IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED.	
(4)	SIGNATURE ..... DATE	DATE 11/01/2018. ..... SIGNATURE

CASE NO: 51810/2014

WORKERS LIFE DIRECT (PTY) LTD
(Previously known as LESAKA EMPLOYEE BENEFITS) — **PLAINTIFF**

and

DENTON JOHN FRANK GOODFORD — **1ST DEFENDANT**

MULTISURE (PTY) LTD — **2ND DEFENDANT**

JUDGMENT

KHUMALO J

[1] This is an action instituted by Workerslife Direct (Pty) Ltd, the Plaintiff, against Mr Colin J F Goodford ("Goodford"), the 1st Defendant and Multisure (Pty) Ltd, the 2nd Defendant, jointly and severally (as "the Defendants") for payment of an amount of R175 158.69 which Plaintiff alleges to be the balance of the debt due to it in terms of an acknowledgment of debt signed by the Defendants in the Plaintiff's favour on 7 November 2016, plus interest at the rate of 15.5% a *tempora morae*.

[2] The Plaintiff is a network marketing business and a subsidiary of Popcru Group of Companies (Pty) Ltd. It was previously known as Lesaka Employee Benefits and had, at the time of the institution of the action, changed to its present name, that is Workerslife.

[3] Mr Goodford is the sole director, 100% shareholder of the 2nd Defendant ("Multisure") which also ran a similar business as the Plaintiff. The following facts are common cause between the parties:

[3.1] Goodford signed the acknowledgment of debt in his personal and representative capacity acknowledging his and Multisure's indebtedness to the Plaintiff for monies lent and advanced in the sum of R300 000.00 from April 2012 bearing interest at the rate of 8.5% from 26 October 2012, which debt he undertook to settle in monthly instalments of R50 000.00 starting from 29 October 2012. The last instalment was to be paid by 5 May 2013.

[3.2] The acknowledgment of debt recorded that the Plaintiff was willing to reduce the principal debt by R40 000.00 for actual costs that Goodford incurred when he travelled to Pretoria to meet representatives of the Plaintiff when they were negotiating the purchase of Multisure shares by the Plaintiff ("the deal"), on condition proof of payment of the costs was provided.

[3.3] The agreement furthermore recorded that failure to pay any instalment on due date was to result in the balance of the debt and interest becoming due and payable immediately. **A certificate of balance issued under the signature of the financial director of the Plaintiff would be accepted as *prima facie* proof of Defendants' indebtedness and acceptance of the onus of disproving the amount so stated.**

[3.4] Following the signing of the acknowledgment of debt, the Defendants made payments totalling R145 000.00, comprising of single payment of an amount of R50 000.00 and various payments amounting to R95 000.00.

[3.5] On August 2013, the Plaintiff issued a certificate of balance indicating the amount claimed in their summons as the balance outstanding.

[4] The Plaintiff's action followed the Defendants' failure to make any further payments. Its alleged in the Plaintiff's particulars of claim that despite demand the Defendants had failed to pay the outstanding amount.

[5] The Defendants deny that the money for which they signed the acknowledgment of debt was lent and advanced but plead that the money was paid by the Plaintiff in lieu of purchasing a 51 % share stake in Multisure ("the deal"). Further that the Plaintiff was to pay the money while the Defendants hand it the 51% share certificate. **The Defendants issued the share certificate on receipt of the R300 000.00.**

[6] The Defendants allege that the Plaintiff unilaterally repudiated and cancelled the deal, afterwards demanded the repayment of the R300 000.00. Whilst they at that time were demanding the return of the share certificate. Goodford was forced by the Plaintiff through undue influence or duress to sign the acknowledgment of debt by refusing to return the share certificate in the absence of a signed acknowledgment of debt.

[7] As a result the Defendants allege that Goodford had no other choice but forced to sign the acknowledgment of debt. **The Defendants therefore plead that the acknowledgment of debt was signed under duress.**

[8] Pleading in the alternative, the Defendants also allege that the Plaintiff has actually been **overpaid** and hence they have a counterclaim which they were going to institute in due course. **They therefore deny that the amount or any amount is due to the Plaintiff.**

[9] They further dispute that the Plaintiff's claim **is of a liquidated amount since they were entitled to set off the travelling costs incurred against the capital amount claimed.**

[10] At the pre-trial meeting the parties recorded that the Defendants carry the onus and the duty to begin.

[11] Based on the fact that the Defendants had admitted to having received the money and to signing the acknowledgment of debt upon which the certificate of balance was to be regarded as *prima facie proof* of its indebtedness, the proposition was reasonable. Consequently the issues which were to be decided upon in the trial were whether:

[11.1] the acknowledgment of debt was signed by Goodford under duress (or force or undue influence) hence invalid, if not,

[11.2] the debt is of a liquidated amount, considering the certificate of balance;

[11.3] there was overpayment and therefore Defendants no longer indebted to the Plaintiff;

[11.4] A further issue arising to be proven by the Plaintiff is whether the money demanded was indeed lent and advanced.

