

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
 REPUBLIC OF SOUTH AFRICA

Case No. 16532/2008

In the matter between:

RZT ZELPY 5073 (PTY) LTD	First Applicant
THEMBINKOSI MANDLA LEONARD MALEVU	Second Applicant
MALEVU INVESTMENTS CC	Third Applicant

and

MJONO'S TOURS CC	Respondent
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JUDGMENT

GORVEN J:

1]The respondent launched an application in December 2008 against the applicants ("the main application"). The second applicant is a director of the first applicant and the sole member of the third applicant. An order was granted by default on 5 March 2009. The order granted was a joint and several one for payment by the applicants to the respondent of R750 000.00 along with interest and costs. In August 2009, when his shareholding in certain companies was attached pursuant to the order, the second applicant became aware of the order. In October 2009 an attempt was made by the second applicant, without legal representation, to launch an application to

rescind the order but he was informed by the court in February 2010 that his papers were wholly defective and the matter was removed from the roll. Some time elapsed. The holding company of the private companies whose shares had been attached, known as Miranda Holdings, became alarmed by the attachment. This was because it was concerned that the sale of these shares might affect its rights under certain contracts since the second applicant's shareholding contributes Black Economic Empowerment credentials necessary for the contracts held by these companies. Miranda Holdings accordingly assisted the applicants in funding the present application, which has been brought under Uniform rule 42(1)(a) alternatively the common law, for rescission of that order ("the rescission application"). I shall refer to the parties by their present designation and, where I quote from the main application papers, I shall insert their present designation in square brackets in place of the designation in the main application so as to avoid confusion.

2]The issues in this application are essentially twofold, namely:

(a) Whether the order was erroneously granted within the meaning of those words in Uniform rule 42 (1)(a).

(b) Whether the applicants have shown sufficient

cause for rescission under
the common law.

I shall deal with the second of these first.

3]An applicant for rescission must show sufficient cause why the application should be granted. The two essential elements under the common law were said, in *Chetty v Law Society, Transvaal*¹, to be the following:

- '(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success'

4]It is not necessary to go into any great detail regarding the question of wilful default. Mr *Hollis* SC, who appeared for the respondent in the rescission application, indicated in argument that he would not persist with any submissions to the effect that wilful default on the part of the applicants had been shown. Suffice to say that the second applicant made out a case that the application did not come to his attention and further made out a case that there had not been any proper service on the first and third applicants prior to the grant of the order. I agree with Mr *Hollis* in this regard.

5]This then leaves the second aspect of a *bona fide* defence which, *prima facie*, carries some prospect of success. In this regard, the history of the matter is of some consequence. The second applicant assembled a consortium of individuals and corporate entities. The consortium was formed

¹ 1985 (2) SA 756 (A) at 764I-765C.

to provide transport under a proposed contract with Duvha Transport CC. The first applicant was to be utilised for the purpose of contracting with Duvha Transport CC. The various members of the consortium were to make available vehicles to the first applicant for the performance of the contract. Since many of the members of the consortium did not have such vehicles or the means to purchase them, deposits were to be paid by them so that finance could be obtained to purchase the vehicles. It is common cause that the deposits were placed in the bank account of the third applicant purely for onward transmission. There is some dispute as to the basis of these payments. The applicants said that the deposits were advanced to one Patricia Royeppen pursuant to agreements concluded between her and individual consortium members whereby she would facilitate the purchase of the vehicles for each consortium member. The respondent said that the money was advanced to the first applicant for this purpose and that it was unaware of any contract with or involvement of Royeppen. The respondent was a member of the consortium.

6]The business venture failed. The proposed contract between Duvha Transport CC and the consortium never materialised. The applicants' version is that the money advanced to Royeppen were misappropriated, in all probability by the person to whom she forwarded the money. Quite understandably this gave rise to significant unhappiness on the part of consortium members who had advanced money. The respondent had advanced R750 000.00 and the second applicant R880 000.00. Because the second applicant had played a leading role in the venture, members of the

consortium looked to him for an explanation and, in some cases, for payment.

