Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Ms Acting Justice Golden
Date of hearing: 14 February 2024
Date of judgment: 22 February 2024

Case No:3651/2023

In the matter between:

PHOENIX INTERNATIONAL LOGISTICS (PTY) LTD Plaintiff

and

STAX OF WOOD CC First Defendant

GERHARD KIRSTEIN Second Defendant

JUDGMENT

GOLDEN AJ:

[1] The plaintiff has noted an exception to the defendants' Plea dated 6 July 2023 on the basis that it lacks averments which are necessary to sustain a defence. The relevant facts are summarised below.

[2] The plaintiff provided logistical and freight forwarding services to the first defendant in respect of which the plaintiff shipped wood to the first defendant's overseas clients. A dispute arose regarding the plaintiff's invoices and what was owing to it by the first defendant. Because of the dispute the plaintiff refused to release and ship 13 containers of wood to the first defendant's overseas clients. The defendants then signed two Acknowledgement of Debts (AODs) which the plaintiff required before it was prepared to release the orders for shipment.

[3] The plaintiff filed a provisional sentence summons on 1 March 2023 where it sought judgment against the defendants for payment of the amount of R579,700.76 together with interest thereon based on the AODs.

[4] The defendants entered into the principal case and delivered their Plea. Their defence is set out more fully in paragraphs 3.4 to 3.4.10 of the Plea.

[5] The defendants plead as follows:

[5.1] Prior to the signing of the documents, the plaintiff rendered logistics and freight forwarding services to the first defendant and rendered invoices to the first defendant.

[5.2] During the course of December 2022, the first defendant entered into a legitimate dispute with the plaintiff concerning the plaintiff's invoices

and refused to make further payment of same, as can be seen from emails annexed hereto marked “SOW1”.

[5.3] At the time, the plaintiff was unable to prove that the amounts of its invoices were indeed due and owing to it.

[5.4] Because of the dispute, the plaintiff refused to release the first defendant’s shipments of 13 containers of wood, which were exported by the first defendant to its overseas customers.

[5.5] The refusal to release the shipments of wood compromised the first defendant’s relationship with its overseas customers, to the extent that the customers threatened to terminate their relationships with the first defendant, which in turn threatened the first defendant’s very existence.

[5.6] At the time when the documents were signed, the plaintiff threatened the defendants that the shipments would never be released, if the defendants do not sign the documents.

[5.7] The threat was conveyed to the first defendant, duly represented by the second defendant, on 10 January 2023 at Strand, orally by Mr Craig Melnick, and via email by Ms Robin Theron, a copy of which email is annexed hereto marked “SOW2”.

[5.8] The defendants signed the documents in the *bona fide* and reasonable belief that, if they failed to do so, it will inevitably lead to the first defendant's demise, for the reasons pleaded above.

[5.9] But for the threat, the defendants would not have signed the documents.

[5.10] The documents are therefore void due to duress.

[6] The first exception is that the defendants have failed to plead:

[6.1] that the alleged threat made by the plaintiff was of considerable evil to the person concerned;

[6.2] that the alleged threat was of an imminent or inevitable evil and induced fear; and

[6.3] that the alleged threat was unlawful or *contra bonos mores*.

[7] The plaintiff further pleads that, to the extent that the purported defence is one of ***economic duress***, such a defence is in any event not sustainable in terms of the law and does not constitute a defence to the plaintiff's claim.

[8] The second exception posits that the covering email referred to in paragraph 3.5.1 of the defendants' Plea upon which the first defendant relies to prove that there was no consent to the AOD's, constitutes extrinsic evidence and is inadmissible to contradict, add to or modify the AOD's. The plaintiff asserts that the defendants' allegation that the plaintiff could therefore not have placed reliance on the AOD's is therefore unsustainable and bad in law.

[9] During the course of legal argument counsel for the plaintiff, Mr Robbertze, informed the Court that the plaintiff no longer pursues the second exception as it was predicated on *justus error*, as the plaintiff had understood the defendants' defence also to have been premised on a mistake thereby bringing the assent to the AOD's into question, by relying on the email dated 10 January 2023. In this email, the second defendant informs the plaintiff that he (second defendant) does not automatically waiver his right to query any invoice which may have any discrepancies or disagreements in the mentioned period by agreeing to the AODs.

[10] There appears to be some conflation on the part of the plaintiff between the basis for the second exception and the defence of *justus error.* I did not understand the defendants' defence to be one of *justus error* simply because they never relied on an alleged mistake which induced them to conclude the AODs. A defence of *justus error* must also be expressly pleaded if a party seeks to rely thereon which the defendants have not done. However, I need not determine the second exception as counsel for both parties agreed in the

hearing that the issue for determination will now only be confined to the issue of economic duress and/or duress of goods, namely, the first exception.

