IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO. 2743/2015

In the matter between:

FIRST RAND BANK (REGISTRATION NUMBER 1929/001225/06)	**APPLICANT**
And	
CONSOLIDATED TIMBER EXPORTS CLOSE CORPORATION AND 5 OTHERS	**FIRST RESPONDENT**
STEWART HAMISH MACKENZIE	**SECOND RESPONDENT**
KIM NANCY CAMP	**THIRD RESPONDENT**
KATHRYN MARGARET MACKENZIE N.O.	**FOURTH RESPONDENT**
STEWART HAMISH MACKENZIE N.O.	**FIFTH RESPONDENT**
KIM NANCY CAMP N.O.	**SIXTH RESPONDENT**

J U D G M E N T

MADONDO J

[1] In this application the applicant seeks judgment sounding in money against the respondents jointly and severally, the one paying the other to be absolved, in the sum of R3 687 539.89 plus interest at the rate of 15.5% per annum, compounded monthly in arrears, from 16 February 2015 to date of final payment and costs of suit.

[2] The applicant's claim arises from the acknowledgement of debt executed by the first respondent in favour of the applicant which, in turn, has its origin from what

is termed “factoring agreements” concluded between the parties and the suretyship agreements in terms of which the other respondents bound themselves as sureties in solidum and as co-principal debtors with the first respondent for its debt to the applicant

[3] However, at the commencement of these proceedings it has been indicated on behalf of the applicant that it only now proceeds against the first and second respondents and that the relief sought against the other respondents be adjourned sine die.

Parties

[4] The applicant is First Rand Bank, a company and financial institution incorporated in accordance with the company and banking laws of the Republic of South Africa, carrying on business as a registered commercial bank and having its registered office at 17th Floor, 1 Merchant Place, Corner Fredman and Rivonia Roads, Sandston, Johannesburg.

[5] The first respondent is Consolidated Timber Exports Close Corporation, a close corporation duly registered according to the close corporation and company laws of South Africa with its registered address at 45 Esther Roberts Road, Glenwood, Durban.

[6] The second respondent is Stewart Hamish Mackenzie, a major male farmer, and third respondent is Kim Nancy Camp, a major female, both respondents are of Wild Acres Farm, Highflats, cited herein as members of the first respondent and a

trustee of Stewart McKenzie Family Trust ("the Trust"). The fourth, fifth and sixth respondents herein are cited in their capacities as the trustees of the Trust.

Factual Background:

(i)Selective Invoice Financing Agreement

[7] On 22 September 2008 the first respondent and the applicant entered into selective invoice financing agreement (sale and purchase of debts, "SR1") read with revised facility letter ("SR2") dated 22 June 2009 in terms of which the first respondent would select and sell debts to the applicant. The aforesaid selective invoice financing agreement is termed the "factoring agreement" and the applicant describes it as one of the many ways in which business entities generate finance from lenders. The lender advances money to the borrower in return for the borrower's claim against his debtor, which the debtor is then supposed to pay the lender directly. The monies advanced are still required to be repaid, if the debtor concerned fails to pay his or her debt to the lender, the borrower must on written notice repay the amount advanced plus discount fee (repurchase price).

[8] In this case, Mr van Rooyen for the applicant has argued that the applicant advanced funds to the first respondent on the strength of invoices generated to the customer. Each invoice was a loan, repaid by the payment by the customer into account. If not paid, the advance remained outstanding and in which event the applicant was in terms of the agreement entitled to recover it from the first respondent.

[9] The factoring agreement of 22 September 2008 entered into between the parties together with the revised facility letter of 22 June 2009 was signed by the third respondent in her capacity as the member of the first respondent. On 22 September 2008 both the second and third respondents signed suretyship agreements in their capacities as members of the first respondent in terms of which they stood sureties in solidum and as co-principal debtors with the first respondent for its indebtedness to the applicant ("SR4", "SR5").

[10] In terms of the agreement between the parties in the event of the first respondent intending to sell a debt to the applicant it would complete and transmit an offer schedule to the applicant regarding the intended sale. The applicant might in its sole discretion elect to purchase all debts or one debt listed in the offer schedule. If the applicant elected to purchase a debt it would make payment of the purchase price of the debt purchased to the first respondent, and this would be deemed to be acceptance of the offer to the applicant. The sale price less the deferred payment amount in respect of each debt purchased ("the advance payment") would be paid to the applicant within three business days of the receipt of the offer schedule.