7]The case of the respondent contained in the founding affidavit in the main application can be set out briefly. It stated that the second applicant had undertaken, on his own behalf and on behalf of the first and third applicants, to repay the deposits paid by consortium members. It further said that a letter dated 3 January 2008 was sent by the second applicant's attorney to the respondent which, the respondent claimed "records an admission by the First and Second [Applicants] of their liability to make repayment of the amounts paid by the [Respondent]". It went on to refer to a further letter dated 23 July 2008, signed by the second applicant addressed to all consortium members which the respondent claimed amounted to a personal undertaking by the second applicant to all consortium members to repay this money.

8]A court dealing with a rescission application has a wide discretion as to what constitutes sufficient cause. The following was said by Trengove JA in this regard:²

'Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by *Kersteman (op cit sv defaillant)*) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. . . It follows from what I have said that the Court's discretion under the common law extended beyond,

² *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F-H.

and was not limited to, the grounds provided for in Rules 31 and 42(1)’

9]The main issue debated in argument before me was the question of the defence raised by the applicants. Mr *Hollis* was unable to submit that this was not the case in respect of the first and the third applicants. I agree. On the applicants’ version, neither was a party to the contract pursuant to which the respondent advanced the money and neither undertook liability to pay the moneys to the respondent. If evidence to this effect is accepted by the trial court, the defence raised would be good.

10]The second applicant disavowed having made any undertaking but admitted sending the letter of 23 July 2008. Mr *Gordon SC*, who appeared for the applicants, submitted that this letter did not give rise to any liability on the part of the second applicant. The first point to consider is the contention of the second applicant that the letter was sent under duress in circumstances which render any contract concluded as a result of its being sent voidable.

11]The second applicant stated in this regard that he was told by a consortium member that a hit man had been hired to kill him. In addition, he stated that on several occasions individuals purporting to represent consortium members went to his residence and threatened his life. He was not present when these incidents took place and put up an affidavit by his step sister telling of three such occasions. In the first of these, during August 2007, men rang the doorbell and demanded to see the second applicant stating that they had come to fetch ‘their money’. When they were told that he was not present,

they claimed that he was in fact present and was avoiding them. They thereafter discharged firearms before leaving. The second occasion was similar and took place during the same month. On the third occasion, about one year later, some men rang the bell and said that they would kill the second applicant unless he gave them 'their money'. The second applicant said that these and other incidents induced in him a fear for his life. This is why he sent the letter of 23 July 2008 to all consortium members. As a result of these threats he also started to sell his assets so as to pay the most threatening consortium members portions of the amounts invested by them. The second applicant did not say whether he could establish on whose behalf the persons who arrived at his gate were threatening him. It is also clear that, if the above evidence is accepted by a trial court, the fear of the second applicant was not an unreasonable one and the threats were *contra bonos mores*.

12]Our courts have recognised that a contract concluded as a result of duress may be rescinded in certain circumstances. De Villiers CJ said the following in this regard:³

'Where a man is forced by menaces to his person to make payments which he is not legally bound to make, it cannot be said that there is a total absence of consent – but, inasmuch as his consent is forced and not free, the payment is treated as involuntary, and therefore subject to restitution.'

13]The threat emanated from third parties who the second applicant has not linked to the respondent as its agents. It has not been decided in our law

³ *White Bros v Treasurer-General* (1883) 2 SC 322 at 351.

whether this gives rise to a right to rescind although Ramsbottom J, *obiter*, said the following:⁴

'It seems probable that in our law a contract entered into through fear induced by the duress of a third party is voidable, on the principle that there is no true consent: See Wessels on *Contract* (vol. I. par. 1193); Pothier on *Obligations* (Part I, ch. I, sec. 23); Story on *Contracts* (5th ed., par. 518); but in view of the allegations I have just quoted, it is unnecessary to express an opinion on this point.'