[11] The defendants' position is that they would not, of their own volition, have concluded and signed the AODs had it not been for the plaintiff's threat that it would not release the shipments to the defendants' overseas clients. They contend that the refusal to release the shipments of wood had compromised the first defendant's relationship with its overseas customers, where they had threatened to terminate their relationships with the first defendant and that this had threatened its commercial existence.

[12] The exception noted against the defence of economic duress is twofold. The first is that the defendants' have failed to plead the essential allegations required to substantiate a defence of duress, and that without pleading these essential allegations, the defendants' plea is vague and embarrassing. The plaintiff asserts that the defendants should have pleaded that (i) the alleged threat made by the plaintiff was one of considerable evil to the person concerned, (ii) that the alleged threat was of an imminent or inevitable evil and induced fear, and that (iii) the alleged threat was unlawful or *contra bonos mores*. The plaintiff contends that the failure to have pleaded that the alleged threat was unlawful or *contra bonos mores*, means that the Plea remains excipiable. Counsel for the plaintiff contended that there is further no reasonable basis to interpret the defendants' Plea to read that the alleged threat was unlawful and/or *contra bonos mores*.

[13] The second leg of the exception is that, even if properly pleaded, the defence of "*economic duress*" is not a recognised defence in our law. The plaintiff relies on *Medscheme Holdings (Pty) Ltd & Another v Bhamjee* 2005 (5) SA 339 (SCA) for this proposition. I shall deal with this issue first.

[14] During legal argument, counsel for the plaintiff seemed to accept that economic duress and/or duress of goods was an accepted defence in our law. He rather – and more emphatically - persisted with the submission that the defence does not avail the defendants because it had not pleaded the *essentialia* of such a defence.

[15] The concession that economic duress was now a legitimate defence in South African law was correctly made.

[16] The Labour Court in *NEHAWU v The Public Health and Welfare Sectoral Bargaining Council & Others* [2002] 3 BLLR 2022 (LC) has held that economic duress is held to be present when commercial pressure is exerted on a party, amounting to coercion, which compels the party to enter into the contract unwillingly. The Court held that consent is vitiated in these circumstances.

[17] In *Medscheme*, the respondent, a medical doctor, had also signed two AODs in favour of the second appellant, a medical aid scheme. Under both AODs, the respondent undertook to repay the appellant certain sums of money that he had already claimed from the appellant. The appellant had made a threat that if the

respondent failed to sign an AOD in favour of their schemes, they would terminate direct payment of all claims to the respondent. According to the respondent, his economic survival was at risk because it meant that he would have to recover his charges from his patients who were members of the medical aid schemes who would look to the scheme for reimbursement, and that this would result in them no longer consulting him. Because of this threat, the respondent acknowledged himself to be indebted to the appellant by signing the AOD.

[18] The central issue in *Medscheme* was whether the appellant's threat to terminate direct payment to the respondent was *contra bonos mores*. The Court *a quo* had found that the threat to cause economic ruin was unconscionable and that it amounted to economic duress. Whilst the SCA found that the respondent had signed the AODs in the belief or fear that his failure to do so placed his medical practise at risk because of the appellant's threat, it overturned the finding of the High Court on the basis that the threat was neither unconscionable nor unlawful in the circumstances, and, that there was accordingly no economic duress. The Court disagreed with the High Court that the conclusion of the AOD was unconscionable, *inter alia*, on the basis that the respondent had gained the ability to continue his lucrative medical practice.

[19] In paragraph [18] of the judgment, the SCA however held that:

> "*Such cases are likely to be rare … for it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with van den Heever AJ (in Van den Berg & Kie Rekenkundige Beamptes at 795E-796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.*"

[20] *Medscheme* recognises that in certain [rare] cases there can be circumstances which may constitute economic duress. It held that "*Something more…would need to exist for economic bargaining to be illegitimate or unconscionable*" to constitute this type of duress.

[21] Duress, in the ordinary legal sense, means that a person does not act out of free choice and acts unwillingly for a reason which has come down to bear upon him, that he has no choice in the matter (see *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) at 397 and 398).

[22] English authorities have defined economic duress as constituted by illegitimate commercial pressure exerted on a party to a contract which induces him to enter into the contract, and which amounts to a coercion of the will which vitiates his consent (*North Ocean Shipping Co Ltd v Hyundai Construction Co*

Ltd [1979] AC 704; *Universe Tank Ships Inc of Monrovia v International Transport Workers' Federation* [1982] 2 ALL ER 67 (HL))

[23] In *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2021] UKSC, a more recent decision of the Supreme Court of the United Kingdom, the Court held that duress is established when an illegitimate threat or pressure causes a claimant to enter into a contract (at paragraphs 78-80). The question whether the threat made was illegitimate, then arises. The Court held that regard must be had to, amongst other, the behaviour of the threatening party including the nature of the pressure which it applies and the circumstances of the threatened party. In contrast, South African law requires the threat to be unlawful and/or *contra bonos mores*. The Supreme Court in *Times Travel* thus defined economic duress as "*concerned with identifying rare exceptional cases where a demand motivated by commercial self-interest is nevertheless unjustified*" (at paragraph 99).

