

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION,
DURBAN**

Case No: 11645/2015

In the matter between:

MARK PEARCE

PLAINTIFF

and

MANDFRED ADRIO

DEFENDANT

JUDGMENT

Delivered on 30/10/2018

MNGADI, J

[1] The plaintiff, Mr Mark Pearce, sues the defendant, Mr Manfred Adria, for payments of R3, 05 million plus interest and costs. The action is defended by the defendant who appeared in person, his legal representative having withdrawn some months prior to trial.

[2] The plaintiff in the particulars of claim stated that he and the defendant concluded a settlement agreement in settlement of a dispute on 17 December 2014. The defendant was in breach of the settlement agreement and the plaintiff was claiming in terms of the settlement agreement.

[3] There were four parties to the settlement agreement. It was the two close corporation namely, Total Food Solutions CC and Supplement Factory CC and the defendant on one hand and the plaintiff on the other hand.

[4] The preamble to the settlement agreement stated that the plaintiff had bought 49% stake in the two close corporations for R2 million and had advanced a loan of R1 m to one of them. The defendant at the time was the sole member of both close corporations. The transaction was based on the financial information provided by the defendant to the plaintiff. It turned out that the financial information, according to the plaintiff, was not correct. As a result, plaintiff intended to withdraw from the transaction and the settlement covered the withdrawal of the plaintiff from the transaction.

[5] In the settlement agreement the close corporations and the defendant agreed to pay the plaintiff a total sum of R3 million as follows, R1.5 million within 6 months from 1 December 2014, and thereafter monthly equal instalments of R75 000. In turn, the plaintiff shall resign as an employee of the close corporations on 31 January 2015 and transfer back his membership interest in the close corporation to the defendant by 30 June 2015 and waive interest on the loan and purchase price paid for the acquisition.

[6] The settlement agreement provided that, as security for the due fulfilment of the repayment obligations, the defendant irrevocably cedes to plaintiff his loan account in the close corporations and his members' interest. Further, the defendant irrevocably agrees to stand surety for the obligations of the close corporations. The defendant and the close corporations renounced the exceptions relating to surety (which were specified).

[7] The plaintiff states that he duly performed his obligation in terms of the settlement agreement. The defendant and the close corporations, avers the plaintiff, breached and remains in breach of the settlement agreement in that that only one payment of R150 000 was made on 3 August 2015.

[8] The defendant, in the plea admitted signing the settlement agreement but denies being bound by it. He admitted that he and the close corporations had not paid as stipulated in the settlement agreement. He set out that he had not misrepresented the financial information on the basis of which the initial transaction was based. He pleaded that he signed the settlement under duress. He explained that the settlement agreement was drafted and concluded pursuant to certain improper and unlawful threats made by the plaintiff, alternatively, his father. The threats were that the defendants' misrepresentation of the financial information of the close corporations constituted fraud. As a result of the fraud, he would be incarcerated and in prison, he will be sexually violated.

[9] During the trial, the defendant was the only witness that testified. He admitted that he had signed the settlement agreement and he and the close corporations had not paid the plaintiff as stipulated in the settlement agreement. He testified that the plaintiff bought into the close corporations by money advanced to him by his father, and the plaintiff paid the money stipulated in the preamble of the settlement agreement. Prior to the settlement agreement, the threats were made to him by Eddie Pearce during the negotiations He was then naïve, and he believed the threats. In truth, he had not committed any misrepresentation. After the initial transaction the plaintiff joined the close corporations as an employee. He was not prepared

to put the required effort so that the projected income could be realised. He then developed the buyer's remorse and wanted to withdraw from the transaction. The plaintiffs' father who had no business got involved came up with the idea that the projected income was not being achieved because of the misrepresentation. He accused him of having committed fraud and threatened him with prosecution and incarceration. He denied that he had committed any misrepresentation

[10] The defendant testified that although he was assisted by the lawyer when the settlement agreement was concluded, the lawyer did not deal with the threats, he merely ensured that the formalities were complied with. He decided not to instruct the lawyer to deal with threats to avoid legal expenses. He stated that the debt was not his own debt but those of the close corporations. The close corporations should be afforded an opportunity to pay the debt.

