

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **DURBAN** on **14 September 1999**
before **GILDENHUYS J and BAM P**

CASE NUMBER: LCC 113/99

In the case between:

DEODAT BENJAMIN FRONEMAN

Applicant

and

MFISELWA MVELASE

First Respondent

THEMBI ELIZABETH SITHOLE

Second Respondent

ZALOWAKHE MIYA

Third Respondent

SINUKI MIYA

Fourth Respondent

THE KWADANKI COMMUNITY LAND TRUST

Fifth Respondent

JUDGMENT

GILDENHUYS J:

[1] The applicant in this matter is the owner of the remaining extent of portion 1 of the farm Schurfde Poort, district Colenso, KwaZulu-Natal. I shall refer to this property as “the farm”. The first four respondents are labour tenants, previously in the employ of the applicant and still residing on the farm. During January 1997 the applicant gave notice to the four respondents and to the Director- General of the Department of Land Affairs of his intention to obtain an order for the eviction of the four respondents, as is required under section 11(1) of the Land Reform (Labour Tenants) Act.¹ I shall refer to this Act as the “Labour Tenants Act”. The grounds on which the eviction of the four respondents was sought, are not important for purposes of this judgment. The Director- General, pursuant to section 11(3) of the Labour Tenants Act, convened a meeting between the parties to mediate a settlement. This meeting led to the appointment of a certain Mr Dominic Mitchell, a seasoned mediator, who speaks Zulu fluently. Mr Mitchell conducted lengthy negotiations to explore a settlement. At those negotiations, the applicant was represented by his present attorneys and the four respondents were represented by attorney, Mr Christo Loots.

1 Act No 3 of 1996, as amended.

[2] During the negotiations, the applicant indicated that he would be prepared to consider the sale of a portion of his Schurfde Poort property to the four respondents. Eventually, a mediated settlement was reached on 7 April 1997 between the applicant and the first four respondents. The settlement agreement provides for the sale by the applicant of a portion of Schurfde Poort to a trust or a community property association to be formed by the four respondents, at a price of R49 000. I will refer to this land as “the purchased land”. The purchase price would be paid from Government subsidies. Incorporated in the settlement agreement was an application by the four respondents to the Department of Land Affairs to acquire ownership of the purchased land in terms of Chapter III of the Labour Tenants Act and also an admission by the applicant that the respondents are labour tenants. The settlement agreement imposed several collateral obligations on the applicant. Of importance for purposes of this judgment is the applicant’s obligation to disinfect the purchased land of termites, his obligation to make good the existing dam wall and his obligation to sink a borehole on the purchased land. Finally, the settlement agreement provided that the purchaser must take occupation of the purchased land on date of registration of transfer.

[3] After the conclusion of the agreement of sale, the four respondents had misgivings about the transaction. They discussed their misgivings with their attorney, Mr Loots, and also with the Department of Land Affairs, but nothing came of these discussions. Subsequently, the Director-General “certified the agreement”. Apparently this was done in terms of section 18(5) of the Labour Tenants Act. Section 18(5) reads as follows:

“(5) No agreement for the settlement of any application shall be of any effect unless the Director-General has certified that he or she is satisfied that it is reasonable and equitable, or unless it is incorporated in an order of the Court in terms of this Act.”

[4] The four respondents then proceeded to form a Trust to take transfer of the purchased land. They are the trustees of the Trust. The Trust was registered during 1998 as the Kwadanki Community Land Trust. The Trust is the fifth respondent in this matter. The purchased land was surveyed and eventually (on 23 March 1999) it was transferred to the Trust. It is presently owned by the Trust.

[5] Despite the transfer of the purchased land to the Trust, the respondents refused to vacate the farm. After several fruitless attempts to get them to move, the applicant caused letters of demand, calling upon them to vacate the farm by 29 August 1999, to be served on them. Service was effected by the Sheriff on 31 July 1999. The respondents, on their part, changed their attorneys twice, firstly by transferring their mandate to the firm C M Sardiwalla and Company and thereafter by instructing their present attorney, Mr Shum. On 27 August 1999 Mr Shum wrote to the applicant’s attorneys that their clients “will not move from the part of the farm they

presently occupy,” without stating any reason for the refusal. The applicant then instituted an urgent application for the eviction of the first four respondents in this Court, stating that he intends to develop the farm as a game farm with hunting and eco-tourism facilities, and that he could not do so while the four respondents remained in occupation of the property.