LEGAL FRAMEWORK

On duress

[12] A contract proved to have been signed under duress may be voided by the innocent party. To prove duress, the innocent party will have to establish as outlined by Corbett J in *Arend & another v Astra Furnishers (Pty) Ltd* [1974] 1 All SA 522 (C) 1974(1) SA 298 (C):

[12.1] a threat of considerable evil to him or to her or his family (whether or not the family limitation makes sense is debatable)

[12.2] actual violence or reasonable fear;

[12.3] an imminent threat or inevitable evil and induced fear;

[12.4] the threat or intimidation was unlawful or *contra bonos mores*:

[12.5] that the contract was concluded as a result of duress.

[13] Every person who complains of duress is entitled to be seen as the sort of person he or she is, but to prevent the remedy getting out of hand he is not entitled to resile from the contract if he claims to have succumbed to a fear that would be **unreasonable even for the**

sort of person he is; see *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 1 SA 434 (SE) 4401-4411.

[14] In *BOE Bank Bpk v VanZyl* 1999 3 SA 813 (C) 828H-829G it was decided that it is not necessary that the threat be by express words or deeds. **Like misrepresentation, it may be implied, tacit or by conduct, and may also, like extortion, consists in more subtle forms of intimidation.**

[15] **In commercial bargaining the exercise of free will is always fettered to some degree by** the expectation of gain or **the fear of loss**. Hard bargaining is not the equivalent of duress, even when the bargaining is the product of imbalance. **The law draws a distinction between economic duress and hard bargaining which is not to be overlooked**; see *Medscheme Holdings (Pty) Ltd v Bhamjee* [2005] 4 All SA 16 (SCA). *Benning v Union Government (Minister of Finance)* 1914 AD 420; *Malilang v MV Houda Pearl* [1986] 2 All SA 177 (A), 1986 (2) SA 714 (A); **Inequality of bargaining power overlaps economic duress,** and in some factual situations the overlap is so complete that the contract could equally be well scrutinised from either angle.

[16] In *Malilang* and *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK 1999 1 SA 780 (T) at 786C-787 Corbett JA and Van den Heever AJ indicated that English Admiralty Law undoubtedly shows that duress of the person, duress of goods and economic duress can be equally unconscionable. **Therefore leading to their finding that there is a good reason for the law to treat a contract obtained by economic duress as not binding on a victim.**

[17] **Improper pressure can also be exerted through duress of goods, when someone was by an unlawful detention of goods, made to pay money that is not due. In such an instance, to recover the payment so extracted, it is essential to allege and prove that payment was accompanied by an unequivocal protest**; see *Hendricks v Barnett* [1975] 1 All SA 520 (N), 1975 (1) SA 765 (N); *C F Commissioner for Inland Revenue v First National Industrial Bank Ltd* [1990] 2 All SA 327 (A), 1990 (3) SA 641 (A)

[18] The principle has been extended beyond the recovery of money paid, to cover property , including property wrongfully attached in execution and to **enable a Defendant to resist enforcement of a contract induced by duress of goods. The duress of goods has been duress accepted as a valid ground for rescinding a contract, and as incorporating the recovery of money paid under protest to obtain possession of goods wrongly detained; see** Ivsee *Assurity (Pvt) Ltd v Truck Sales (Pvt) Ltd* 1960 (2) SA 686 (SR) and Hendricks *supra.*

[19] **The onus of showing that the payment was made unwillingly and that there had been no abandonment of rights would, of course, be upon the person seeking to recover it, and hence the importance of a protest or unequivocal statement of objection made at the time.** Without such protest it is difficult to see how the Plaintiff's state of mind could be established to the satisfaction of the court; see *Union Government (Minister of Finance) v Gowar* 1915 AD 426 - 434.

EVIDENCE LED

[20] The evidence of the Plaintiff led by Mr Grosskopf, its executive director and attorney of record, was that in 2012, the board of directors of the Plaintiff, pursing its interest in

buying a 51 % share stake in Multisure, instructed him to draft the relevant agreements which, *inter alia,* included a confidentiality, service and shareholders agreement. After he had prepared a summary of all the agreements, the Plaintiff commenced with a due diligence investigation conducted by KPMG on the financial and legal affairs of Multisure. **During that time Goodford approached certain directors in Plaintiff and borrowed money from them.** The request was discussed in the board meeting. After the KPMG report was discussed at the highest level, the board decided not to proceed with the deal.

[21] In respect of the money advanced to Goodford, it is his testimony that the two parties were represented by their attorneys to discuss its fate. He was with Mpho Dipela ("Dipela"), **the financial director of the Plaintiff when it was discussed that they will keep the share certificate as security for the R300 000.00.** At the time t**he Defendants wanted the share certificate back**. They were w**illing to let the Defendants have it back but required them to sign an acknowledgment of debt for the R300 000.00.** He prepared the acknowledgment of debt and forwarded it to Defendants' attorneys Erasmus Scheepers. When he received the signed version he informed the financial division of the Plaintiff to release the share certificate and the CM 42 Form. The Defendants at that time made 2 payments into his trust account in terms of the acknowledgment of debt. He was not sure of the amounts. **They had negotiated that the Defendants be allowed to deduct Goodford's travelling costs, which was** indicated to be in the region of R40 000.00**.** Multisure had its principal place of business in Port Elizabeth and Goodford had been to Pretoria 3 times to further the negotiations on the deal. Goodford but had failed to date to furnish proof of the travelling costs he incurred. When the third instalment was not paid, he sent letters of demand to the Defendants.