[11] The deferred payment amount would only be paid to the first respondent on payment by the first respondent of any fees including penalty fees arising in respect thereof. Until paid to the first respondent, the deferred payment amount would constitute security which the applicant would hold for the payment of the debt by the debtor, the payment of the repurchase price by the first respondent under a claim of recourse by the applicant in terms of the agreement and any amount due by the first respondent to the applicant arising out of any other cause of action.

[12] In, turn, the first respondent would notify the applicable debtor of the sale of a debt and that all payments in respect of such debt were to be made to the applicant, and use its best efforts to ensure payment by the debtor of the debt to the applicant. Should any payment made to the first respondent by the debtor, such payment should immediately on receipt be forwarded to the applicant.

[13] If a debt was not paid within the payment period or a debt is disputed or for any other reason the debt was not paid to the applicant by the debtor concerned, the applicant's attorney or collection agent, acting on the instruction of the applicant, would collect payment of a debt from the first respondent. The first respondent would then immediately, on written notice from the applicant, repurchase from the applicant the debt in question at the repurchase price.

[14] On 22 June 2009 the first respondent through the offer schedule sold the debt it had against Sappi Forests for the sum of R3, 000,000-00. However, the applicant reserved the right to recover the debt from the first respondent if not paid by the due date or earlier or should the debtor dispute its liability to pay the debt. Sappi Forests failed to pay on invoice and in which event the applicant was in terms of the agreement entitled to recover the unpaid debt from the first respondent.

[15] However, the relationship between the parties continued until 2011 where it became clear that a large amount of money remained unpaid. The total outstanding amount due to the applicant by the first respondent was then R2, 646, 310-98 plus interest at the rate of 15.5% per annum, and such amount had been outstanding

since 31 August 2011. The parties then entered into settlement negotiations with a view to liquidating the then existing debt.

[16] Following such discussions, the meeting was held between the parties on 11 January 2012. At such meeting the second respondent, representing the first respondent, verified that the first respondent was indeed indebted to the applicant in the aforesaid amount and also confirmed that the amount was then owed, due and payable. The first respondent then undertook to liquidate the debt by making monthly payment of R20, 000 for a period of six months and the first payment was to be made on or before 31 January 2012. Thereafter, the monthly instalments would be revised. The settlement terms were to be incorporated into the acknowledgment of debt agreement.

[17] On 13 January 2012 the applicant's attorneys addressed a letter (RA14) to the first respondent's attorneys re-stating the terms of the agreements reached between the parties and the undertakings made on behalf of the first respondent at the meeting of 11 January 2012. The letter elucidated that the then outstanding amount of (R2646310-98) represented the first respondent's indebtedness to the applicant as at 14 September 2011and that such amount was not in dispute that it was due, owing and payable to the applicant. The first respondent then signed an acknowledgement of debt agreement confirming its indebtedness to the applicant. The applicant`s attorneys went on to state that the acknowledgments of debt and suretyship agreements were then being drafted for signature before Friday, 20 January 2012. They then concluded by calling upon the attorneys of the respondents to confirm whether what had been stated accorded with their instructions so to

enable the applicant`s attorneys to refer same to the applicant, their client, for its comment and reply.

[18] In a letter dated 19 January 2012 ("RA18") the second respondent replied to the letter of the applicant's attorneys dated 13 January 2012 and advised that "the contents of the letter were duly noted and accepted, with the exception of the re-registration of Turnstone Trading CC, which will take at least 60 days".

[19] In a letter date 27 January 2012, addressed to the first respondent's attorneys, the attorneys of the applicant said that they were still attending to the drafting of the acknowledgement of debt agreement, power of attorney, the suretyship agreements and the necessary resolutions to accompany same and undertook to forward draft copies to them shortly for their perusal and comment. The applicant's attorneys indicated to the first respondent's attorneys that the applicant intended to have the documents signed on or before Friday 3 February 2012. They then requested the first respondent's attorneys to advise on a suitable date and time to meet at the offices of the applicant's attorneys for the purpose of signing the document. In response thereto, in a letter dated 27 January 2012, addressed the applicant`s attorneys, the first respondent said the following:

> "We have spoken to our client Mr Mackenzie who is willing to come to our offices to sign the necessary documents. You may liaise with him directly to arrange an appointment. His call number is 0823279945."