[6] The main defence raised by the respondents in their answering affidavits is that they “have no obligations in terms of the agreement” because they “signed it as a result of duress”. The first respondent, who deposed to the main answering affidavit, stated that he had been reluctant to sign the agreement:

“One of the reasons I was reluctant to sign the agreement was that I was uncertain as to the terms and conditions of the agreement because I was not happy with the explanation given to me by JABU MADONSELA (*the representative of the Department of Land Affairs*) of the terms of the agreement.” He averred that, during the settlement negotiations, he raised his “concerns about the suitability of the land proposed as an alternative to the land we occupied then” with the representative of the Department of Land Affairs (Ms Jabu Madonsela) and also with their attorney (Mr Christo Loots). He did not, in his answering affidavit, explain what those concerns were. He continued by stating that Ms Madonsela and Mr Loots were not, in his opinion, acting in the best interests of the respondents.

[7] At the time of signing, according to first respondent:

“Mr LOOTS became angry when we expressed a reluctance to sign and said, in the presence of the respondents (including myself) . . . words to the following effect,

- (a) if you don’t sign you’ll get nothing
- (b) if you don’t sign I will leave you to conduct the negotiations by yourself.”

These statements, so the first respondent deposed, made all the respondents feel “anxious and uncertain”. The first respondent then concluded by stating:

“I believe that the reason we signed the agreement after a short meeting was because we were scared we would lose all we had, as Mr LOOTS had said. We were also anxious and uncertain. The process was no longer under our control. We felt abandoned by our advisors.”

It is significant that the first respondent, when he gave his version of what happened prior to the signing of the agreement, stated that Mr Loots told the respondents that “if you don’t sign you’ll get nothing”. This is totally different from the alleged statement now attributed to Mr Loots that the respondents would lose all they had.

[8] The defence of duress emanates from Roman and Roman Dutch law, where it is known as the *exceptio quod metus causa*. Duress involves the following elements:

- “(a) There must be a threat of imminent evil, for example to the life, person, honour or property of a person or a member of his family;
- (b) The threat must be unlawful;
- (c) The threat must have induced the threatened party to enter into the contract or to agree to terms which he would not otherwise have agreed to.”²

In the case of *van den Berg en Kie Rekenkundige Beambtes v Boomprops 1028 BK*,³ van den Heever AJ, with reference to the well-known work of Sir John Wessels, put the requirements as follows:

- “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 the threat of an imminent or inevitable evil;
- 4 The threat or intimidation must be *contra bonos mores*; and
- 5 The moral pressure used must have caused damage.”⁴

The latter explication was accepted in a number of High Court decisions, to which van den Heever AJ referred.⁵ In essence, there is not much difference between the two.

[9] The onus to prove duress is on the respondents.⁶ It is difficult to ascertain from the affidavits of the respondents what the threat is of which they complain. It can only be the alleged statement by their own attorney, Mr Loots, that if they do not sign they “would get nothing” or would “lose everything”. In my view, such a statement (if made) is not a threat, but is advice from the attorney who represented the respondents at the time. Also, although the statement (if made) might have caused fear, the statement is not unlawful or *contra bonos mores*.⁷ As held by Dave-Wilson JP in *Steiger v Union Government*:

“... it is only where the fear is caused illegally that restitution is competent.”⁸

Duress is a delict which, if committed by a contracting party, renders the contract voidable. If in this case the alleged threat was not made by the applicant, or not made on behalf of or with the

2 LAWSA Vol 5(1) first reissue (Butterworths 1994) par 152

3 1999 (1) SA 780 (T)

4. *van den Berg v Boomprops* above at 784G

5 *van den Berg v Boomprops* above at 784H-I.

6 *Savvides v Savvides and Others* 1986 (2) SA 325 (T) at 330B; *Paragon Business Forms (Pty) Ltd v du Preez* 1994 (1) SA 434 (SEC) at 439F; *Rothman v Curr Vivier Incorporated and Another* 1997 (4) SA 540 (C) at 551H-I.

7 *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 at 306D-G.

8 1919 NPD 75 at 81.

knowledge of the applicant, he cannot in law be guilty of duress.⁹ There is nothing in the answering affidavits which links the applicant with the alleged threats.