[22] Consequent to not receiving any further payments from the Defendants, notwithstanding the demands, Dipela issued a certificate of balance for an amount of R175 158.62 in accordance with an acceleration clause in the acknowledgment of debt, each party was to pay its own costs. Grosskopf said he was aware of Goodford's plea of duress **but could not understand how an advocate of the High court represented by attorneys can be under duress** when the acknowledgment of debt he signed was sent to his attorneys. He claimed that the allegation **that the Defendants handed their share certificate as security for the amount that was advanced was true. He said** some board members were unhappy about the advance saying they are not a bank. He pointed out that the funds emanated from Popcru, the business arm of the Plaintiff who expected them to take caution when lending money to the public, making sure that there is security and the transaction is properly recorded.

[23] **After the acknowledgment of debt,** Grosskopf alleges that **he had no further contact with the Defendant's attorneys. Later when he did they informed him that they do not act for the Defendants anymore.** He confirmed that he afterwards **received a letter from the Defendants' attorneys alleging that the payments were made under duress.** There were no further payments made by the Defendants besides the R95 000.00 and the R50 000.00. He also has not received proof of the Defendant's R40 000.00 expenses.

[24] Responding to Goodford's questions posed to him during cross examination, **he confirmed that he was not a party to the negotiations for the alleged loan extended to the Defendants.** Also that he **was not in a meeting where the amount was discussed but could**

only testify to what he was told by Mr Dipela, who constantly indicated to him that the money was an advance to the Defendant. Dipela was nevertheless not going to testify. He also was never in a meeting that took place between Mdletshe and Goodford where the offer to reimburse Goodford for his expenses was made or held by Goodford, Mdletshe, the CEO and Dipela.

[25] Grosskopf was also not sure if he has **ever seen Dipela's qualifications** and **certificates. So he said did not know if he has any** accountancy or financial background although he is a financial director of the PGC group. **He could not say if Dipela prepared the certificate of balance himself or one of the 25 people who work under him did, although it is likely that he looked at the calculations and signed the certificate off. He however cannot say with certainty if that is how it happened.** When **the payment was overdue, he requested instructions and received them with a certificate of balance attached. He confirmed that in September 2012 Goodford sent an email to Mdletshe, himself and Gregory Rockman with a breakdown of expenses that Goodford calculated at the time and told them that he does not owe the Plaintiff anymore money.** He confirmed that the email was polite and Goodford suggested that they close that chapter. He said he wrote back to Goodford and told him that he cannot renegotiate a transaction that has already been negotiated with his attorneys and told him that the settlement proposal was rejected. **Summons were served a year later**. He said he did take note of Goodford's calculations but did not arrive at the amount that Dipela has put in the financial certificate. He **however commented that the calculation was simple and not difficult to do taking the amount that was owed and the two payments that were made.**

[26] He could not remember whether at the meeting of May 25th the pack that directors received already had the KPMG diligent report but confirms that directors would normally receive a pack of documents before the beginning of the meeting. The first agreement was not fulfilled by 30 April 2012 and had in terms of the head agreement lapsed. A second agreement was signed by Mr Nkonyana and Goodford and amended by him in June 2012. He was not sure if it formed part of the pack for directors at the board meeting of 25 May 2012. He could not confirm if the deal was voted for by the directors after Goodford's presentation, or after the signing of the new heads of agreement. But as far as he was concerned there was a concern about the deal at the time, as the value placed by Goodford on Multisure was R6 Million and they would have bought 51 % shares for R3 Million, yet the profits of Multisure shown before tax were only R122 000.00, which shows a decline in the business.

[27] **He confirmed that he wrote a letter to the attorneys that they are not going to release the share certificate which they hold as security and would release it only on signing of the acknowledgment of debt.** It was put to him that the share certificate was never given to Plaintiff as security for the loan but given as part of the purchasing deal as a person would not hand over a certificate for 51% shares worth R6 Million for a loan of R300 000.00. Grosskopf confirmed that the first agreement lapsed on 30 April 2012. The second heads were signed in June whilst the money was paid to Defendant in May 2012. **So when the money was paid there was no signed agreement between the parties. Grosskopf argued that, that indicates that Plaintiff made the payment on risk.**

[28] **He also confirmed that Goodford told him that he could not trade in his company whilst they hold the certificate as security.** Also that leading up to the signing of the acknowledgment, he received a letter from the Defendants' attorneys demanding the return of the share certificate. Grosskopff accepted what was put to him that on 18 September 2012, after a lot of to and fro about the share certificate Goodford sent an email to Mdletshe and Mr Nkonyana informing them that he is left with no option but to proceed with legal action to recover the certificate. The Defendants' attorneys in the next day or two sent a letter to him demanding the return of the certificate. Goodford put to him that he was thereafter threatened by Mdletshe. Grosskopf allege that the interchange was followed by negotiations that took place between Goodford's and Plaintiff's attorneys on 22 October 2012, when Goodford after being told to do so, signed the agreement and the terms thereof on 7 November 2012. A third draft of the acknowledgment accommodated the indulgence of costs incurred to be submitted within 6 days.