[11] Under cross-examination Mr Adrio stated that on 19 October 2014 he received an email from the plaintiff which stated that financial confirmation furnished by him was a misrepresentation by him and that that constituted fraud and it contained a proposal for Mr Pearce to pull out of the deal. He also confirmed that the negotiations relating to Mr Pearce pulling out of the deal took place over a period of time and he was represented by an attorney, and it involved meetings and exchange of written communication. Everything was done in a transparent manner. In a letter dated 20 November 2014 written by Mr Pearce's attorney to Mr Adrio the details of the alleged misrepresentation are furnished, and it is claimed that it constitutes breach of the agreement and fraud. It was claimed that it misled the plaintiff to buy into the close corporations. The letter went on to propose possible solutions including repayment of the monies paid to Mr Adrio. He confirmed that his attorney responded to the fraud allegation and he denied that he misrepresented the financial confirmation. This was in an email dated 25 November 2014. The email acknowledged that a dispute had arisen between the parties and it proposed referral of the dispute to arbitration and it undertook to appoint independent auditors to conduct forensic audit into financial affairs of the close corporations.

[12] . Mr Adrio confirmed that in an email dated 25 November 2014 his attorney on his instructions proposed settlement by payment to Mr Pearce of R3 million in full and final settlement, R1.5 million paid within 6 months from

date of acceptance of proposal and the balance in equal monthly instalments of R50 000 subject to that amount being increased after the initial 12 month period. He testified that subsequently on 3 December 2014 the offer in relation to monthly instalments was increased to R75 000 with a condition that Mr Pearce resigns as an employee on 31 January 2015. He testified that he was acting under duress when he agreed to stand surety for the close corporations. He signed the settlement in his own personal capacity and on behalf of the close corporations. The close corporations to a lesser extent also signed the settlement under duress.

[13] It is clear that the allegation that Mr Adrio misrepresented the financial information of the close corporation was made openly. It was on the basis of that, that it was claimed that Mr Adrio committed fraud because the misrepresentation induced Mr Pearce to part with his money to buy into the close corporations. It was claimed that such a fraud could result in Mr Adrio being prosecuted and goaled, resulting in him suffering the unpleasantness of incarceration, including being sexually molested. Mr Adrio was not being truthful when he testified that the fraud allegation was made in a clandestine manner and without the knowledge of his legal representatives. The claim for his misrepresentation formed the basis of the dispute which was settled in the settlement agreement.

[14] The settlement agreement was signed on 17 December 2014. On August 2015 the defendant made the only payment of R150, 000. In November 2015 the plaintiff issued summons against the defendant. On February 2016, for the first time, in an affidavit opposing a summary judgment, the defendant made the claim that the plaintiff's father, during the meetings had come with a notion of fraud and made threats as regards as to what would happen to him should he not agree to reverse the initial transaction and threatened that unspeakable things would happen to him should he not reverse the transaction. The defendant in his affidavit referred to above states that: 'I have been advised that the threats which were made to me constitutes unlawful threats and amount to duress'.

[15] The defendant, if he was advised on receipt of summons that the settlement agreement was invalid because it was signed under duress, he has not explained why he did not comply with it before action was instituted against him. The dispute and the settlement thereof were canvassed by the parties with the assistance of their attorneys over a period of time. The defendant does not say that he was ordered not to disclose the duress he was under, and he does not explain why he did not disclose it. The defendant is a business man based in

