IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Case no. 5039/2013

In the matter between:

STEWART N.O., MICHAEL LAWRENCE	First Plaintiff
PARKER N.O., WAHIDA	Second Plaintiff
[In their capacity as the duly appointed joint trustees of the consolidated insolvent estate of **GRAEME MINNE** and **CAROLINA FREDERIKA MINNE**]	

and

LOUW, ANDRé ALBERT	Defendant

CORAM:	S J REINDERS, AJ
HEARD ON:	10, 11 AND 13 FEBRUARY 2015
JUDGMENT DELIVERED:	26 FEBRUARY 2015

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[1] The plaintiffs (in their capacity as trustees in the consolidated insolvent estate of Graeme Minne and Carolina Frederika Minne) claims R425 984.00 from the defendant together with mora

interest and costs from the defendant pursuant to an agreement entered into between the parties on the 7th April 2011.

[2] The defendant in a counterclaim requests a declaratory order that the said settlement agreement (which is annexed as annexure "E" to the particulars of claim) is null and void.

[3] A plea of prescription was (correctly in my view) abandoned at the commencement of the trial by defendant.

[4] Although in the Rule 37 conference it was agreed that the plaintiff had the duty to begin, I was informed at the commencement of the trial that the defendant would begin adducing evidence.

[5] Mr Louw (the defendant) testified and his evidence boiled down to the fact that after he has received a summons to appear before the Master, he and his wife travelled to Johannesburg where he later signed the agreement *in casu* on the same day to wit the 7th April 2011. When he travelled to Johannesburg he did not know that the purpose of the summons was to either claim money from him or to enter into a settlement and he thought that he was going to testify in the affairs of Mr Minne (the insolvent). On arriving there, he was met by a panel of people and was intimidated in that he was informed (by the attorney who later testified, Mr Brand) that they (he and his wife) were not going to leave before a settlement was entered into. The plaintiff was already in possession of a "*contract*" and furthermore informed him of the particulars of the house that he and his wife resides in.

He was afraid that he was going to lose his house and he was requested to consider how much he can afford to pay. He and his wife had a discussion in this regard whereafter the agreement (annexure “E”) was entered into. He and his wife left Johannesburg that same day after signing the agreement.

[6] The defendant’s wife testified and from her evidence it transpired that the agreement which was signed was in pro-forma. It was read to the defendant and the contents explained. The defendant was given the opportunity to decide how much he can afford to pay and he and the witness (his wife) decided on R1 000.00 per month which was accepted and accordingly the agreement was finalized on this basis whereafter it was signed *inter alia* by him and his wife.

[7] After defendant closed his case, the plaintiff called Thelma Veldtman the owner of the transcription services who confirmed her role at the enquiry to attend to the recording of the enquiry proceedings by the Master. Mr Brand and Mrs Young also testified. None of these two witnesses could remember the defendants and evidence by both of them were how similar interrogatories were in general conducted. Although Mr Brand could not recall the two defendants, the allegation by the defendant that Mr Brand precluded them from leaving the room before signing a settlement agreement was denied by Brand and he stated that he would seriously reprimand any person who would have made such a statement in his presence.

[8] The main contention of the defendant (as set out in his counterclaim) is that he signed the settlement agreement under duress. The more full allegations are:

> "*4.4 Defendant was subpoenaed to appear for questioning on the 7th April 2011 at Johannesburg by the Master of the above Honourable Court.*
>
> *4.5 On arrival for questioning the defendant encountered a panel of five people, whose identities and capacities are unknown to the defendant at this stage, however defendants specifically avers that the first plaintiff was present.*
>
> *4.6 Defendant specifically avers that his wife, Dorothea Maria Elizabeth Louw accompanied him to the questioning.*
>
> *4.7 Defendant avers that both himself and his wife were extremely intimidated by being confronted with the panel and by the surroundings.*
>
> *4.8 This intimidation was furthermore aggravated by the aggressive attitude of the panel before which the defendant appeared.*
>
> *4.9 The plaintiff demanded to know from the defendant how the due amount would be paid back, but did not allow the defendant to ask any questions and/or to discuss the matter.*
>
> *4.10 On the defendant's arrival the settlement agreement was mostly already drafted. The defendant was not given an opportunity to consult or obtain any advice from a legal representative.*

4.11 Defendant specifically avers that the first plaintiff demanded that he must commit to the repayment of the said amount as stated in the particulars of claim.

4.12 The defendant further avers that the first plaintiff specifically stated that he would lend the money whereafter he would register a bond against the defendant's house situated at 30 Scott Crescent, Fleurdal, Bloemfontein.

4.13 Defendant specifically pleads that the fact that their property information was already concluded within the settlement agreement, furthermore arose suspicion and intimidation, in the alternative, fear for losing their only immovable asset.

4.14 Defendant further avers that his wife is very ill and was ill at the time of the conclusion of the agreement. At the time the defendant signed the said agreement, his only concern was to ensure that his house was not taken away from them.

4.15 Defendant avers that if he had been informed of his right to properly consult with a legal representative, and that if he was not intimidated by the first plaintiff, he would not have signed the said settlement agreement, and therefore same was signed under duress."

[9] The onus *in casu* is on the defendant to prove that he signed the document under duress. **Savvides v Savvides and Others** 1986 (2) SA 325 TPD at 330 B.

