

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

CASE NUMBER:

A420/2010

5 DATE:

25 FEBRUARY 2011

In the matter between:

ASAPI 1046 CC t/a PFC DURBANVILLE

1st Appellant

EREKA KOTZE

2nd Appellant

10 and

ANDRIES VISSER

1st Respondent

YOLANDE VISSER

2nd Respondent

J U D G M E N T

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BOZALEK, J:

The first and second appellants in this matter were the first
20 and third defendants in an action in the Bellville Magistrate's
Court in which the first and second respondents, as first and
second plaintiffs, sued the first appellant for monies owing
under a loan agreement and, as sureties therefor, the second
appellant and one Noleen van den Berg as second defendant.
25 To avoid confusion I shall refer to the parties as they were in
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the Magistrate's Court where the plaintiffs applied for summary judgment against the first and third defendants in the sum of R329 000,00 plus interest and costs.

5 The first and third defendants filed an opposing affidavit but in the event summary judgment in the amount of R178 500,00 was granted against the second and third defendants. Summary judgment was granted against the second defendant, even though this was not sought by the plaintiffs. The first
10 and third defendants noted an appeal against the magistrate's judgment. Since no judgment was given against the first defendant and there is no cross-appeal, it is unclear to me on what basis the first defendant lodged an appeal. The first defendant was subsequently placed into liquidation and the
15 liquidator has not been substituted as the plaintiff in the appeal.

In the circumstances I consider that no appeal by the first defendant is properly before the court and in any event
20 appellants' counsel advised the court at the commencement of the hearing that the first defendant is no longer proceeding with the appeal in the sense that he could obtain no instruction in that regard. The second defendant has not appealed against the magistrate's order against her but, since it is
25 incompetent, I consider that it will be appropriate in this
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appeal to vary the magistrate's order at least in that respect. What remains then of the appeal is the third defendant's appeal against the magistrate's summary judgment against her in the sum of R178 500,00.

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The plaintiff sued the defendants on the basis of a written agreement of loan involving the sum of R425 000,00 concluded between the plaintiffs and the first defendant on 11 November 2008. They alleged that the capital sum
10 outstanding, which in terms of the agreement was repayable on demand, stood at R329 000,00. The plaintiff sued the third defendant in terms of a written suretyship agreement, also concluded on 11 November 2008. The third defendant filed an opposing affidavit, made both in her personal capacity and on
15 behalf of the first defendant, wherein she stated that:

1. prior to the written agreements of the 11 November 2008 being concluded, the only existing documentation was four loan agreements between the plaintiffs and the first
20 defendant, totalling R355 000,00;
2. as at 3 July 2009 the first defendant owed the plaintiff the sum of R178 500,00 plus interest.

25 The third defendant then purported to raise various defences

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on her and the first defendant's behalf, namely, that the loan agreement concluded on 11 November 2008 reflected the incorrect balance owing by the first defendant, that such agreement and the suretyship agreement were entered into by
5 her under duress and finally, various technical defences arising out of the provisions of the National Credit Act of 2005. According to the third defendant's heads of arguments, however, all defences in terms of the National Credit Act are abandoned. The magistrate found that the third defendant had
10 failed to convince the court of the "viability of this threat or duress defence". He found further that the third defendant had failed to persuade him that she had any *bona fide* defences for the claim of R178 500,00 and granted summary judgment against her in this amount.

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The issue on appeal is then whether the magistrate erred in finding that the third defendant had failed to satisfy the court that she had a *bona fide* defence to the claim of R178 500,00 in that she had signed the suretyship agreement under duress.
20 The third defendant's defence of duress is set out as follows in paragraphs 5.6 to 5.8 of her opposing affidavit:

"After attending a meeting with Mr Van Niekerk on
or about 30 October 2008 in Durbanville, both
25 second defendant and I were accosted by the

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plaintiffs in their double cab LDV, who pulled their vehicle in front of us, preventing us from being able to move forward and in the process, nearly driving over my foot. The first plaintiff then started attacking my character, accusing me of being a thief, and further threatening that if second defendant and I did not sign the documentation which they had presented to us, they would report us to the Commercial Unit of the SAPS and also inform my husband. The first plaintiff was well aware of the fact that I am petrified of my husband who previously held a high position within the Directorate of Special Operations (Scorpions) and that I would do anything to prevent the plaintiffs from making contact with him to inform him of the first defendant's precarious financial position. As a consequence of the coercion and fear which was installed upon (sic) the second defendant and I, we reluctantly signed the new loan agreement which is marked Annexure B to the plaintiff's particulars of claim, as well as the deeds of suretyship marked Annexure C thereto."

In BOE Bank Beperk v Van Zyl 2002 (5) SA 165 (C), the following dictum of Corbett, J, as he then was, in Arend &
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Another v Astra Furnishers (Pty) Limited 1974 (1) SA 298 (C)
at 306A-B was approved:

5 "Where a person seeks to set aside a contract or
resist the enforcement of a contract on the grounds
of duress based upon fear, the following elements
must be established:

1. The fear must be a reasonable one;
2. It must be caused by the threat of some
10 considerable evil to the person concerned or his
family;
3. It must be a threat of an imminent or
inevitable nature.
4. The threat or intimidation must be unlawful or
15 *contra bonos mores*.
5. The moral pressure must have caused
damage."

Setting out the approach in summary judgment
20 proceedings where facts are disputed or new facts are
alleged constituting a defence, Corbett, JA stated as
follows in Maharaj v Barclays National Bank Limited 1976
(1) SA 418 (A) at 425G-426E:

25 "... the court does not attempt to decide these

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issues or to determine whether or not there is a balance of probabilities in favour of one party or the other. All that the court inquires into is:

5 (a) Whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded.