[10] The affidavits filed by or on behalf of the respondents do not contain the requisite factual allegations to substantiate the defence of duress. Even if it did, duress would render the settlement agreement voidable, not void.¹⁰ The affidavits filed by or on behalf of the respondents clearly indicate that their misgivings about the agreement existed from the date of signing. Instead of cancelling the agreement, they proceeded to implement it, which must have involved the signing of documents necessary for forming and registering the Trust and taking transfer of the purchased land. They cannot approbate and reprobate.¹¹ Any right which they might have had to cancel the contract can no longer be exercised at this late stage, more than two years after the settlement was concluded.

[11] Mr Shum argued that there are factual disputes on the affidavits before the Court and that the applicant had “a case to answer”. Accordingly, he asked for the matter to be referred to evidence. It was stated in the well-known case of *Plascon-Evans Paints v van Riebeeck Paints*¹² (to which Mr Shum referred in his argument) by Corbett JA (as he then was) that:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”¹³

In this case, the affidavits of the respondents do not contain the essential allegations to substantiate the defence of duress. Accordingly, if the applicant is otherwise entitled to relief, the raising of that defence and the disputed factual allegations relating thereto are not sufficient to prevent me from granting the relief.¹⁴

9 *Malilang and Others v M V Houda Pearl* 1986 (2) SA 714 (A) at 731A-F.

10 See *Broodryk v Smuts NO* 1942 TPD 47 at 53; D Hutchinson ed. *Wille’s Principles of South African Law*, 8th edition (Juta & Co, 1991), 446; R H Christie, *The Law of Contracts in South Africa*, 2nd edition, (Butterworths Durban, 1991) 376-377.

11. *Bowditch v Peel and Magill* 1921 AD 561 at 572-3, *Armstrong v Magid and another* 1937 AD 260 at 273

12 1984 (3) SA 623 (A)

13 *Plascon-Evans v van Riebeeck* above at 634H. See also this Court’s decision in *Dhlahdla and Others v Erasmus* 1999 (1) SA 1065 (LCC) at 1071F-1072D.

14 Compare *Rothman v Curr Vivier Incorporated and Another* above n 6 at 551I-552A.

[12] The next defence raised by the respondents is formulated as follows in first respondent's answering affidavit:

"I would like to state that the Applicant is incorrect in claiming in his founding affidavits that he has:

- (a) sunk a borehole on the property (4.2)
- (b) made good the existing dam wall on the property (4.4)
- (c) disinfected the property of termites.

I have been advised that because the Applicant has not performed in full in terms of the agreement the agreement is of no force and effect and no obligations therefore flow from the agreement."

[13] In his founding affidavit, the applicant stated that he had instructed Bonamanzi Close Corporation to sink a borehole. He attached a copy of the tax invoice from Bonamanzi Close Corporation for their work. He also alleged that he disinfected the purchased land with a poison referred to as Regent 200SC. Finally, he stated that he had the dam wall repaired by a Mr Boshoff, an earthmoving contractor of Ladysmith. In his replying affidavit and in answer to respondents' denial that he performed those obligations, the applicant invited the Court to inspect the property "to see that all that I am obliged to have done in terms of the Agreement has in fact been performed". The applicant, in his founding affidavit, set out in some detail how he performed the obligations concerned. The respondents cannot content themselves in their answering affidavits with bare and unsubstantiated denials.¹⁵ In my view, the denials by the respondents do not "raise a real, genuine or *bona fide* dispute of fact".¹⁶ I am satisfied with the inherent credibility of the applicant's averment that he performed the obligations, and we intend following a robust approach¹⁷ by rejecting the denials of the respondents as clearly untenable.¹⁸ I ought to mention, in this respect, that it was not argued with any great vigour, by Mr Shum, that I ought to accept these denials.

[14] The respondents have not demonstrated any tenable defence against applicant's claim for eviction. I must now determine whether we have the necessary jurisdiction to order their eviction from the farm. Mr Shum did not contest our jurisdiction. I must, however, still satisfy myself that this Court has jurisdiction. The settlement agreement was entered into pursuant to the provisions of the Labour Tenants Act. Under section 29 of the Labour Tenants Act:

15 Erasmus, *Superior Court Practice* (Juta & Co) B1-44; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882H.

16 *Plascon-Evans v van Riebeeck* above n 13 at 634I.

17 See *Dhladhla and Others v Erasmus* above n 13 at 1072C-D, and the case referred to therein.

18 *Plascon-Evans v van Riebeeck* above n 13 at 635B-C.

“The Court shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, . . .”