[20] The meeting of 11 January 2012 and subsequent correspondence between the parties resulted in the execution of the acknowledgment of debt agreement on 29 March 2012 ("SR3") by the first respondent in favour of the applicant "and the signing

of the suretyship agreements by the second and third respondents as well as limited guarantee and indemnity in terms of which they stood sureties for the first respondent's debt to the applicant. All the respondents were in fact part of the acknowledgment of debt signed by the second respondent on behalf of the first respondent as its member.

[21] The second respondent also signed an acknowledgment of debt agreement in his capacity as the trustee for Stewart Mackenzie Family Trust ("the trust"). The second respondent had already signed suretyship agreement in his capacity as the trustee on 22 September 2008 (SR4") and so as the third respondent ("SR5"). On 3 February 2012 the third respondent signed Limited Guarantee and Indemnity ("SR6") on behalf of the trust.

(ii) Acknowledgement of Debt Agreement and Suretyship Agreement

[22] On 29 March 2012 the first respondent and the applicant concluded a written acknowledgment of debt in terms of which the first respondent acknowledged its facility indebtedness to the applicant in the sum of R2799087-74 together with interest thereon at the rate of 15.5% per annum, compounded monthly in arrears, calculated from 31 December 2011 to date of final payment (both days inclusive), which amount was then due, owing and payable. The second to sixth respondents agreed and acknowledged that they were indebted, jointly and severally, and in solidus, and as co-principal debtors with the first respondent in an amount equal to the facility indebtedness. The respondents also agreed and acknowledged that the facility indebtedness was then due, owing and payable to the applicant.

[23] The first respondent undertook to pay the amount then owing, due and payable to the applicant by monthly instalments of R20, 000 per month for a period of six (6) months commencing on the signature date. The first instalment was due on 28 February 2012.

[24] Six months after the signature date, by monthly instalments in an amount to be agreed between the applicant and the first respondent by no later than six (6) months after the signature date provided that such monthly instalments should not be less than R20,000 and that the indebtedness was paid in full by 31 January 2014.

[25] If the first respondent failed to make payment of the indebtedness in full by the final repayment date (31 January 2014) or if the first respondent failed to make any payment in full on the day on which it became due, the applicant would become entitled without prejudice to claim immediately payment of the full amount due.

[26] A certificate signed by any manager of the applicant whose appointment need not be proved, as to the amount owing to it should constituted prima facie proof of the indebtedness.

[27] The second and third respondents bound themselves unto and in favour of the applicant as sureties for and co-principal debtors with the first respondent for all amounts which the first respondent then owed or might from time to time thereafter owe to the applicant from whatsoever cause and howsoever arising, the suretyships were unlimited.

[28] All legal costs on the attorney and client scale incurred by the applicant in terms of the suretyship would be payable by the second and third respondents.

[29] The trust (being represented by the second respondent) unconditionally and irrevocably guaranteed in favour of the applicant, as a principal obligation, the due and punctual payment in accordance with the prescribed terms of all the amounts payable to the applicant by the first respondent, as well as the due and punctual performance and discharge by the first respondent of each of its obligations to the applicant under or in connection with the financing agreement.

[30] The second respondent also unconditionally and irrevocably undertook that, should any amount not be paid punctually by the first respondent within 5 business days after the receipt by the first respondent of a written notice from the applicant requiring payment, for any reason whatsoever and/or a demand from the applicant in respect of any loss, expense liability or lost, the first respondent would be obliged to pay such amounts to the applicant in cash without set-off,counter-claim or any other deduction whatsoever, immediately upon receipt of a first written demand to that effect.

[31] The liability of the second respondent to the applicant under or in terms of the guarantee would be limited to the amount of R2 799 087.74 plus interest thereon at the rate of 15.5% per annum, compounded monthly in arrear, commencing from 31 December 2011 to date of final payment (both days inclusive).