[29] Goodford put to Grosskopf that the company was suffering financially, at the time, he could not apply for a loan or make any movements. He received calls from attorneys threatening him with legal action and Mr Mdletshe demanding payment although the money was paid to keep the business of Multisure going. He was in a position where he had no option but to comply with the acknowledgment of debt proposal and sign it against his will because he was desperate. The business was at a standstill for almost a year, because of the delay in finalising the deal. Financially he was strapped. He could not continue litigating in order to obtain his certificate**. Goodford said he was literally on his knees begging for his certificate so as to continue with his business.**

[30] Grosskopf's testimony in chief that he was in a meeting with Dipela and Goodford when he was told that the money was an advance was denied by Goodford. Goodford put to him that the meeting was only between him and Dipela on 4 May 2012 and Grosskopf was not there and nothing was said about an advance. Goodford put it to him that in a meeting of 25 May 2012 in which a report from KPMG was made available a decision was made to continue with the purchasing of Multisure. But on 3rd July the board manager told him they were no longer proceeding. He immediately started the negotiations with Mr Ndaba on the advice of Mdletshe to have the share certificate returned as soon as possible. He also put it to him that he was unduly influenced to sign the acknowledgment otherwise he would not have received his certificate.

[31] The Plaintiff closed its case.

[32] Mr Goodford testified on behalf of the Defendants. **He commenced by disputing the authenticity and the contents of the certificate of his indebtedness, arguing that e nobody has testified as to its authenticity. He then** applied for an amendment of his plea to substitute the word duress with undue influence. The application was denied.

[33] According to Goodford's testimony Plaintiff had an interest to buy shares in Multisure as they marketed the same products although using different methods. He was invited by the founder of Popcru, Mr Rockman, to a meeting with Plaintiff's representatives at PGC head offices who then had so much interest that they invited him to come to Pretoria so that they can have a closer look and meet with him and have more details about Multisure. At the time he was growing the Multisure business with cash flow, having no big investment or a rich shareholder who could fund its growth. By the end of 2011 Plaintiff

directors were keen and at a brink of making him an offer to buy shares. He had made it clear that the business needed funding so he was on the lookout for investors or sources of funding. At the end of 2011, he was then desperate for the deal to happen. They asked him to hold it, and promised to make him an offer and it went on for some time. He eventually pulled out of the deal because they were wasting his time. When they again got him to talk again they agreed that they will engage KPMG to do a due diligence. In February 2012 KPMG started with the due diligence. By then he was very eager to find alternative investment.

[34] In March 2012 he met Mr Mdletshe for the first time at Michael Angelo. He was with Mr Rockman who acted as a middleman. Mdletshe informed him that he does not want the deal to go bad and promised that he was going to take care and control of the matter. In that meeting Mdletshe made him a verbal offer right there for 51 % of the shares in Multisure for R2 Million. He refused the offer and explained to him that he already in the previous year in August 2011 met the Plaintiff's representatives and at that time was also talking and having negotiations with other investors and those opportunities gone with many months having passed due to Plaintiff's representatives who kept on postponing. Mdletshe promised that he was going to give the deal to his right hand man Mr Sibanze. He started dealing with Mr Sibanze whom Mdletshe has spoken highly of. **Mdletshe undertook in that meeting to advance an amount of R300 000.00 to Multisure to keep the business going as they had a lot of expenses and to show that he was negotiating in good faith. Mdletshe could** not understand what was causing the delay and was going to speak to Mr Mpilo to contact him (Goodford). Ironically Mdletshe warned him that these sort of deals may destroy his company and end up in bankruptcy. Mdletshe promised that the deal was already a done deal, they just needed to sort out the logistics, the specific amounts and so on. Due to that, Multisure's underwriting insurance products and funeral covers were moved over to Plaintiff. The two businesses then formed the new part of PGC group.

[35] Notwithstanding going in the right direction, two months after the meeting the R300 000.00 was still not paid as Mdletshe had promised. He started having doubts about the deal especially if even the word of the CEO of the group could not be taken. He sent Mdletshe an email asking to meet with him to discuss the issue further. Subsequent to submitting some documents, projections and the KPMG report being available, the R300 000.00 was paid to Multisure as part of the investment in the deal that was being discussed, **by then it was already the beginning of May 2012**. The whole of the sale of shares was about money to be paid into the company, for growth funding, which in a nutshell was "the deal". The understanding from their side was that as the Plaintiff's directors were aware that they were delaying and causing Multisure problems, they still did not want him to cancel the deal and therefore paid the R300 000.00 as an investment. He could not have taken the money as a loan not knowing what the terms of repayment were, and when there was no certainty about the deal due to delays. Based on the KPMG report Plaintiff offered to buy 51 % of the shares which he first rejected. Later in April he received another offer, which was basically the same offer trying to find out if there are some synergies on the issues at hand. He complained several times trying to keep the deal.

