22/11/2010

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: A1462/05

In the matter between:

P GEROLOMOU CONSTRUCTIONS (PTY) LIMITED — Appellant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED
15/11/10 DATE
SIGNATURE

DERRICK VAN WYK — Respondent

JUDGMENT

Tuchten J:

1 This is an appeal from a decision by a magistrate. I shall refer to the parties as they were described at the trial. The plaintiff claimed payment for certain subcontracting work carried out by the defendant during the period April to June 2002 pursuant to oral agreements between the parties. The work required the plaintiff to design the four highest corners of the Nan Hua Temple in Bronkhorstspruit according to a plan and, after they had been constructed from wood by the

plaintiff through an outside contractor, to instal them. The trial began on 4 November 2004. At that stage both parties were legally represented. The trial resumed on 8 August 2005. On that date the attorney for the plaintiff withdrew from the case and the plaintiff, a legal layman, proceeded to represent himself. Up till that date, the plaintiff had enjoyed legal representation both in regard to the preparation of the pleadings and the conduct of the trial. The lawyer who represented the defendant on the first day of the trial also withdrew but was replaced by another legal representative on 8 August 2005. Judgment was given on 19 August 2005. At the appeal, the appellant was represented by counsel but there was no appearance for the respondent.

2 Although the appellant placed the work done by the plaintiff in issue, the magistrate found that the plaintiff had done the work properly. She found that the plaintiff was a very good witness and the version given by the defendant's witnesses was false. She rejected all the defences raised by the defendant, including those with which I shall shortly deal. She upheld three of the plaintiff's claims, together with interest and costs. The defendant appeals against the magistrate's decision. The issues for decision on appeal concern those which arose from paragraphs 4.2.2 and 4.3 of the appellant's plea:

4.2.2 During or about October 2002, the Plaintiff accepted a final payment in the amount of R19 291,70 in full and final settlement in respect of all amounts due to the Plaintiff for the works. A copy of the signed acceptance for the aforesaid payment is annexed hereto as "DW3".

4.3 The plaintiff has been paid the amount in terms of annexure "DW3".

3 The plaintiff replied to these paragraphs as follows:

> Die Eiser erken dat hy die kontrak geteken het maar ag homself nie gebonde aan die kontrak, aangeheg aan die Verweerder se Pleit en gemerk aanhangsel "A", nie aangesien die Eiser se handtekening bekom is deur middel van onbehoorlike beïnvloeding.
>
> Die Eiser is onbehoorlik beïnvloed deurdat die Verweerder:
>
> 1 'n Invloed oor hom gekry het;
>
> 2 die invloed het die eiser se teenstandsvermoë verswak en sy wil plooibaar gemaak;
>
> 3 en dat die verweerder hierdie invloed op gewetenlose wyse gebruik het om toe te stem tot 'n transaksie wat:
>
> a) tot sy nadeel strek; en
>
> b) wat hy met normale wilsvryheid nie sou aangegaan het nie.

4 The plaintiff went on in his reply to allege that he had suffered damages of R104 280, 40 as a result of the influence which the defendant had gained over him and that the defendant had made the

plaintiff's will malleable by being for a considerable time in default of performance which in context means not paying the plaintiff what the plaintiff says he was owed for the work he did.

5 The trial was conducted on the basis that the document referred to in the passage from the defendant's plea which I have quoted ("the full settlement document") was indeed an agreement of settlement, although the defendant did not plead that the full settlement document did constitute a written agreement of any kind. In my view, the full settlement document was not intended by the defendant, on which the onus in this regard lay, to constitute an agreement of any kind.

6 The evidence of the plaintiff was that he signed the full settlement document under compulsion. After he had completed the work he went to Nicholson, the plaintiff's foreman to negotiate the payment to the plaintiff of retention money of R49 523, 54 which the defendant was withholding. The plaintiff was under pressure from his workers to pay them and the plaintiff could only do this with money paid to him by the defendant. After considerable delays engineered by the defendant, the plaintiff, Nicholson and Kruger, the defendant's project manager and quantity surveyor respectively, met for this purpose at the site during the morning of 16 October 2002.