[32] The second respondent also agreed that the guarantee would constitute continuing covering security and its obligations under guarantee would not constitute a suretyship but would be constituted as a primary undertaking, giving rise to principal (and not accessory) obligations of the second respondent.

[33] A certificate signed by any manager of the applicant setting out the amount of the second respondent's liability to the applicant in terms of the guarantee and any other matters relevant to the guarantee would, in the absence of manifest error, be *prima facie* proof of matters stated therein and such proof may be tendered and used for all purposes, including for the purposes of pleadings and of obtaining provisional sentence in default, summary or other judgment thereon.

[34] On 31 January 2014 the first respondent failed to pay the R20 000.00 instalments in full. Pursuant to the breach the applicant caused demands to be delivered to the first respondent by its attorneys. Prior to this, by a letter dated 19 May 2012 the applicant had advised the first respondent that it was in breach and drew its attention to the applicant's entitlement to claim immediately repayment of the full amount of the indebtedness. The second letter dated 12 June 2012 reiterated that the first respondent was in breach and advised it that the full amount was then due, owing and payable.

[35] Following the demands the applicant received from the first respondent the amount of R105 000.00. R100 000.00 being five months instalments of R20 000.00 each, plus R5 000.00 received by the applicant on the winding-up of Turnstone CC on 12 December 2014.

[36] The applicant avers that, accordingly, the respondents are indebted to the applicant jointly and severally, the one paying the other to be absolved, in the amount of R3 687 539.89 plus interest thereon at the rate of 15.5% per annum from 16 February 2015 to date of final payment and costs of suit.

[37] The respondents aver that the agreement annexure “SR1” entered into between the applicant and the first respondent on 22 September was an agreement in 2008 in terms of which the applicant would purchase debts from the first respondent at discounted prices. Payments by the applicant to first respondent in consequence of the purchase of debts did not constitute loans.

[38] An offer “SR2” made by the applicant specifies that the debts offered by the first respondent for purchase to the applicant would be invoices to Sappi Forests. Clause 12 of annexure “SR1” read with annexure “SR2” provided recourse to the applicant in certain circumstances including the failure by Sappi Forests to the first respondent’s invoices.

[39] In such circumstances the first respondent was required immediately on written notice from the applicant to repurchase from the applicant such debts at the repurchase price. The respondents aver that at no stage did the applicant give such written notice to the first respondent to repurchase any debts from the applicant. Accordingly, the applicant was not entitled to claim from the first respondent repurchase price of any debts.

[40] The respondents further aver that at the time of signing the acknowledgement of debt the second respondent was labouring under a mistaken *bona fide* belief that the first respondent was indeed indebted to the applicant. Matthys Gerhardus Scheepers, the applicant's attorney, told the second respondent that the first respondent owed the money claimed. He then threatened him with criminal prosecution, in the event of him not signing the acknowledgment of debt for signing as surety in September 2008 whilst he was under a provisional sequestration order.

[41] In reply thereto, the applicant avers that the defences by the respondents are afterthoughts since the respondents have throughout admitted the debt and their liability to repay it. In the letter to respondents' attorneys addressed to the applicant dated 15 September 2012 ("RA1") they committed themselves to continue paying monthly instalments of R20 000.00 per month. Prior to that the applicant wrote the first respondent a letter on 12 June 2012 advising it of its breach of the acknowledgment of debt agreement entered into between the parties, on 29 March 2012.

[42] With regard to the allegations of mistake and duress in terms of the second respondents answering affidavit deposed to in the proceedings of sequestration of its estate ("RA2") no mention of duress or mistake is made. The second and third respondents averred that the debt was not due, owing and payable because the applicant's notice of breach did not describe the trusts' breach (second respondents) of the acknowledgment of debt as to the duress the applicant denies threatening Mackenzie, representative of the first respondent, with criminal prosecution and

states that at the time Mackenzie's estate had not known that the second respondent had been provisionally sequestrated.

Issues

[43] Issues for determination are:

(a) whether the first respondent became indebted to the applicant as a consequence of selective invoice financing agreement (factoring agreement) read with the revised facility letter.

