

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3234/2012

In the matter between:-

MARTHINUS PETRUS ODENDAAL
AVELING N.O.

1st Applicant/Plaintiff

LIZMA AVELING N.O.

2nd Applicant/Plaintiff

GERT JACOBUS VAN NIEKERK N.O.

3rd Applicant/Plaintiff

and

MICHIEL DANIËL BURGER N.O.

1st Respondent/Defendant

CAROLINA JOHANNA BURGER N.O.

2nd Respondent/Defendant

ANDRIES VENTER N.O.

3rd Respondent/Defendant

MICHIEL DANIËL BURGER

4th Respondent/Defendant

HEARD ON:

8 NOVEMBER 2012

JUDGMENT BY:

EBRAHIM, J

DELIVERED ON:

22 NOVEMBER 2012

[1] This is an application for summary judgment brought by the three plaintiffs, who, in their capacities as trustees of the Mpola Trust, have instituted action against the defendants, jointly and severally, for payment of the amount of R1 876 000,00 together with interest and costs on an attorney and own client scale.

- [2] The first three defendants have been sued in their respective capacities as trustees of the Michiel Burger Boerdery Trust. The first defendant is also sued in his personal capacity as fourth defendant on the basis of a suretyship undertaking. The *causa* and basis of the debt is an agreement entered into between the Mpola Trust and the Michiel Burger Boerdery Trust, dated 5 September 2011, which has been annexed to the summons as “A” evidencing the plaintiffs’ claim in respect of the lease of sheep to the Michiel Burger Boerdery Trust. The plaintiffs also claim an order against the first, second and third defendants, jointly and severally, that a certain known property described as the “Remainder of the farm Pietersdal 150” in the district of Senekal be declared specially executable.
- [3] Annexure “A” is an acknowledgement of debt for the sum of R1 876 000,00 which fourth defendant undertakes in terms of that agreement to secure by means of a second mortgage bond passed over trust property, the farm Pietersdal. The agreement provides also for an interest rate of 17,7% per annum calculated from 1 January 2011 and for payment of costs on an attorney and own client scale. In this regard it is alleged by the first and second defendants that the first

plaintiff threatened them that a charge of theft would be laid on a Friday with the South African Police if they did not sign the acknowledgement that they owed the amount in question and that they would be detained in custody over an entire weekend. This caused them to seek legal advice and the attorney consulted confirmed that such a course of conduct would be open to the first plaintiff and, accordingly fearing arrest they signed annexure "A".

- [5] I agree with counsel for the plaintiffs that this defence does not amount to undue influence or duress, because of the improbabilities inherent in it and because of its vagueness; no indication is given of precisely when, where and how the threat was made. The precise circumstances surrounding the alleged threat are conspicuous by their absence in the defendants' opposing papers. In addition, it is highly improbable that any attorney worth his salt would merely confirm that the first/fourth defendant and his wife could be arrested without conducting some investigative action into the matter and it is significant that the attorney has not deposed to a confirmatory affidavit in support of these averments made by the first/fourth defendant. I have no doubt that if this version were indeed of substance, the

attorney would have addressed a communication to the plaintiffs in haste to inform them that no grounds exist for criminal charges to be laid; that any such attempt to arrest his client would amount to malicious and unlawful arrest and detention, at any rate time would be bought for the defendants and some negotiations conducted on their behalf with the first plaintiff. So I reject out of hand the defendants' version that they were unduly influenced to sign annexure "A". It is patently false. The test for duress has not been satisfied – **BOE BANK BEPERK v VAN ZYL** 2002 (5) SA 165 (C); **AREND AND ANOTHER v ASTRA FURNISHERS (PTY) LTD** 1974 (1) SA 298 (C) at 306A – B.

I find that the defendants' defence of duress is a sham defence.

- [6] The primary defence raised by the defendants is that it was not the Michiel Burger Boerdery Trust which leased the sheep, which took delivery of the sheep and which farmed with the sheep, but the Ek + Pa Trust which had entered into a lease agreement with first plaintiff in his personal capacity. That agreement had been renewed on 31 January 2010. Fourth defendant avers that it is the Ek + Pa Trust which

owed money to first plaintiff in his personal capacity and that the Michiel Burger Boerdery Trust, as a result of the duress brought to bear upon fourth defendant by the plaintiffs, agreed to mortgage its property in order to secure the acknowledgement of debt undertaken by first and second defendants. That is how it came about that third defendant authorised the signing of the lease agreement dated 28 February 2011 and the resolution giving the trustees authority to sign the acknowledgement of debt (annexure "A"). Fourth defendant thus alleges that the agreement is a "simulated" agreement. I find this hard to believe that a trustee, supposedly independent from family connection with first/fourth defendant and second defendant, would authorise signature of a lease agreement, which is a farce, and more particularly, acknowledge an indebtedness undertaken to make payment thereof when such a debt did not and never did exist. Moreover, not just commercial reality shows that parties never bind themselves in this manner to pay such a debt, but such conduct defies logic. Even more stupendous is the fourth defendant's version that the third defendant agreed to and gave authority for the Michiel Burger Boerdery Trust to mortgage an immovable asset belonging to the trust to secure payment of a debt not owed by the trust and one

which had never been incurred by the trustees on behalf of the trust.

[7] The defendants have not disclosed a *bona fide* defence which is good in law. Summary judgment is accordingly entered against the defendants, jointly and severally, the one paying, the other to be absolved, for:

1. 1.1 payment of the amount of R1 876 000,00;
 1.2 interest on the amount of R1 876 000,00 at the rate of 17,7% per annum from 1 January 2011 to date of payment in full;
2. In addition defendants are ordered to pay the plaintiffs' costs of the application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and own client.
3. The property described as "certain remainder of the farm Pietersdal 150, district Senekal, Free State Province, in extent: 5 139 201 hectares" held by virtue of Deed of Transfer T717/2007 is declared specially executable.

S. EBRAHIM, J

On behalf of plaintiffs: Adv N Snellenburg
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of defendants: Adv P C F van Rooyen SC
Instructed by:
Hill McHardy & Herbst Inc
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/sp