7 Kruger produced a draft of the full settlement document. He told the plaintiff that the defendant had raised contra charges against him and that the plaintiff must sign the full settlement document or he, the plaintiff, would not get any money at all. The plaintiff protested, saying that he could not sign the full settlement document because it was unfair ("onregverdig"). Kruger made it plain to the plaintiff that if he did not sign the full settlement document, the plaintiff would not get any money at all.

8 The full settlement document itself does not purport to be a memorandum of an agreement. It is headed "Final account for Derek van Wyk". It begins with a list of money retained and the dates of each such retention. The total of the retentions is R48 523,54. There follows a section identifying the contra charges raised by the defendant for repairing damaged materials, removal of material and stripping out "tsuantzees". The total of the contra charges is R29 231, 84. On the final page of the full settlement document, the contra charges are deducted from the retention monies, leaving a balance of R19 291,70.

9 The full settlement document then concludes:

> I, Derek van Wyk, herewith accept the payment in the amount of R19 291-70 in full and final settlement of all

accounts, claims etc that I or any of my workers may have on the Nan Hua Temple in Bronkhorstspruit from Gerolemou [sic] Construction.

(sgd) 16.10.002

DEREK VAN WYK DATE

10 It is trite that a contract is formed by an offer and an acceptance. I see no indication on this evidence that the defendant was making the plaintiff any offer at all. The draft full settlement document was presented to the plaintiff for signature on the footing that the plaintiff would not get what the defendant admitted was due to the plaintiff unless the plaintiff in his turn signed an admission that he owed the defendant what the defendant was demanding in respect of contra charges. The plaintiff made it clear at the meeting that he admitted no such thing. To the knowledge of the defendant's representatives, the defendant signed the full settlement document to obtain payment of what the defendant admitted owing him and not to put an end to the dispute between the parties which was whether the plaintiff owed the defendant anything at all in respect of contra charges and, if so, how much. So the defendant was not led to believe that the plaintiff was accepting an offer of settlement made by the defendant and no issue of quasi-mutual assent arose.

11 The fact that the plaintiff, in his reply, characterised the full settlement document as a contract cannot in my view assist the defendant

because it was not the defendant's pleaded case that the document constituted a contract or that a contract of compromise had been concluded between the parties. As the defendant did not assert a contract of compromise, it cannot be said that the defendant admitted that there was such a contract.

12 But if I am wrong, then one must determine what the offer was that the plaintiff accepted. Christie[1] analyses the cases and points out[2] that the words "in full settlement" are ambiguous. In *ABSA Bank Ltd v Van der Vyver*[3], in the context of a pre-existing dispute, the executrix of an erstwhile customer of the bank sent the bank a cheque for the amount she said was owing after deduction of certain countercharges. In the letter accompanying the cheque, the executrix said that the amount tendered was "in volle en finale vereffening". After an analysis of the relevant case law the court held, with reference to *Harris v Pieters,*[4] as follows:[5]

> What the judgment of Innes CJ in *Harris* at 649-50 does serve to show clearly, in my view, is that the expression 'in full settlement' is not in itself ambiguous but that its effect

1 *The Law of Contract in South Africa*, 5th ed.

2 At p459

3 2002 4 SA 397 SCA

4 1920 AD 644 per Innes CJ.