14]The second applicant said that the letter was sent as a result of duress and in fear of his life even though he did not say in the rescission application that the member of the respondent or someone else acting on behalf of the respondent was behind the threats. (An averment was contained in the plea which he sought to file in the main application after the order had been granted that he feared that the respondent 'and his hosts' would shoot him and that all the members of the consortium had threatened him with acts of violence). If that evidence is led and the respondent is found to have made such a threat, this would, of course, raise a defence to the claim. Even if there is no such evidence, it is at least arguable on the reasoning in *Broodryk* that, in the remaining circumstances set out by the second applicant, a court would not require him to demonstrate that the threats were made by persons connected to the respondent before setting aside the undertaking relied on. The letter, sent as it was to all the consortium members, would have given rise to a number of individual contracts as and when each consortium member accepted the offer contained in it. If sufficient facts are established, it may be held, therefore, that the sending of the letter to all members, prompted

⁴ *Broodryk v Smuts NO* 1942 TPD 47 at 53.

as it was by duress, could not give rise to a valid offer and that each such contract is subject to rescission. There is accordingly some prospect that all such contracts, including that with the respondent, may be found to be subject to rescission. I am not in a position to go further than that and deliberately refrain from making any such finding on the facts before me at this stage that the defence of duress is a good one.

15]Mr *Gordon* further submitted that the main application did not make out a case for the relief claimed. It is necessary to evaluate the founding affidavit in the main application for this purpose. He submitted that the underlying *causa* relied upon by the respondent in the main application appears in the last sentence of paragraph 15 thereof, to the following effect:

‘The Second [Applicant] on his own behalf and on behalf of the First and Third [Applicants] undertook to immediately refund the payments made amounting to R750 000.00.’

16]This was followed by the following averments concerning the attorney’s letter of 3 January 2008:

‘The letter records that the Second [Applicant] had applied to the Industrial Development Corporation for a loan to refund money paid by the [Respondent] in respect of the failed coal transportation business. The significance of this letter is that it records an admission by the First and Second [Applicants] of their liability to make repayment of the amounts paid by the [Respondent].’

17]Paragraph 18 of that affidavit continued:

‘On 23 July 2008 the [Respondent] received a letter from the Second [Applicant] A copy of this letter is attached hereto marked Annex “**FA 5**”. In this correspondence the Second [Applicant] accepted personal liability for all amounts contributed to the failed transportation business venture and agreed to pay the said amount in cash or otherwise to the respective

individuals and/or companies.’

18]The respondent then claimed that the applicants were jointly and severally liable for repayment. In relation to the first and third applicants, the claim rests only upon the alleged undertaking of the second applicant on his and their behalf referred to in paragraph 15 of the main application. Mr *Gordon* submitted that this was insufficient to found a cause of action. The averments in this paragraph amount to a bare assertion. In applications it is accepted that the affidavits must be regarded as both pleadings and evidence.⁵ In Uniform rule 18(6), it is required of a party who relies on a contract that he or she ‘shall state whether the contract is written or oral and when, where and by whom it was concluded’. The underlying rationale is clear. The basis of a contract must be set out with sufficient particularity to enable the other party to respond meaningfully to it by way of a plea or, in application proceedings, an answering affidavit. For the same reason, that Uniform rule 18(4) requires that the material facts on which a party relies should be pleaded. In the case of a contract, these would be the material terms thereof. None of this was done. There is an argument that this is insufficient to found a cause of action but, in any action, it would more properly give rise to a complaint that the pleading was vague and embarrassing rather than that it fails to disclose a cause of action. The baldness of the averment is a factor to be borne in mind when weighing up whether the second applicant has shown sufficient cause. I do not consider it necessary or desirable to make a finding on whether, on this basis, the order was erroneously granted and thus rescindable under Uniform rule 42(1)(a).

⁵ *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469D-E.

19]Mr *Gordon* further submitted that, properly construed, the letter of 23 July 2008 did not amount to the undertaking relied upon by the respondent. It was necessary for this purpose, he submitted, to construe the nature of the undertaking that appears from the letter. Paragraph 18 echoed the words of the letter where the undertaking was said to be to 'pay the said amount in cash *or otherwise*' (my emphasis). He submitted that the election as to the means of repayment, that is, whether it was to be cash 'or otherwise', lay with the second applicant. The respondent could not, therefore, obtain an order for specific performance for payment of cash. The 'or otherwise' was spelled out by the second applicant in some detail and involved a transfer of his shareholdings in certain companies to the company on whose letterhead he wrote the letter and which had been formed for that purpose. The various consortium members would obtain shares in that company as repayment. Once again, this interpretation of the undertaking has some prospect of success but I refrain from going any further and making such a finding at this stage.