(b) whether the respondents are bound by the terms of the acknowledgement of debt signed in favour of the applicant:

(i) whether the second respondent signed an acknowledgment of debt in error or

(ii) under duress.

[44] The applicant's claim against the first respondent has its origin in banking facilities provided by the conclusion of written agreements on 22 September 2008 and 22 June 2009 respectively. The second and third respondents concluded written suretyship agreements on 22 August 2008.

[45] The respondents admit the conclusion of the aforesaid agreement between the applicant and the first respondent as well as the suretyship agreements by the second and third respondents. On 22 June 2009 a "Revised Facility Letter" (SR2) was signed by the third respondent on behalf of the first respondent which reads thus:

"Basic Terms of the Facility

1. The facility will continue on a fully disclosed basis and Debtor to acknowledge the facility in writing.
2. The invoices offered to ourselves for purchase will be for payment by the following companies and invoices will be purchased up to the following credit limits for each company;
   - Sappi Forest R3000 000.00

     A discount fee of 3.25% of the invoice amount will apply for 30 days period (calculated from date of our pay out).
3. Should invoices not be paid within the 30 day period, thereafter, an additional interest rate of Prime +5% will apply on a daily basis until payment is received by FNB.
4. We will withhold from the purchase price payable an amount equal to 20% of the invoice value. This amount will be paid to you, less penalty fee and any other allowable deduction, when the debtor pays the invoice.
5. A deposit account is opened with FNB which payment details must be noted on all invoices and the details thereof given to all debtors for payment purposes.

   ….

8. This facility may be availed subject to the terms and conditions of and as set forth in the selective Invoice Finance agreement made and entered into by and between the Bank and Client on the 22nd September 2008 ….”

[46] In terms of Selective Invoice Financing Agreement:

“4.2 If the Seller wishes to sell a Debt to the Bank, the Seller must complete an Offer Schedule and transmit it to the Bank in hard copy or electronic format.

4.3 The offer schedule must be accompanied by the invoices and if applicable signed and properly authorised delivery notes in respect of goods sold and delivered and/ or written acceptance of services rendered in respect of each Debts in question.

4.4 The Offer Schedule shall constitute an irrevocable offer by the Seller to the Bank to purchase any or all of the Debts set out on Offer Scheduled and such offer shall be open for acceptance for the offer period.

4.5 The Bank shall be entitled to make whatever enquires it deems appropriate regarding a Debt offered for sale, which may include approaching the Debtor for confirmation as to the debt and payment terms.”

[47] The terms of the agreements are not in issue save that according to the respondents for the first respondent to become indebted to the applicant, the latter had in terms of clause 12 of the agreement to require the first respondent, on written notice, to repurchase the debt at the purchase price in the event of any invoice (debt) not paid. The respondents aver that no such notice was given to the first respondent by the applicant that Sappi Forests had failed to pay on invoices and it should therefore repurchase such debt. In the respondents' submission, in the premises, no indebtedness arose. Mr White for the respondents argued that until such notice was given the first respondent did not owe the applicant any money.

[48] It is the applicant's contention that the acknowledgment itself amounts to written notice of the amount which the first respondent and the sureties must pay and the manner in which such amounts must be paid. So as the issue and service of this application amounts to a notice to the first respondent to repay its debt. Further, that the applicant has on numerous occasions provided the respondents with notices in writing to pay the debt owed to it, with no avail.

[49] It is not in dispute that the respondents' attorneys were in a letter dated 13 January 2012 advised of the outstanding amount of R2 646 310.98 plus interest at the legal rate of 15.5% per annum, compounded in monthly arrears, from 31 August 2011 ("RA14"). The second respondent verified that the aforesaid amount did indeed represent the total indebtedness of the first respondent to the applicant and further confirmed that the outstanding amount was due, owing and payable to the applicant.