[36] On 4 May 2012, he met with Mr Dipela who then instructed one of his employees to pay over to Multisure the R300 000.00 after he has again threatened to pull out of the deal. No loan agreement was ever mentioned or entered into. There were obviously agreements and documents that needed to be finalised, exchanged as PGC was also under pressure to

obviously move the deal having now shown their commitment by paying the amount. From that time they had high level meetings with Plaintiff's directors, Multisure really being now part of the PGC stable. Shortly thereafter he started receiving documents that indicated conditions of what has to be exchanged to fulfil the eventual shareholder agreement, heads of agreement and employment agreements as mentioned by Grosskopf because the deal was on a serious level. All that was happening in mid May, part of that was to make sure that he has the share certificate of 51% shares made out in the name of the Plaintiff. Mr Dipela now wanted something to show because of the investment already made to Multisure. Later on there was various correspondence between Plaintiff and Multisure. Emails were going around in mid May from some directors from PGC to outside parties, their associates and so on, informing them that PGC has purchased the 51 % shares in Multisure. PGC had a share in the Protea Hotels and so they were told that they can use their venues. That is how far the relationship had gone. In mid May when the pressure was there then to hand over the certificate, they complied. At that time they had fulfilled most of the conditions, the employment agreements were signed and a number of other things done. The bank stuff and a number of other documents was handed to them. **The share certificate was more important to Dipela because of the R300 000.00 investment made.** At the time for him he could not see anything going wrong from thereon. He acted *bona fide* and provided them with the certificate. Even thou he was aware of the risks he trusted the process and was encouraged by Rockman.

[37] Thereafter the meeting of the 25 May 2012 happened at the invitation of Mr Nkonyana a PGC board member and the CEO of the Plaintiff. He was accompanied to the meeting by a Multisure employee from their Midrand office Mr Wandi Goliath ("Goliath"). Nkonyane introduced them to the rest of the board members and several non-executive members that were present who came from all over the country. At the meeting the KPMG report formed the board pack that was handed to everyone present before the meeting. After Multisure has completed the presentation, Mr Nkonyane moved that a decision to purchase 51% shares in Multisure be taken. All directors now had sight of the report, seen and heard them and at that point, everybody was in favour of the deal. That gave him comfort that a board decision was then made unanimously to proceed with the deal. He was comfortable that they had the 51 % share certificate in their possession. The Plaintiff then started to have some interactions with Mr Goliath in Midrand on their business model, how it was going to be used and integrated into PGC business. Eventually the heads of agreements were signed and everything was going fine for a while leading up to the final document that needed to be signed, the shareholders agreement, which just could not be finalised. Payment was to be made once the shareholders agreement was signed some of the money coming to him and the other paid to the business. No matter how much he tried to have the conditions met, it just did not work out. He was so frustrated that he even refused to speak to Mr Rockman the middleman. Something would be found wrong with the agreement every second day. Things were now dragging on forever without any sufficient reason. He was getting concerned that something was not right. He had also eventually used the investment money for the daily expenses as the deal was dragging on. Although he was very careful with it. Ultimately he was again invited by Mr Mdletshe, although he was having reservations now, with the influence of Mr Rockman, he saw Mdletshe.

[38] In June 2012 Mr Mdletshe who has been in Europe and had a back operation and had left the deal with the others stepped in again. He wanted the agreement finalised so

that the money can be paid over. Mdletshe told him to prepare his family to move to Johannesburg since he will be operating from there to be in daily contact with the directors. He asked him to come up to their offices in Johannesburg on 3 July 2012 to finalise the deal. He said he was going to get somebody to lock the boardroom until the shareholders agreement has been signed. However before he left PE the meeting venue was changed to Protea Hotel in Midrand. He had prepared all the documents and had the shareholders agreement believing that the agreements was still going to be finalised. Mdletshe accompanied by Mr Chaka Mda, one of the directors, met him at the Hotel foyer. They took him to one of the boardrooms. As he was preparing to sit down Mdletshe told him that the deal was off. Almost a year later after they had their first meeting when he met Mr Mda in August 2011. He became emotional and cried for all the hard work that he had put in and all for nothing. Mdletshe said to him he realised that they were at fault but the deal was being cancelled because of a clash that has happened between Mr Rockman and the board. **He said he knew that he had used the R300 000.00 and also realised that they have wasted costs, he must negotiate with Mr Ndaba regarding how they can work out things and so on.** He left the meeting and when he was at the airport, he then sent an e-mail making reference to the meeting and the reasons of cancellation. Mr Mdletshe called him and asked him to take out any reference to Rockman and he refused.

[39] Immediately thereafter the negotiations started for the return of the certificate. Mdletshe had also said it must be sorted out soon. When he enquired upon it, the issue of the R300 000.00 suddenly became a problem. He wrote several emails to Dipela and others to say that he urgently needed the certificate to start talking to other potential investors. Suddenly there was pressure on him to come up with the money, pay back this money which was supposed to have been factored in as an investment on signing of the shareholders agreement. It was now for the first time termed to be a loan after cancellation of the deal. On 18 September 2012, he still had not received his certificate so he could not sign for an overdraft or do anything. He again sent them an email. On 19 September he then got his attorneys to send the plaintiff a letter demanding the return of the certificate. On that day he received a stunning phone call from Mdletshe telling him that he has started a war and made a big mistake, so his troops will be waiting for him. Mdletshe dropped the call before he could explain. **The Plaintiff's were now demanding the R300 000.00 less the expenses. He was required to find the invoices urgently. It became obvious to him that the Plaintiff was not going to give him his certificate until he committed to repay the loan.** He regarded what they were doing as putting him in a corner to do what they wanted. He could not do anything with Multisure until he has the share certificate. They were not acting with any urgency. It was like holding a gun on his head that he must sign or he is not getting his certificate back. At that time they were liaising with his attorneys. On receiving Mr Grosskopf's letter it became obvious to him that they were going full out to use their financial power. The stakes were against him he did not have the money and the transaction took place in Jhb not in PE, the costs were going to be enormous. What Mdletshe said to him about the money did not mean anything now. He had to come up with a solution to get the certificate. Mr Goliath resigned from Multisure saying he is going to a full time study, when he actually was going to join the Plaintiff to form the same business model with them. He then received the acknowledgement of debt and he told himself that he has got to sign it and agree to these terms.