[10] To establish the defence of "*duress*" (*metus*) the defendant accordingly have to prove on a balance of probabilities the following:

10.1 There must be a threat of imminent evil, for example, to the life, person, honour or property of a person or a member of his/her family. **Arend v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C) 305H.

10.2 The threat must be unlawful. **Kruger v Sekretaris van Binnelandse Inkomste** *(supra)*.

10.3 The threat must have induced the threatened party to enter into the contract or to agree to terms to which he/she would not otherwise have agreed. **Arend and Another v Astra Furnishers (Pty) Ltd** (*supra).*

[11] Unfortunately I cannot find on the evidence adduced, (even on the defendant's own version) that he entered into the agreement under duress. On the evidence adduced by the defendant there was no threat of imminent evil or alike made to him. He was never threatened with losing his property at all. At best, he and his wife came to the conclusion due to the fact that the plaintiffs already knew about their property, that they had to enter into an agreement to save the property. At no stage did plaintiff make any threat in this regard, but even so, if the plaintiff did tell the defendant that he could or would lose his house if he was not in a position to pay, it does not seem to me to be an unlawful threat.

Same would have constituted only clarification of the probable the end result to wit that in case summons judgment was issued and taken against the defendant and he could not pay, his immovable property could be attached. **Boe Bank Beperk v Van Zyl** 2002 (5) SA 165 (C) at 180 C - H.

[12] Mr Louw testified that he was informed that he and his wife must discuss what amount he can afford. He suggested R1 000.00 after he and his wife had a discussion in this regard. Mrs Louw (his wife) testified that the proposed agreement was shown to them. They had the opportunity of reading it and it was also explained to them. She testified that reference was made to their property but only in as far as reference was made to a second bond that would be registered over the property. She thus testified that she and her husband was afraid because if they lost their house the two of them would have nowhere to live. The evidence furthermore does not reveal that the defendant was unduly influenced to sign a particular agreement. On his evidence when he arrived, he was informed that they should reach an agreement (my underlining) – which they did after negotiating.

[13] I accordingly cannot find that the agreement was entered into due to *metus*.

[14] Mr Brand testified that *in casu* the method of calculation of repayment as set out in **Fourie N.O. ander Others v Edeling N.O. and Others** 2005 (4) All SA 393 (SCA), were not followed

as he was of the view that same would *in casu* lead to an unjust result. This explains why the defendant was requested to sign an acknowledgement of debt for the whole amount to wit R883 984.00. The amount invested by the debtor in the amount of R450 000.00, was not subtracted. It is not necessary for me to make a decision in this regard as same did not form part of the dispute on the pleadings. I am not called upon to adjudicate what the original amount was that the defendant might have owed the plaintiffs due to the Ponzi-scheme. This was settled by the parties. Whether it be a good or bad settlement is none of my concern – I am only called upon to decide whether the agreement was entered into due to undue duress.

[15] The evidence as a whole establishes that the defendant *in toto* in any event received R883 984.00 from the insolvent estate. The defendant invested R450 000.00 and paid an amount of R8 000.00 *in toto* before he stopped paying. It might be mentioned that in his evidence Mr Louw averred that faxes were sent to the plaintiff informing the plaintiff that he cannot afford to pay R1 000.00 anymore and that he reduced the payments to an amount of R500.00 per month before stopping payment. No such faxes were handed in as evidence nor was any such payments proved. The Court adjourned in order to allow the defendant to obtain proof of these payments, but I was informed at a later stage that the defendant do not proceed with these allegations. Brand testified that the amount being claimed excludes the original investment of R450 000.00 as well as the payments received. In par. 5 of the agreement it was agreed that

a certificate signed by one of the trustees certifying the indebtedness of the debtor shall be *prima facie* proof of the debtor's indebtedness to the trustee and such a certificate has been annexed as annexure "G" to the papers. Same has been signed by Mr Stewart and indicates the outstanding amount as at the 15th November 2013 as R425 984.00 – no evidence unsettled this *prima facie* proof.

[15] I feel sorry for the defendant in this matter. However, legally, to my mind, he is indebted to the plaintiff in the claimed amount.

[16] The plaintiff urged upon me to make a special cost order *de bonis propriis* on the scale as between attorney and own client regarding the costs relating to the witness Thelma Veldtman. The reason being that the defendant's attorney was not prepared to accept her transcription of the evidence before the Master and therefore plaintiff had to call her as a witness. The transcription could have been proved in my view *prima facie* in terms of Section 154 of the Insolvency Act 24 of 1936. I am not prepared to make any special cost order in this regard nor do I consider the lady to be a necessary witness. In fact, in as far as Caroline Young, could also not remember the particular incident, her testimony did not and could not contribute herein and she was an unnecessary witness as well.

[17] Accordingly I make the following orders:

1. Defendant to pay plaintiff the amount of R425 984.00.

2. Defendant to pay interest as follows:

   2.1 At the rate of 15.5% per annum for the period 22 November 2013 to the 31st July 2014; and

   2.2 At the rate of 9% per annum for the period 1st August 2014 to date of payment.

3. Costs of suit.

4. The counterclaim is dismissed with costs.

S. J. REINDERS, AJ

On behalf of the plaintiff:	Mnr. C. H. du Plessis Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the defendant:	Mnr. P. Peyper Instructed by: Horn & Van Rensburg BLOEMFONTEIN