[50] Further, pursuance to the agreement between the parties the first respondent was in letter dated 12 January 2012, 13 January 2012, 10 May 2012, 12 June 2012 and 4 September 2012 notified of its debt and that it was required to pay it.In response to the last notice, on 5 September 2012, Singh and Gharbaharan (the respondent's attorneys) in the letter addressed to the applicant's attorneys reiterated the respondent's commitment to meeting their obligations in terms of the acknowledgment of debt. Lastly, on receipt of advanced award the applicant's attorneys on 26 February 2015 wrote to the respondents calling for a meeting to discuss repayment of the balance. On all occasions referred to above, the first respondent has been apprised of its breach but it took no steps to remedy such breach, by repurchasing the aforesaid debt. I, therefore, conclude that all such letters constitute a required written notice that such debt remained outstanding and that the first respondent should repurchase it.

[51] It is the respondents' argument that there has never been an agreement between the parties. It is not in dispute that it was one of the essential terms of the agreement that in the event of the debtor failing to pay for the sold debt, the applicant would have recourse to the first respondent. The reason being, that by that time the applicant would have made advance payments in favour of the first respondent.

[52] It appears from the Revised Debt Letter dated 22 June 2009 and it is common cause between the parties that the first respondent sold the debt of Sappi Forests to the applicant to the tune of R3 000 000.00. Sappi Forests failed to pay such amount to the applicant and it, therefore, remained unpaid. Sappi Forests' failure to pay its

debt in terms of the agreement entitled the applicant to have recourse to the first respondent for such debt. In the final analysis there was a debt owed to the applicant by the first respondent arising from Sappi Forests' failure to pay the debt, the first respondent had sold to the applicant. The inevitable conclusion, therefore, is that though there was no direct loan agreement between the parties, the situation and the nature of the agreement entered into between the parties created a debt for the first respondent, which it also admitted. This is evident from the fact that according to the agreement the applicant was entitled to hold deferred payment as security for the payment of the debt by the debtor or payment of repurchase price by the first respondent. It was also against that background the first respondent in terms of the agreement had a duty to use its efforts to ensure payment by the debtor. Accordingly, at all times relevant hereto the first respondent has been aware of its indebtedness to the applicant and that the indebtedness amount has been owing, due and payable.

Are the respondents bound by the terms of the acknowledgment of debt agreement?

[53] The applicant in this case proceeds against the first and second respondents on the basis of the acknowledgment of debt admittedly executed by the first respondent in favour of the applicant and the suretyship agreement signed by the second respondent dated 22 September 2008 in terms which he stood surety for the first respondent's indebtedness to the applicant ("SR4"). This court is, accordingly, obligated to decide the matter on the acknowledgment of debt and a suretyship agreement in question.

[54] The respondents contend that as the acknowledgment of debt was for “facility indebtedness”, being the indebtedness in terms of selective invoice financing agreement since the applicant has failed to comply with the provisions of clause 12, no such debt arose.

[55] The applicant avers that the applicant provided the first respondent with bank facility as an advance payment on the invoice. Each advance was a loan. If the customer did not pay such debt it remained outstanding. The total amount outstanding then was R2 646 310.98 plus interest at 15.5% per annum and such amount had been so outstanding since 31 August 2011.

[56] Sappi Forests had failed to pay on invoice. The second respondent verified that the aforesaid amount did indeed represent the total indebtedness of the first respondent to the applicant and confirmed that the outstanding amount was due, owing and payable to the applicant. This led to the execution of the acknowledgment of debt by the first respondent and in respect to which the second respondent stood surety for the applicant’s indebtedness to the applicant.

[57] In executing the acknowledgment of debt the first respondent admitted that it was indebted to the applicant in the agreed amount of R2 799 087.74 plus interest thereon at the rate of 15.5% per annum, compounded monthly in arrears, calculated from 31 December 2011 to date of final payment, which amount was then due, owing and payable.

[58] In terms of the acknowledgment of debt agreement the first respondent only paid six months instalment, totalling R120 000.00 and R5.000 on liquidation of Turnstone CC. The question arises is whether the applicant was required to give the first respondent notice in writing to pay its debt. In a letter dated 4 September 2012 the first respondent was duly notified that it had not honoured the terms of the acknowledgement of debt. In reply thereto, the respondents` attorneys reiterated the respondents` commitment to meeting their obligations in terms of the acknowledgment of debt. The first respondent had also been given prior notices on 19 May 2012 and 12 June respectively.