[40] Mr Grosskopf made it clear that there was no way he was going to get his certificate unless he has signed the acknowledgment of debt. He felt that he was forced into this and there was nothing else he could do. He had no money to pay attorneys. Therefore no other options available to obtain his certificate. On the other hand he did not want to keep the money that they paid as an investment although he felt he was entitled to use it to keep the business running and was going to make a plan so as to put it behind him. **He reluctantly, after he received the acknowledgment of debt, looked at it, pondered and eventually moved himself to sign it. He then send it back, towards the end of October 2012.** He knew he could come back afterwards and litigate for the acknowledgment to be declared to have been signed under influence **and get it set aside as he was being forced to do it.** After sending the signed acknowledgment of debt he paid the money and still had to beg for the certificate. He took some of his available funds on 12 November 2012, (although he said October which is unlikely since Undertaking signed on 7 November 2012), flew to Pretoria to PGC offices, paid the R50 000.00 and demanded his certificate. Diana Makwarela handed the certificate to him after 45 minutes. They were running around because they said the certificate was in Mr Dipela or Mr Grosskopf's office. It crossed his mind to take action against the Plaintiff for having made him sign the agreement to get back his certificate. However he had no financial resources to spend on litigation.

[41] He said he was aware that according to the acknowledgment of debt, he could deduct the expenses that he has incurred, leaving room for movement besides the R40 000.00. He still felt that he should not have done that but he had no option. So he paid what he could, paid some more and before he paid any further he decided to check on the expenses he incurred. He obtained his credit card statement from which he had paid for everything and went through it, calculating all the expenses incurred going to Johannesburg and Pretoria and some he could not because he did not keep the slips for everything. He came up with an amount he had worked out including his professional time as advised by Rickman as well as his travelling and accommodation costs as suggested by Mdletshe. He then at the recommendation of Rickman put some detail and explained extensively how he came about with the amount. He indicated why he said he did not owe them anything but had overpaid them. The e-mail was sent to Mdletshe on 4 September 2013 and copied to Grosskopf. He decided to leave the litigation about setting aside the acknowledgment and move on. When for almost a year he did not receive a response, he thought maybe the Plaintiff has decided to move on as he had also decided to do. He got the notification that summons had been issued, a year after he had written the e-mail.

[42] Two months later he heard that Mr Goliath has actually started working for the Plaintiff and started a similar business within the fold of PGC. **He tried to calculate the amount in the certificate, trying different methods he could not arrive at the amount in the certificate. The certificate does also not explain how the outstanding balance is constituted, if any payments made (as alluded by Grosskopf) when paid.** He reckons there is a couple of thousand difference and to have made a good case against disputing the certificate as there is no explanation for the certificate, how the amount was reached or constituted, by who and who calculated the balance.

[43] He indicated that he remembered vaguely that when he signed with Mdletshe there was sort of an agreement that agrees that the money paid during the negotiations would be forfeited by one party to the other, because it was done in the business negotiations during

the initial agreement and not in the agreement he signed with Mr Nkonyane. He could not produce the document. After his cross examination by Mr Stevens, Mr Goodford closed the Defendant's case.

ANALYSIS

[44] It has become clear on Mr Grosskopf evidence that he was not part of the going-ons between the Plaintiff and the Defendants that led to the payment of the R300 000.00 to the Defendant and the signing of the acknowledgment of debt. As a result his testimony as to the terms and purpose for which the money was paid is of no probative value. It carries no weight as it would be hearsay evidence. He talks about being told by Mr Dipela and Mr Mdletshe. **He confirmed that he was not a party to the negotiations for the alleged loan extended to the Defendants. He also was not in a meeting where the amount was discussed but could only testify to what he was told by Mr Dipela, who constantly indicated to him that the money was an advance to the Defendant. He indicated that Mr Dipela was not going to testify.**

[45] It is however common cause looking at the sequence of the events as narrated by Goodford that when the money was paid to the Defendant the first agreement had collapsed and it was during negotiations of the second agreement. Goodford states that at the time he was disillusioned due to the time it was taking to finalise the deal and frustrated by the lapsing of the first agreement when Mr Mdletshe in order to show good faith paid the money in lieu of acquiring the 51 % shares the Plaintiff had committed to buy. The money going to be fattered in as an investment as he says. Mdletshe had promised that the deal would materialise.

[46] Since the negotiations towards the acquiring of the shares by the Plaintiff were indeed proceeding, there is no reason why Goodford's testimony cannot be believed, as a plausible explanation. The idea of a standalone loan, divorced from the sale of the shares or negotiations is on a balance of probabilities very much unlikely. It is therefore accepted by the court that the R300 000.00 that was paid by the Plaintiff to the Defendant was not a loan but as explained by Goodford indeed an investment made in lieu of the shares that the Plaintiff was to acquire from the Defendants.