5 Para 16

> differs depending on the context in which it is used: *Karson v Minister of Public Works* 1996 1 SA 887 E at 895F-G. It is not inherently ambiguous because it always serves to do no more, legally speaking, than import the condition that on acceptance the creditor has no further claim to any balance of the debt. But, as a matter of language, and with regard to the two different situations in which it is employed, *it is a question of fact* whether the payment made is intended to effect a compromise or to pay an admitted liability. In the former situation the condition is binding if the offer is accepted. If the offer is rejected the money should be returned. In the case of a payment of an admitted liability the condition is not binding. The creditor may keep the money and sue for the balance. [My emphasis]

13 The judgment continues:[6]

> Sending one's creditor a cheque 'in full settlement' *coupled with a denial of liability* would almost certainly signify an offer of compromise. But there may be an offer of compromise *if there is simply no admission of liability* accompanying the payment. And one may have to do with an offer of compromise *even if there is an admission of liability*. In the latter instance the line between an offer of compromise and payment of an admitted liability would naturally be finer than in the other two cases. In *Paterson Exhibitions*, for example, the admission was, in effect, no more than that something was owing, but without admitting how much or that the payment offered represented the admitted indebtedness. [Again, my emphasis]

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6 Para 18

14 It is clear from the evidence that when the defendant's representatives framed the full settlement document, the defendant had made a calculation, deducting from what it in fact admitted that it owed the plaintiff a sum which the defendant had calculated was owed to it by the plaintiff for contra charges and concluding arithmetically that after deduction of what the defendant claimed was owed to it, the balance owed to the plaintiff was R19 291,70. The admission made by the defendant in favour of the plaintiff in the full settlement document was not merely that "something" was owing but that the very balance tendered, R19 291, 70, was owing. In my view, if the document constituted an offer to the plaintiff, then the offer, seen in its factual matrix, was this:

> We both know that you are owed R48 523,54 by us for retention monies, that you dispute owing us anything at all by way of contra charges and that when the amount of the disputed contra charges is deducted from our admitted indebtedness to you of R48 523,54 there is a balance due to you of R19 291,70. We offer to pay you what we owe you on our version, ie R19291,70, only if you acknowledge in writing that you owe us the full amount of the contra charges which we claim. If you do not so acknowledge in writing, we shall pay you nothing, not even the amount we admit owing you.

15 Counsel referred in argument to *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd*[7]. In that case, a dispute had arisen as to the quality of T-shirts which were sold by the respondent to the appellant and the discount, if any, to which the appellant was entitled arising from the alleged defects. The appellant sent the respondent a letter headed "Credit Request", proposing a discount of something over half of the balance of the purchase price in dispute, together with a cheque for he balance. The cheque was marked on its face with the words "full and final settlement of account". With the letter, the appellant also sent the respondent a letter headed "Final Reconciliation". The court considered[8] whether the cheque was intended to effect a compromise or pay an admitted liability and came to the conclusion, on the facts, that the words "full and final settlement" on the cheque

> can only amount to an offer to the respondent to settle their dispute by payment of that amount which the latter could have accepted or declined, but on acceptance of which the dispute between the parties would be compromised. The fact that the appellant admitted liability in a certain amount is no bar to the proposal being construed as an offer of compromise. [Footnotes omitted]

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7 2008 3 SA 327 SCA

8 Para 11

16 I think the essential difference between the factual situations in *Be Bop A Lula* and the present case is that in the present case the defendant made it clear that it would not pay what it owed and would therefore force the plaintiff to go to court to recover not only the portion of the plaintiff's claim disputed by the defendant but also that portion of the plaintiff's claim which the defendant did not dispute.

17 That, in my view, is not an offer to compromise the dispute which only existed in relation to the contra charges but an offer (if it was an offer at all) to pay what was owing only if the plaintiff made the admission demanded, failing which the defendant would not pay the plaintiff what it owed the plaintiff even though the defendant had, and knew it had, no basis in law for withholding such payment.

18 Finally I turn to the issue raised in the reply of undue influence or, as it seems to have been characterised at the trial, duress. I do so on the assumption, which I have concluded is ill-founded, that the full settlement document constitutes a contract of compromise. It is correct that the onus to establish that there was undue influence rests on the plaintiff but as the magistrate accepted the plaintiff's evidence and rejected that presented on behalf of the defendant, a finding which was not challenged on appeal, the question resolves itself into

an enquiry whether the plaintiff's evidence establishes undue influence.