Durban, a big city. He negotiates deals in the course of business. He knows that there is a crime of fraud for which one may be prosecuted and be goaled. He also knows the legal process, one is not thrown to gaol because another person claims that he had committed fraud. A due process is followed, from laying a complaint with the police, followed by investigations, and decision by the prosecution whether to prosecute or not, and finally, the court, after hearing evidence, decides whether one person is guilty or not. Whatever was said by Mr Eddie Pearce must have been understood by Mr Adria, as well as his attorney, in that context. There was no threat of laying a false charge against Mr Adrio and there was no threat to misrepresent facts when laying a complaint with the police. In my view, there is no merit in Mr Adrio's claim that he signed or concluded the settlement agreement under duress. Even if one of the things he took into consideration was that if he settles the dispute with Mr Pearce, it will not be necessary for Mr Pearce to lay a complaint with the police, that is not tantamount to concluding the settlement under duress.

[16] In any event the claim of duress by the defendant is that the plaintiff's father told him that he had misrepresented the financial information of the close corporations and that had misled the plaintiff to buy into the close corporations that, claimed the plaintiff's father, constituted fraud for which he will be prosecuted and jailed. The defendant knew that the plaintiff or his father could not arrest and lodge him in prison. He knew that all what they could do, if they believed that he committed fraud was to lay a complaint with the police. In any event, the defendant did not claim that it was said that if he signs the settlement agreement a complaint will not be laid with the police. It was equivalent to a threat to sue him. In *Machanick Steel & Fencing (Pty) Ltd v Westhodan (Pty) Ltd; Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W) at p271, it was stated that the elements of the defence of duress are the following:

- (1) actual violence or reasonable fear;
- (2) the fear must be caused by the threat of some considerable evil to the party or his family;
- (3) it must be the threat of an imminent or inevitable evil;
- (4) the threat or intimidation must be *contra bonos mores*;
- (5) the moral pressure used must have caused damage.

[17] The defendant in the initial transaction received R3.2 million from the plaintiff. In settlement agreement the defendant undertook to refund a sum of R3 million return in of the plaintiff returning the interest he had bought in the close corporations. It was a sensible deal between two businessmen to avoid protracted litigation. It was a take and give. There was nothing unlawful or *contra*

bonae fides in the deal. There was no unfair advantage gained by either party. There was nothing wrong in warning the defendant that misrepresentation can constitute fraud and for fraud one can be prosecuted and be jailed. The plaintiff did not exact or extort something to which he was otherwise not entitled to. In *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 306 it is stated: 'It is pointed out in Wessels, *Law of Contract*, 2nd ed, sec.1186, that if one party to a contract makes use of his legal right then the fact that this induces fear in the other party and leads him to enter into a contract, affords no ground for avoiding the obligation. It is trite a party seeking to avoid liability to a contract on the basis that he assented to an agreement by reason of duress bears the onus. See *Honne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA) at para 29. The defendant has failed to establish that he entered to the settlement under duress.

[18] The defendant in his evidence stated that the debt in the settlement agreement is for the close corporations, he is not liable for it in his personal or private capacity. In his affidavit opposing the summary judgment the defendant did not say anything about not being personally liable. This is also not raised as a specific defence in the plea. In the particulars of claim it is averred that the defendant is indebted to the plaintiff in that full amount in his personal capacity and in his capacity as surety for the close corporations. The defendant made no specific denial of this averment. In any event, the settlement agreement places it beyond doubt that the defendant in his personal capacity and in his capacity as a surety for the close corporation held himself liable for the full amounts.

[19] In the circumstances the judgment is granted in favour of the plaintiff against the defendant as follows:

- (1) Payment of the sum of R3, 050 000.00.
- (2) Interest thereon at the maximum legally prescribed rate from date of service of summons.
- (3) Costs of suit.

MNGADI J

APPEARANCES

For the Plaintiff : Mr W. Shapino

Instructed by : GKC Attorneys
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REF : GKC/Pearce 031 304 4212

For the Defendant : In Person (Manfred Adrio)

Matter argued on : 22 October 2018

Judgement delivered on : 30 October 2018