entitling a party to set aside an agreement are well settled and were described by Wessels: Law of Contract in South Africa Vol 1, 2nd ed., at paragraph 1167, to be the following:
- (1) actual violence or reasonable fear;
 - (2) the fear must be caused by the threat of some considerable evil to the party or his family;
 - (3) it must be a threat of imminent or inevitable evil;
 - (4) the threat or intimidation must be *contra bonos mores*;
 - (5) the moral pressure that was used must have caused damage. (See *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at para 36).
- [8] In their answering affidavits the respondents do not allege that any threat was made by the applicant or her husband. The first respondent's alleged fear for the lives of his wife and child was not induced by any threat of imminent or inevitable danger. According to the respondent, the applicant merely demanded that the respondents sign the Acknowledgements of Debt. The first respondent's alleged fear for his daughter and his wife's lives was not induced by anything the applicant or her husband did or said. The first respondent's alleged fear purportedly arose because he remembered that the applicant's husband owned a firearm. Any fear which the first respondent may have experienced could not be considered reasonable in the circumstances described in the answering affidavits.
- [9] In his answering affidavit, the first respondent omits to disclose the e-mails and WhatsApp messages which had been exchanged between himself and his sister prior to conclusion of the Acknowledgements of Debt. An initial Acknowledgement of Debt incorporating the full indebtedness of R533 000,00 had been sent to the first respondent. The second respondent refused to sign the Acknowledgement of Debt incorporating the full indebtedness and accordingly at the request of the first respondent, the Acknowledgement of Debt was split into two documents. On 17 March 2020 in a WhatsApp message the respondent recorded his receipt of the two Acknowledgements of Debts mail and undertook to print and sign them.
- [10] Subsequent to the signing of the Acknowledgements of Debts, there were further communications between the parties relating to payment. The alleged duress was raised for the first time in these proceedings.

- [11] Although the respondents in their answering affidavits allege that they had made certain payments towards their indebtedness, they failed to provide any details of such payments. From the answering affidavits it is impossible to determine what amounts the respondents allege they had paid and no information or documentation is provided in support of these allegations.
- [12] Subsequent to the delivery of the answering affidavits, the respondents uploaded onto Caselines a number of payment notifications purportedly confirming payments of R1 000,00 per month for the period November 2021 to May 2022. The payment notifications were not supported by an affidavit and were not referred to in any of the papers. The applicant accepted that the respondents had made payment of an amount of R11 000,00 and that this should be deducted from the amount claimed under the first Acknowledgement of Debt.
- [13] The first and second respondents appeared in person at the hearing of the application. During the course of argument, they contended that certain payments made to the applicant had not been taken into account in the calculation of the amounts claimed by the applicant. Other than the payment of R11 000,00 conceded by the applicant, however, it appears that the amounts were all paid prior to the signing of the Acknowledgement of Debts and accordingly did not constitute payments made pursuant thereto.
- [14] The respondents implored that I should take into account the amount by which the respondents' water account was credited by Johannesburg Water pursuant to the intervention by the Ombudsman during September 2021. In this regard the respondents relied on e-mail correspondence received from the Office of the Ombudsman recording that a credit of R130 826,37 would be issued on the first respondent's water account and a debit of R62 217,96 would be raised for the period 11 January 2016 to 22 November 2019 by Johannesburg Water.
- [15] There is, however, no evidence that the Johannesburg Water account was rectified in the manner suggested. From the documents relied on by the respondents it appears that the relevant water account was registered in the first respondent's name and there is no evidence that any amounts were paid over to the applicant following upon the alleged crediting of the account. Indeed, this is not even suggested to be the case relied upon by the respondents. The respondents have thus not proved any entitlement to credits over and above the R11 000,00 conceded by the respondent.
- [16] The respondents' version of the events of 18 March 2020 fly in the face of the correspondence and WhatsApp messages exchanged between the parties during the relevant period. In the absence of any threat having been

made by the applicant or her husband, the contention that the respondents signed the Acknowledgements of Debt under duress is far-fetched, misconceived and can be rejected out of hand. I am accordingly satisfied that the applicant is entitled to the order set out below.

[17] The applicant has not proved by means of evidence what the prime rate of interest was at the date of default. The applicant has thus not established a basis for such interest. See *Midrand/Rabie Ridge/Ivory park Metropolitan Substructure v Lanmer (Pty) Limited* 2001 (2) SA 516 (T) paras [13] to [19].

[18] I accordingly make an order in the following terms:

1. That the respondents jointly and severally, the one paying the other to be absolved, make payment to the applicant –
 - 1.1. of the amount of R389 000,00;
 - 1.2. interest thereon at the rate of 7% per annum from 24 June 2020 to date of payment.
2. The first respondent is to make payment to the applicant
 - 2.1 of the amount of R133 000,00;
 - 2.2 interest thereon at a rate of 7% per annum from 24 June 2020 to date of payment.
3. The respondents pay the costs of the application on the scale as between attorney and client.

N REDMAN

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 21 November 2022
Judgment: 01 December 2022

Appearances:

For Applicant:	F Darby
Instructed by:	Schultz Demarthe Inc.
For Respondents:	[In Person]