In essence, this case is about whether the provisions of the settlement agreement are binding on the respondents. If the respondents are not bound thereby, they will be protected from eviction by the provisions of section 5 of the Labour Tenants Act.¹⁹ I find the provisions of the settlement agreement to be binding on the respondents. Enforcing those provisions is incidental to the issue of whether the provisions are binding or not. Consequently, this Court has jurisdiction to enforce the settlement agreement and to order the first four respondents to vacate the farm.²⁰ In terms of the settlement agreement, the applicant must assist the first four respondents to relocate to the purchased land by providing transport, thatching grass and poles. The applicant indicated that he has no objection to this obligation being included in the order which I intend to make.

[15] I now come to costs. The answering affidavits of the respondents do not contain the basic allegations necessary to establish the defence of duress, or to show that the applicant did not perform some of his obligations under the settlement agreement. In the exercise of my discretion, I will not follow the usual practice of not making a costs order where public interest litigation is involved. The first four respondents blatantly refused to honour a settlement agreement into which they entered after lengthy negotiations and with full legal assistance. A representative of the Department of Land Affairs was present during much, if not all of the negotiations. The Director-General of Land Affairs certified that the terms of the settlement agreement are reasonable and equitable. The four respondents formed a Trust to take transfer of the purchased land, and actually took transfer. To refuse to implement the transaction at this stage, more than two years after the settlement agreement was signed, and for totally insufficient if not false reasons, reeks of bad faith. This is sufficient to justify a cost order against them.²¹

19 Section 5 reads as follows:

“Subject to the provisions of section 3, a labour tenant or his or her associate may only be evicted in terms of an order of the Court issued under this Act.”

If the settlement agreement is binding, the right of the four respondents to occupy the farm came to an end when they took transfer of the purchased land - see section 3(2)(d) of the Labour Tenants Act.

20 See section 22(2)(c) of the Restitution of Land Rights Act No 22 of 1994 (as amended) read with section 30 of the Labour Tenants Act. See also *Labuschagne v Sibiyi and Another* LCC28/98, 4 August 1999, a decision of Moloto J, (with which I concurred) as yet unreported, internet web site address www.law.wits.ac.za/lcc/1999/labuschagnesum.html.

21 If a defence, from its inception, had no hope of success, a suitable cost order should be made, even if the lack of prospects is due to the manner in which the legal advisers drew the papers. See *Ntuli and Others v Smit and Another* 1999 (2) SA 540 (LCC) at 553G-554A, [1999] 2 All SA 1(LCC) at 13

[16] The Court orders:

- (1) The First, Second, Third and Fourth respondents, together with all people holding title under them, are hereby ordered to vacate, with their possessions and livestock, applicant's property known as the remaining extent of portion 1 of the farm Schurfde Poort No 4417, Registration Division GS, Province of KwaZulu-Natal.
- (2) Service of the order must be effected:
 - (a) Upon the First, Second, Third and Fourth Respondents by the Sheriff delivering a copy of the order to those Respondents personally or to effect service in accordance with the rules;
 - (b) Upon all people holding title under the First, Second, Third and Fourth Respondents by the terms of this order being read out by the Sheriff to so many of them as are present at the remaining extent of portion 1 of the farm Schurfde Poort No. 1147, Registration Division GS, Province of KwaZulu-Natal, at the time, and by displaying a copy of the order on a notice board in a conspicuous position at the Applicant's aforementioned property, provided that if anyone requests a copy of the order, the Applicant shall make a copy available to him or her at the offices of the Applicant's attorney.
- (3) In the event of the First, Second, Third or Fourth Respondent or any person holding title under them failing to comply with the order in 1 above within seven days of the service of this order upon them, the Sheriff for the district of Colenso, be and is hereby authorised to take all such steps as may be necessary to effect such eviction.
- (4) The Applicant must assist the First, Second, Third and Fourth Respondents to relocate to Portion 2 (a portion of portion 1) of the said farm Schurfde Poort, if any of them want

such assistance, through the provision of transport, thatching grass and poles.

- (5) The First, Second, Third and Fourth Respondents must jointly and severally pay the applicant's costs, taxed as between party and party, the one paying the others to be absolved.

JUDGE A GILDENHUYS

I agree

PRESIDENT F BAM

Heard on: 14 September 1999

Handed down: 23 September 1999

For the applicant:

Adv A Potgieter, instructed by *Van Onselen-O'Connell*, Durban.

For the respondents:

Michael Shum Attorney, Mooi River.