20]Mr *Hollis* submitted that the letter of 3 January 2008 corroborated an earlier undertaking by the second applicant to pay the money. This letter stated that the second applicant had applied to the Industrial Development Corporation for a loan to refund money paid by the respondent. The letter does not mention any prior undertaking. It may well not, itself, amount to an undertaking. It is not immediately apparent to me how it could provide corroboration for an undertaking. It should be recalled, in addition, that the

threatening visits to the second applicant's home had commenced in August 2007 which pre-dated this letter and the same issues may well arise as regards duress. The letter is certainly not such as to immediately banish the defences raised by the second applicant to an extent requiring me to find that the second applicant has not shown sufficient cause.

21]As a result of the conclusion that I have come to, I do not find it necessary, for the purpose of the rescission application, to determine whether the order was erroneously granted within the meaning of those words in Uniform rule 42(1)(a). This was the context in which the issues I have dealt with in paragraphs 15 to 20 hereof were raised in argument. Taken as a whole, the defences relied upon by the second applicant seem to me to carry some prospect of success. In the light of what I have said above, I consider that the interests of justice and fairness dictate that the order against the second applicant should be rescinded in that the applicants have shown sufficient cause for rescission of the order under the common law.

22]Mr *Hollis* submitted that my discretion extends to granting any appropriate order. He submitted that this includes an order interdicting the dealings of the second applicant in his shareholdings and he moved for such an order. He based his submission on the words in Uniform rule 31(2)(b) that the court can grant rescission 'on such terms as to it seems meet'. Of course the application was not brought under that rule although it seems that, under the common law, a similar discretion exists. It may well be that a court has the discretion contended for by the respondent. I consider the discretion to relate primarily to

matters of procedure and costs rather than to such matters. Even if a court had such a discretion, however, it would need to be exercised judicially on the basis of disclosed facts. In the normal course of events, an interdict against dealing in one's property would only lie if it can be shown that there is a likelihood that such dealing would take place and that, in addition, such dealing would be done with the object of frustrating the claim of the party seeking the interdict.⁶

23]No such case has been made out by the respondent. All that was raised was an averment of prejudice in the respondent's affidavit if the second applicant should transfer the shares on the basis envisaged in the letter of 23 July 2008. There are at least two answers to this averment. In the first place, the second applicant has clearly repudiated that letter in this application. He is therefore unlikely to give effect to it. Secondly, more than a year passed before the second applicant became aware of the order and there is no indication that, during that time, he attempted to deal with the shares in any way prejudicial to the respondent. A rescinded order is a nullity. On the facts before me I can see no basis for the respondent to be placed in a better position than it would have been in had no order ever been granted. I am therefore not inclined to make the grant of an order for rescission subject to such an interdict.

24]In his heads of argument Mr *Gordon* tendered payment by Miranda Holdings of the costs of the application. He reiterated this tender in argument indicating that he would not be able to submit that the opposition to the

⁶ *Knox D'Arcy Ltd & others v Jamieson & others* 1994 (3) SA 700 (W) at 706B-D.

application was unreasonable. Mr *Hollis* accepted the tender and I agree that this would be an appropriate order as regards costs.

25]In the result, I grant the following order:

1. The order of this court, granted on 5 March 2009 under the above case number in favour of the respondent against the applicants jointly and severally, is rescinded.
2. The notice of motion in the main application shall stand as a simple summons in an action between the parties.
3. The respondent is directed to deliver a declaration within twenty days of the date of this order or such date as may be agreed between the parties.
4. The further conduct of that action will be governed by the Uniform Rules of Court.
5. Miranda Holdings is directed to pay the costs of this application, including the costs of opposition.

GORVEN J

DATE OF HEARING : 25 February 2011

DATE OF JUDGMENT : 9 March 2011

FOR THE APPLICANTS' : Adv D A Gordon, SC, instructed by
Shepstone and Wylie Attorneys

FOR THE RESPONDENT: Adv N D Hollis, SC, instructed by
Thomson Wilks Attorneys locally
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