[59] In the letter dated 12 June 2012 ("SR8") the respondents were pertinently advised of their breach of clause 6 of the acknowledgment of debt agreement concluded between the parties on 3 February 2012. The attention of the respondents was even drawn to clause 5.3 of the agreement which, in the event of breach of the acknowledgment of debt agreement, entitled the applicant to claim immediate repayment of the full amount of the facility indebtedness, which was then outstanding. In the circumstances, I do not find any merit in the respondents` contention that since no written notice was given no debt arose.

[60] The second question arises is whether there was a valid *causa debiti* underlying the acknowledgement of debt. For an acknowledgment of debt to avail a creditor, it must not exist *in vacuo.* In *Peter Brett Featonby–Smith and Brett Waberski case no 3624/2011 and 3623/2011 (D) Steyn J* said:

> "There needs to be a real and demonstrable debt owed by the debtor to the creditor. The mere fact that an AOD exists does not mean that the document would grant

> enforceable rights without an existing debt between the parties. If there is no underlying cause then the claim would be unenforceable."

In the present case the *causa debiti* was the sum of R2 799 087.74 plus interest, being the repurchase price of Sappi Forests` debt in respect of which the respondents had not only admitted liability but also that it was then due, owing and payable.

(i) Error

[61] The respondent aver that the second respondent signed the acknowledgment of debt on behalf of the first respondent in a mistaken belief that the first respondent indeed owed the applicant the aforesaid amount. He only subsequently learned that this debt could only arise on written notice by the applicant to the first respondent to repurchase it.

[62] For the respondents to succeed on a defence of a mistaken belief, such mistake must be *iustus. In* determining whether the mistake is *iustus t*he court in *George v Fairmed (Pty) Ltd 1958(2) SA 465(A) at 471 A-D* posed the following question:

> " Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? … If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

[63] The second respondent vouched that he had verified the first respondent in debtedness to the applicant. He must have the necessary records in terms of the agreement as to the existence of such debt, as the offer schedule should be

accompanied by a duly signed invoice and properly authorised delivery note in respect of goods sold and delivered or written acceptance of services rendered in respect of each debt. He must have verified it with Sappi Forests that it had not paid the debt the applicant had purchased from the first respondent. In which event, in terms of the offer schedule, the first respondent was obliged to repay the purchase price. On 5 September 2012 the respondents' attorneys confirmed the respondents` "commitment to meeting their obligations in terms of the acknowledgment of Debt…."

[64] The agreement to conclude the acknowledgment of debt agreement was reached on 11 January 2012. The respondents, through their attorney, confirmed in writing on 27 January 2012 that the second respondent was willing to come to the offices of the applicant`s attorneys to sign "the necessary documents". This led to the conclusion of the acknowledgment of debt and suretyship agreement. No misrepresentation was made by the applicant to the second respondent which induced or could have induced the respondents to sign the agreement. The respondents knew at the time that the first respondent owed the applicant, money arising from the first respondent`s failure to repurchase Sappi Forests` debt. In his affidavit the second respondent admits that the first respondent sold Sappi Forests` debt to the applicant for R3 178 940.09 which amount remains outstanding. The existence of such debt is confirmed by the schedule annexed to the respondents` answering affidavit, marked "SHM7".

[65] If there had been a mistake on the part of the second respondent, it could be a unilateral mistake. In this regard the Appellate Division said the following:

> "The decisive question in a case where unilateral mistakes is in issue is whether the party whose actual intention did not conform with the common intention expressed

> (the offeror) led other party (the offeree) as a reasonable man, to believe that his declared intention represented his actual intention. To answer that question a three-fold enquiry is necessary; firstly, was there a misrepresentation as to the offeror`s intention, secondly, who made the misrepresentation, and, thirdly, was the offeror actually misled, and would a reasonable man have been misled?"

[66] In the present case, the second respondent being the custodian of all the records and documentation relating to the first respondent's agreement with the applicant as well as the details of the debts purchased by the applicant from the first respondent, could not have been and was not misled by the intention of the applicant when executing the acknowledgment of debt agreement. In the circumstances, no would a reasonable man have been misled. The respondents could, therefore, not have signed the acknowledgment of debt agreement and sureties in a *bona fide* error or belief.