[47] Grosskopf on the question of the R300 00.00 said that he got involved to decide on its fate when the deal or negotiations collapsed. This could only be due to the money being linked to the deal that was being negotiated, that the lapse on the deal would necessitate a decision on the recovery terms of the R300 000.00 upon its collapse. Grosskopf's testimony was that at the time t**he Defendants wanted the share certificate back**. He was with Dipela, **the financial director of the Plaintiff when it was discussed that they will keep the share certificate as security for the R300 000.00.** A discussion they would not have had if there was an agreement already in that regard. They were w**illing to let the Defendants have the share certificate back on condition he signed the acknowledgment of debt. As they lacked a cause of action upon which the amount could have been recovered. Goodford had asked that if it was a loan why didn't the Plaintiff sue the Defendants on that basis instead of pressurising him to sign the acknowledgement of debt for him to obtain the certificate.**

[48] Mr Stevens argues that it was the result of hard bargaining. Goodford has however indicated that due to the position that the Plaintiff's unilateral decision not to proceed

with the contract has put him, which decision came about after a considerable delay, affecting his business badly, he found himself in a compromised position where he was under tremendous pressure to get his certificate otherwise his business on the verge of collapsing. A fact that Grosskopf was aware of, because as soon as the deal collapsed Goodford asked for the certificate. Grosskopf conceded that they decided to use the certificate as security to compel the Defendants to sign the acknowledgment of debt. The Defendants were to have the certificate only on signing of the acknowledgment of debt. Goodford said he also lacked the financial strength which fact, the Plaintiff was aware of thus seeking a signed acknowledgment of debt.

[49] Hard bargaining is not the equivalent of duress, even when the bargaining is the product of imbalance. In *Medscheme supra* its pointed out that t**he law draws a distinction between economic duress and hard (tough, rigid) bargaining. Duress involves compulsion, pressure, intimidation, force, bullying or coercion. Whilst bargaining involves negotiating and haggling for a good deal. The duress of goods has been duress accepted as a valid ground for rescinding a contract, and as incorporating the recovery of money paid under protest to obtain possession of goods wrongly or unlawfully detained; see** Ivsee *Assurity (Pvt) Ltd.* The question that arises is whether the detention of the certificate by the Plaintiff after its cancellation of the deal was lawful?

[50] As the Plaintiff did not acquire the 51 % share from the Defendant, Plaintiff's possession or continued detention of the certificate of shares was wrongful and unjustifiable. It was therefore not necessary for the Defendants to sign the acknowledgment of debt in order to secure the release of the certificate. Proof of compulsion of the Defendant or exertion of improper pressure to sign the acknowledgment of debt and his unwillingness to make a payment in order to release the certificate that is unlawfully detained is a good ground for its setting aside. The agreement is vitiated by duress as intimidation or improper pressure renders the consent of the party subjected to duress no true consent.

[51] Mr Stevens says its bargaining as Goodford was not forced to sign the acknowledgment. In his own words he received the agreement, pondered upon it, talked to certain people including his attorneys being an advocate himself and decided to sign it. The agreement was negotiated, eventually affording him an indulgence to deduct his expenses. Goodford had argued that he was reduced to his knees by the effects of Plaintiff's cancellation of the deal. At the time he had already started moving some of his business to the Plaintiff, transferred the shares to the Plaintiff, signed the necessary heads of agreements and advised to start the preparations for the relocation of his family. Therefore Plaintiff's detention of the share certificate that he urgently needed to save or revive his business, using it as a tool to negotiate the signing of an acknowledgment of debt had under those circumstances amounted to force, pressure or serious coercion. He says he did not see himself as having an option if he was to regain possession of his certificate urgently as the Plaintiff were not in a hurry.

[52] Goodford however failed to register his objection to the Plaintiff's conduct. He did not indicate or mention to the Plaintiff his discontentment about signing the acknowledgment of debt or that he regarded Plaintiff's demand that he sign the acknowledgment under such circumstances to be duress or undue compulsion or influence.

The onus of showing that the signing of the contract was under duress and payment made unwillingly, indicating that there has been no abandonment of rights would, of course, be upon the person seeking to set aside the contract and to recover the payment and hence the importance of a protest or unequivocal statement of objection made at the time.

[53] Goodford made the first payment that is supposed to have been made unwillingly following the signing of the acknowledgment of debt he says was under duress (or force), without any protest, his excuse being that he needed to obtain his share certificate. He however when there was no longer any pressure on him or compelling reason for him to make further payments, having now obtained his certificate, made further payments. A conduct that is inconsistent with unwillingness to either abide by the acknowledge of debt and/or to pay. The allegations of having signed the acknowledgment under duress was made only long after the payments and an attempt thereafter to settle the debt.

[54] There was no registration of protestation or discontentment in any form made to the Plaintiff or the Plaintiff's attorneys when signing the acknowledgment of debt and paying the instalments provided thereunder, the Defendants have failed to establish any ground for the setting aside of the acknowledgment its nullification or a right to recovery of the payments made. The letter that has been agreed was sent to Grosskopf alleging duress was after the acknowledgment was signed and the payments made.