[24] Whilst the SCA in *Medscheme* found that the conduct of the appellant did not amount to economic duress, the Court held that there would be no cogent reason why the threat of economic ruin should not be recognised as duress in South African law. This is consistent with the legal concept of economic duress which has been recognised in English law (see *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* and *Universe Tank Ships Inc of Monrovia v International Transport Workers' Federation* supra).

[25] Whilst *Medscheme* has recognised a defence of economic duress and as correctly pointed out by Deeksha Bhana in her article titled *The Future of the doctrine of economic duress in South African contract law: The influence of Roman-Dutch law, English law and the Constitution of the Republic of South Africa, 1996*, 2021 Acta Juridica 107, the SCA did not elaborate on the requirements for such a defence. All the SCA said in general terms was that "*hard bargaining is not the equivalent of duress…and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which is absent in this case – would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress*" (at paragraph 18).

[26] In his analysis of *Times Travel*, Professor Jacques du Plessis suggests that the means used by the threatening party to create or increase the threatened party's weakness or vulnerability, and the benefits that the threatening party (objectively) obtained due to the threat are considerations which may determine whether a threat of a lawful act is unlawful. The learned author is of the view that the complexity of the enquiry into the unlawfulness of the threat suggests it may be unwise for South African law to exclude the possibility of rather following a range-of-factors approach. (See Jacques du Plessis, *Lawful act duress*, 2023 SALJ 733)

[27] Although foreign authorities provide much needed guidance and insight into this undeveloped area of our law, it will be up to our courts to develop this

jurisprudence to face the realities of modern commercial and contractual practice reflective of South Africa's prevailing constitutional dispensation.

[28] Despite the allure of the legal debate, it is not for this Court to determine the appropriate test to adopt for a defence of economic duress. This is for the trial court to determine and to further develop the jurisprudence in this area of the law.

[29] The first exception that economic duress is not a sustainable defence in South African law, must accordingly fail.

[30] The defendants also rely on a defence of *duress of goods.* This defence was acknowledged in *Hendriks v Barnett* 1971 (1) SA 765 (NPD). In distinguishing between duress of the person and duress of goods, the Court held that in a case of duress of goods all reasons for fear of bodily danger being absent – it is impossible to know whether the payment is voluntarily or involuntarily made unless some unequivocal objection to the payment is raised at the time it is made. The Court held that this contemplates that there must be some objection to the payment. In the instant matter, this objection is evidenced by what is pleaded in paragraph 3.5.2 of the Plea, which is also supported by the email of 10 January 2023.

[31] As regards the approach to exceptions, I am guided by *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461

(SCA), that I should not take an overly technical approach to exceptions. I am also reminded that exceptions must be dealt with sensibly (*Luke M Tembani & Others v President of the Republic of South Africa & Another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA)).

[32] This is not a case where there is no cognisable defence which has been made out on the pleadings. As held by Binns-Ward J in *Titan Asset Management (Pty) Ltd & Others v Lanzerak Estate Investments (Pty) Ltd & Another* (case number 2102/2020, date of judgment: 9 June 2023), a pragmatic approach is called for, bearing in mind the purpose of an exception; being to weed out claims that should not proceed to trial because a cognisable claim or defence, as the case may be, has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing.

[33] It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent.

[34] The burden rests on the excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the Court that the conclusion of

law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts (*Luke M Tembani* at paragraph [14).

[35] I am not persuaded that the Plea is excipiable on the grounds contended for by the plaintiff. The Plea sets out sufficient facts which makes out a defence for economic duress and/or duress of goods.

[36] Even if the words "*economic duress*" and/or "*duress of goods*" were not expressly pleaded, the facts pleaded in paragraphs 3.4. to 3.4.10 of the Plea support a cognisable defence that the plaintiff had threatened the defendants and that, but for the threat, the defendants would not have signed the AODs. The pleaded facts clearly support a defence of economic duress. For reasons addressed herein, the exception that the Plea is vague and embarrassing, also fails.

[37] I accordingly make the following Order:

ORDER:

[a] The exception is dismissed.

[b] The plaintiff shall pay the defendants' costs of the exception.

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TJ GOLDEN, AJ

Acting Judge of the High Court

For the Plaintiff:

Adv JH Robbertze

Counsel for the Plaintiff

Instructed by Shepstone & Wylie Attorneys

(Ms J Woker)

For the Defendant:

Adv R Engela

Counsel for the Defendants

Instructed by VanderSpuy Cape Town

(Mr CH van Breda)