19 A litigant who claims rescission of a contract through undue influence must establish precisely what the plaintiff pleaded: that the other party to the contract gained an influence over him, that this influence weakened his resistance and made his will malleable and that the other party used that influence *in an unconscionable manner* to persuade him to agree to a transaction which operated to his prejudice and which he in normal circumstances would not have concluded.[9]

20 There can be no doubt that the defendant gained an influence over the plaintiff. This is established by the facts that the defendant knew the plaintiff was under financial pressure and needed the money owed to him by the defendant to pay his workers who were waiting outside to be paid, the disparity in their respective economic powers and the defendant's knowledge that the plaintiff could not afford a protracted dispute with the defendant while the defendant could well afford such a dispute. The defendant knew well that, as the plaintiff said:

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9 *Patel v Grobbelaar* 1974 1 SA 532 A 533-534

> Op daardie moment was ek in so 'n probleem, in so 'n probleem die mense buitekant hulle wag vir my buitekant, hulle soek hulle se gelde wat ek nog verskuldig is.

21 There can further be no doubt that the defendant took advantage of the plaintiff's situation to persuade him to conclude a transaction which was to his disadvantage and the manifest unfairness of which the plaintiff urged, in vain, upon the defendant's representatives. There remains but one element of the defence of undue influence which requires examination: that the defendant acted unconscionably (op gewetenlose wyse).

22 The notion of a party acting unconscionably has come before the courts most noticeably but not exclusively in the context of the *exceptio doli*. Although the *exceptio* now rests in a peace imposed upon it by the Appellate Division,[10] the decisions of the courts in *exceptio doli* cases, as well as other decisions, provide a guideline for what the courts will regard as unconscionable. Common to them all is a substantial degree of unscrupulousness, an intention to oppress or a departure from the values to which right thinking people subscribe in the relevant context.

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10 *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 A

23 The courts of common law jurisdictions have long exercised a power to set aside or otherwise mitigate contracts in which one party has acted unconscionably. Our courts do not of course have such powers but it is instructive to have regard to what a common law court would hold to be unconscionable. In *Commercial Bank of Australia Ltd v Amadio,*[11] a decision of the High Court of Australia on appeal from a decision in the Supreme Court of South Australia, Gibbs CJ held[12] that a

> transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed. The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands" ...

24 I have no doubt that it is entirely permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved but it is quite another thing when an

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11 [1983] HCA 14; (1983) 151 CLR 447

12 Para 18

economically powerful party withholds what is admittedly owing to an economically weaker party in order to seek commercial advantage. *Pacta sunt servanda* is a prescription that is intimately connected with the constitutionally protected values of freedom and human dignity.[13] It follows that to use the threat of breaching a contract to induce an economically less powerful contractual counterpart to act to his disadvantage in relation to an accrued contractual right, the enforcement of which is not contrary to public policy, is subversive of freedom and human dignity. In the present case, the defendant's conduct further trenched upon the plaintiff's constitutional right to have his dispute with the defendant adjudicated by fair legal or other process.[14] In my view the plaintiff has established the element of unconscionability required. If there were a contract of compromise, the plaintiff was entitled to avoid it. Accordingly, the rejoinder of undue influence must be sustained.

25 I would dismiss the appeal.

NB Tuchten
Judge of the High Court
15 November 2010

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13 *Barkhuizen v Napier* 2007 5 SA 323 CC para 57

14 Section 34 of the Constitution

I agree. It is so ordered.

RD Claassen
Judge of the High Court
15 November 2010

For the appellant:
Adv *JJ Bitter*, instructed by
Biccari Bollo Mariano Inc
Johannesburg

No appearance for the respondent