10 (b) Whether on the facts so disclosed, the defendant appears to have, to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters, the court must refuse summary judgment, either wholly or in part, as the case may be."

15 It is trite that a party opposing summary judgment must set out the material facts upon which its defence is based, with sufficient particularity and completeness to enable the court to decide whether the affidavit disclosed a *bona fide* defence. See Arend & Another v Astra Furnishers (Pty) Limited *supra*, at page 303-304.

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It is against this background that I turn to consider whether the third defendant succeeded in establishing in her affidavit that she had a *bona fide* defence to the plaintiff's claim. The third defendant claimed duress on
25 the ground of the plaintiffs' intimidatory conduct in
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stopping her vehicle and the ensuing encounter and their threat to "report" her to the commercial unit of the SAPS and also to inform her husband. What exactly they would be reporting to the police and what exactly she was afraid
5 of, is somewhat unclear but appears to relate, in the instance of the first threat by the plaintiffs, to accusing the third defendant of being a thief. In relation to her husband, the plaintiffs' alleged threat appears to have been to disclose to her husband the precarious financial
10 position of the first defendant.

There is not an abundance of detail in the third defendant's affidavit to establish the reasonableness or imminence of the threat. And the question also arises in this regard whether the
15 third defendant could not have averted the threat by some other means, other than by signing the agreement, and how much time was available to her to consider or find some method of averting the threat. However, these are matters which, in my view, can only be properly explored in evidence,
20 the question at this stage being simply whether, on the facts, a good defence in law exists; in other words whether a *bona fide* defence has been raised.

A further requirement for the defence of duress is that the
25 threat must be unlawful or *contra bonos mores* since a person

who is legally and morally entitled to do something to another should not suffer at the hands of the law for doing it. As regards the threat of criminal proceedings, the first question must be whether the plaintiffs were within their rights to make
5 such a threat. Once again the lack of detail furnished by the third defendant does not allow a full evaluation of whether any such steps by the plaintiffs would have been justified or not.

The second question is whether the threat or threats induced a
10 payment or an advantage which was not due. What seems clear in this regard is that the first defendant was indeed indebted to the plaintiffs in the amount of R178 500,00. Since summary judgment was ordered against the third defendant for this sum, the key question was whether it was either unlawful
15 or *contra bonos mores* for the plaintiff to threaten to report it to the SAPS or to her husband unless she signed the suretyship agreement.

Inevitably these questions cannot be answered on the basis of
20 the affidavits and the pleadings alone. However, in this regard it is instructive that on the pleadings and affidavits the original loan agreements were replaced by a fresh loan agreement and a suretyship agreement signed by the third defendant. The question inevitably arises as to why the third defendant would
25 assume personal liability for the first defendant's obligations

when the loan agreement which was concluded between the plaintiffs and the first defendant was something which had taken place in the past. Seen in this light, the allegations of duress appear sufficient to satisfy the requirement of a *bona*
5 *fide* defence at this stage of the proceedings.

The final requirement for a successful establishment of the defence of duress is that the moral pressure used must have caused damage, in this case the signing of the suretyship
10 agreement. See in this regard Christie, The Law of Contract in South Africa LexisNexis Butterworth's 5th Edition, page 308.

Mr Maher, on behalf of the plaintiffs, placed considerable emphasis on the unexplained delay of 11 days between the
15 making of the alleged threats and the conclusion of the signing of the suretyship agreement. This delay certainly does raise questions about the imminence of the threat or threats and also whether they were causally connected to the third defendant's conclusion of the suretyship. But once again, on
20 balance, I do not consider that one can ineluctably draw conclusions unfavourable to the third defendant in these respects based simply on the limited material before the court by way of the opposing affidavit and the pleadings.

25 Although the third defendant's affidavit falls short of being
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comprehensive, in my view sufficient facts are alleged therein to ward off summary judgment. In all the circumstances, I am persuaded that the magistrate did in fact err in finding that the third defendant had failed to establish a *bona fide* defence of
5 duress to the plaintiffs' claim for the sum of R178 500,00.

In my view then, the third defendant's appeal must succeed with the further qualification, firstly, that by reason of the magistrate's clear error in granting summary judgment against
10 the second defendant, that part of his order must be varied; secondly, the further qualification is that the magistrate, although apparently intending to do so, did not grant summary judgment against the first defendant and that also should be remedied. As far as the costs of this appeal are concerned, it
15 seems to me that there is no good reason to depart from the normal rule which is that the third defendant, having overturned the magistrate's order on appeal, is entitled to the costs of the appeal. The effect of the order is that this matter is remitted back to the magistrate's court for trial.

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In the result I would make the following order:

1. The appeal is upheld with costs.
- 25 2. The magistrate's order is set aside and replaced with the

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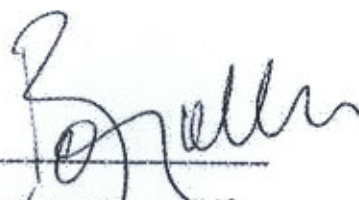
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following order:

5 (a) Summary judgment is granted against the first defendant in the sum of R178 500,00, interest thereon at the rate of 15.5% per annum *a tempore morae* (from 4 August 2009) and attorney and own client costs.

10 (b) Summary judgment against the third defendant is refused and she is granted leave to defend the action. The costs of the summary judgment application in respect of the third defendant will stand over for determination by the trial court.

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BOZALEK, J

20 GOLIATH, J: I agree.

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GOLIATH, J