Unliquidated debt

[55] The Defendants allege that the debt is of an unliquidated amount and therefore incapable of being easily ascertainable as it was agreed that Goodford's travelling expenses were to be deducted from the amount owing. The certificate of balance does not indicate how the amount is constituted.

[56] According to the terms of the certificate and those of the acknowledgment, the certificate issued under the signature of the financial director of the creditor shall be accepted as *prima facie* proof of Defendants' indebtedness, having sufficient probative value. Should any payments due in terms hereof not be made on the due date**, the balance of the principal debt and interest owing in terms hereof shall become due and payable immediately.** The creditor may allocate any payment to capital, interest, costs or any other item as he deems fit, despite any allocation made or deemed to be made by the debtors.

[57] However the acknowledgment of debt furthermore provides that the Plaintiff is prepared or willing to reduce the principal debt with an amount equal to the **actual costs incurred by Mr Goodford for travel to Pretoria to meet the representatives of the creditor**, provided proof of such actual cost and proof of payment is provided to the Plaintiff (the parties record that Mr Goodford had indicated such cost to be in the region of R40 000.00 (Forty Thousand rand). **The acknowledgment of debt or the extent of Defendants' indebtedness** is therefore conditional upon the deductions of his proven costs of expenses, which makes the amount thereat not an unequivocal amount of indebtedness that makes the claim liquid. The condition or indulgence provided as referred to by Mr Stevens, kills the liquidity of the debt. The debt is therefore neither of a fixed or a determinable sum of money.

[58] The document or certificate has to be sufficient in itself and not require extrinsic evidence to prove that the debt is due; see Inter-*Union Finance Ltd v Franskraalstrand Bpk* 1965 (4) SA 1 180 (W) at 181 G. Notwithstanding the certificate upon which the attributes of liquidity are conferred by Mr Stevens, the debt remain illiquid due to the terms of the acknowledgment of debt. Under such circumstances bestowing the attributes of liquidity on the certificate becomes problematic.

[59] In *Rich & Others v Lagerwey* 1974 (4) SA 748 (AD) at 754H it was held that "the certificate is not an unconditional acknowledgement of indebtedness by the debtor, in an ascertained amount of money, the payment of which is due to the creditor." It is settled law that extrinsic evidence cannot make a liquid document illiquid or an illiquid document liquid. A document cannot become liquid ex post facto. A written document is inherently liquid or illiquid depending upon its terms.

[60] The expenses amount for travelling and accommodation, agreed upon by the Plaintiff that it is owing to Goodford and by the parties that it is to be deducted from the capital, has not been ascertained or quantified as a result was not deducted from the capital amount. Consequently the debt, that is the amount upon which interest was to be levied on default was not ascertained. Although that was the intended purpose of the certificate, without extrinsic evidence, it cannot be found to be proof of the extent of Defendants' indebtedness. The claim therefore illiquid.

[61] Furthermore, even though it is common cause that payments amounting to R145 000.00 have been made, leaving a balance of R155 000.00, a simple calculation that has been acknowledged by Grosskopf, indicates a discrepancy on the certificate. The certificate does not stipulate how the amount of indebtedness is constituted, the payments made and the dates of payment and what amount of the balance stated constitutes the capital amount, how much of it is interest and at what rate is it charged. The Defendant in the acknowledgment of debt acknowledges that the principal debt will bear interest at the prime rate of Absa Bank (which at the time was 8.5% per annum) compounded monthly in arrears, whilst the rate of interest sought in the summons is 15.5% a *tempora morae* and also not indicated whether levied monthly or annually.

[62] Grosskopf has testified that he does not know how the certificate came about and what has or has not been taken into consideration. **He has no clue on Dipela's qualifications, he has never seen his certificates or qualifications. He could not say if Dipela prepared the certificate of balance himself or one of the 25 people who work under him did, but said it is likely he had a look at the calculations and signed the certificate off. He therefore could not give any evidence on the amount reflected in the certificate. So which leaves the court non- wiser as to what was taken into account in the calculation of the amount? He however confirms that the amount claimed differs considerably from the balance reached on a simple calculation taking into account what was the principal debt and deducting the payments made.**

[63] Dipela who is the preparer of the document did not testify. Not much could be said by Grosskopf on the certificate. Therefore even though the Defendants are found to have acknowledged their indebtedness to the Plaintiff, the extent of Defendants indebtedness in the amount claimed in the summons has not been proven, the debt being illiquid. I accordingly hold that the amount claimed or agreed upon is not capable of speedy and

Judgment is granted in favour of the Plaintiff against the 1st and 2nd Defendant, jointly and severally, the one paying the other to be absolved for:

1.1 Payment of the sum of R115 000.00;

1.2 Interest on the amount of R115 000.00 at the prescribed rate of 15.5% a tempore morae;

1.3 Absolution from the instance for the payment of the sum of R40 000.00

1.4 Costs on an attorney and client scale.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Plaintiff:	**ADV B D STEVENS**
Instructed by:	**GROSSKOPF ATTORNEYS** **REF: J NYSSCHENS/W39** **TEL: 012 364 2606** **Fax: 012 305 7560**
On behalf of Defendant:	**In person** **TEL: 012 328 6180**