(ii) Duress

[67] Further, the second respondent alleges that he signed the acknowledgment of debt under duress. Mathys Gerhardus Scheepers (the applicant`s attorney) told him (the second respondent) that the first respondent owed the money claimed. He then threatened that should the second respondent not sign, he (Mathys Gerhardus Scheepers) would have the second respondent criminally prosecuted for signing as surety in September 2008 whilst he was under a provisional sequestration order.

[68] Mr Van Rooyen for the applicant has argued that even if the threat was made, it was not unlawful or contra bonos mores since an insolvent, who incurs credit, whilst being an insolvent commits an offence in terms of section 137 of the Insolvency Act 1936.

[69] In Boe Bank v Van Zyl 1999(3) SA 813 (c) at 829G/H –T, it was stated that the mere fact that the defendant had been under pressure when he signed the agreement does not entitle him to impugn the transaction. He has to show that the conduct of the officials of the plaintiff constituted a threat or intimidation that was unlawful or *contra bonos mores*. See also *Astra Furniture's (Pty) Ltd v Arend 1973(1) SA 446(C) at 449B.*

[70] In Shepstone v Shepstone 1974(1) SA 41(D) at 413H, it was stated that a threat to take a lawful action in the courts cannot be regarded as *contra bonos mores*. In Ilanga Wholesalers v Ebrahim and others 1974(2) SA291 (D) at 297H-298A Milnes J said:-

> "… where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which is due the creditor does not act *contra bonos mores* in using that threat of criminal sanction to induce him to acknowledge his true liability. In these circumstances he is doing no more than to exercise his legal rights. Where, however, the creditor does not know and probably cannot establish (and a fortiori where he knows that he cannot establish) the amount of the debtor`s indebtedness it seems to me an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due…"

[71] In Jans Rautenbach Produksies (EDMS) Bpk v Wijma 1970(4) SA 31 (T) at p *33* an acknowledgment of debt allegedly signed under threat of criminal proceedings was held not to constitute contra bonos mores and binding on the defendant since the probabilities favoured the view that the defendant had misappropriated the money which he undertook in the acknowledgment of debt to pay to the plaintiff. What is, however clear from the authorities is that the party relying on duress bears

the onus of showing that he was indeed thereby to conclude the agreement. Put another way, the party bearing the onus must show that he would not have concluded the agreement had it not been for the duress. See *Paragon Business Forms (Pty) Ltd v Du Preez 1994(1) SA 434(SE) at 439E/F.*

[72] The undisputed evidence shows that at the time of signing the acknowledgment of debt agreement Mr Scheepers (the applicant`s attorney) did not know that the second respondent had been placed under provisional sequestration order at all. In the premises, I am not satisfied that the second respondent has succeeded to show on the balance of probabilities that the alleged threat of criminal prosecution induced him to sign the acknowledgment of debt, let alone to prove that had it not been for the threat of criminal prosecution, he would not have signed the acknowledgment of debt in question. The decided authorities show that even if the threat of criminal prosecution had been made, such threat in the circumstances of this case could not have been lawful or *contra bonos mores*. What also worth noticing in this case, is that the defence of duress has not been the prime one but it has been pleaded in the alternative. This shows that the respondents have been fishing for a defence which they thought could be a formidable one. Moreso, in my view, the defence of duress is inimical to that of *bonafide* mistake as it presupposes that the second respondent was fully aware of the true position but due to fear he signed the agreement.

[73] Accordingly, the respondent defences that the acknowledgment of debt was signed in bona fide mistake that the first respondent was indeed indebted to the

applicant and under duress fall to be rejected as false on all probabilities. The applicants claim against the respondents should therefore succeed.

Order

[74] In the result I make the following order;

(a) The first and second respondents are jointly and severally ordered to pay to the applicant the sum of R3 687 539. 89 plus interest at the rate of 15.5% per annum from 16 February 2015 to the date of final payment, the one paying the other to be absolved,

(b) Costs of suit on the attorney and client scale.

Date reserved on:	4th March 2016
Date delivered on:	5 April 2016
Counsel for the Applicant:	Adv Van Rooyen
Instructed by:	Austen Smith Attorneys
	Ref: L Login
Counsel for the Respondent:	Mr White
Instructed by:	Mornet Attorneys