REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2674/2011

In the matter between:

MB DE KLERK & ASSOCIATES **PLAINTIFF**

and

HARRY MARZELL EGGERSCHWEILER **FIRST DEFENDANT**

MWANGI CHEREBAVRAHAM WA KAMAU **SECOND DEFENDANT**

Neutral citation: *MB De Klerk & Associates v Eggerschweiler* (I 2674/2005) [2013] NAHCMD 285 (16 October 2013)

Coram: DAMASEB, JP
Heard: **25 – 26 June 2013, 05 July 2013.**
Delivered: **16 October 2013**

Fly note: Duress – What constitutes – Defendant raising the withdrawal of legal practitioners as threat, alternatively duress to induce him to sign an Acknowledgment of Debt – Such threat not constituting duress in law – Fees – Fees charged for litigious work done – Whether such fees liquidated or taxation necessary – Disputed fees may be paid only after taxation.

ORDER

I make the following order:

1. The defendants are liable to the plaintiff under the *a-d* executed by them in favour of the plaintiff on 24 May 2011 as security for the Agency's liability for legal services rendered by plaintiff to the Agency, jointly and severally, the one paying, the other to be absolved, in the amount to be determined by the taxing master as ordered below;

2. The plaintiff must within 30 court days of this order prepare a separate bill of costs for attorney and own client costs in respect of legal services rendered by the plaintiff to the Agency, and set same down for taxation before the taxing master, on five court days' notice to the defendants who shall be entitled to be present and to object to any item included in such bill, either personally or by counsel;

3. The amount taxed off by the taxing master after having entertained representations from the plaintiff and the defendants shall, upon such taxing off, become due and payable and shall bear interest at the rate of 20% calculated from 1 April 2011 to date of payment;

4. The plaintiff is awarded costs of suit on party and party scale, to include the costs of one instructing and one instructed counsel.

JUDGMENT

Damaseb, JP:

[1] The plaintiff, a firm of legal practitioners, practices law under the name and style of MB De Klerk & Associates. It sues the defendants on an acknowledgement of debt ('*a-d*') which the defendants executed in plaintiff's favour, accepting personal

liability in the amount of N$ 132 587.47. The portions of the *a-d* which are material for present purposes read as follows:

> '1. [Above-cited defendants] Do hereby acknowledge being lawfully and truly indebted to **MB DE KLERK & ASSOCIATES, ROOM 209, 2ND FLOOR, SOUTH BLOCK, MAERUA PARK, CENTAURUS ROAD, KLEIN WINDHOEK,** the one to pay the other to be absolved (hereinafter referred to as "The Creditor") in the amount of N$ 132 587.47 (one hundred Thirty Two thousand five hundred and eighty seven Namibian Dollars and fourty seven cents)(capital) together with all legal costs (costs), interest and collection commission.
>
> 2. We undertake to repay the aforementioned amount on/or before 25 June 2011.
>
> 2.1 the full balance, including costs, disbursements and interest has been paid in full.
>
> 3. We undertake to pay interest on the amount at a rate of 20% per annum on the outstanding balance as from 1 April 2011 until the full amount in respect of capital, interest, collection commission, legal fees and disbursements has been paid in full.
>
> 9. We hereby consent, that should we fail to make any payment on due date, the full amount outstanding will immediately become due, owing and payable and the Creditor shall in such extent be entitled to:
>
> 9.1 Make this Acknowledgment of Debt an order of Court;
>
> 9.2 Apply for Default Judgment for the amount outstanding at that time.'

[2] The plaintiff's action commenced by way of provisional sentence summons which was duly opposed by the defendants by affidavit.[1] The court (Kauta, AJ) then adjudicated the opposed provisional sentence summons[2] and dismissed it; whereafter pleadings were exchanged[3] and the matter proceeded to trial before me.

[3] It is common cause that at the time the defendants executed the *a-d,* they were the directors and sole shareholders of a company, African Civil Agency (Pty)

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[1] In terms of rule 8(1) (*b)* of the rules of court.
[2] In terms of rule 8(8) of the rules of court.
[3] Ibid.

Ltd ('Agency'), which was the client of the plaintiff. It is common cause further that the defendants had not personally received legal services from the plaintiff as a result of which there could exist any present or future personal liability for legal costs towards the plaintiff. The fact of the matter is that the *a-d* had the effect of making the defendants assume personal liability for the obligations of the Agency. The defendants do not dispute that they signed the *a-d* acknowledging liability to the plaintiff in the amount claimed.

[4] The pre-trial order issued by the court on 02 April 2013 based on the parties' joint proposals identified the issues that call for determination by the court as follows: (i) whether the first and second defendants signed the *a-d* under duress and/or under pressure; (ii) whether the document purporting to be an *a-d* is properly so-called, or a suretyship agreement; (iii) whether the *a-d* constitutes security for the fulfillment of a future debt, arising from a cession agreement, and (iv) whether the cession agreement is applicable or relevant to the plaintiff's cause of action. The defendants pertinently pleaded that the *a-d* was to secure a future debt. That picture changed when the defendants came to testify as I will show presently.

Plaintiff's case

[5] Mr. Horn testified on behalf of the plaintiff to the effect that the defendants, acting for the Agency, had a long standing lawyer/client association with the plaintiff firm and that the plaintiff rendered legal services to the Agency since 2009 in various litigious matters. He further testified that legal services were rendered to the Agency by the plaintiff of which an unpaid account has not been settled. I wish to add in parenthesis that Mr. Horn did not discover any account evidencing the debt, nor did he demonstrate how the account of N$ 132 587.47 was made up. According to Mr. Horn, he prepared the *a-d* and arranged a meeting with the defendants on 24 May 2011 to have it signed by them in view of the Agency's inability to meet its financial obligations. He regarded the signing of the *a-d* to be based on mutual consensus and said that no objection thereto was raised by either defendant on 24 May 2011. Mr. Horn also testified that he had in the original draft *a-d* provided that the outstanding debt was payable on 15 June 2011 but that on the request of the

defendants that date was changed to 25 June 2013. It was implied that in so changing the payment date, the defendants applied their minds and were not influenced by any undue pressure. Mr. Horn therefor denied exerting any undue influence or pressure on the defendants to sign the *a-d.*

[6] Mr. Horn further testified that the cession agreement executed by the Agency on the same date and immediately after the *a-d* was to cover future legal costs to be incurred in connection with the case that was set down for the 11th -15th July 2011. He was emphatic that the cession bore no relationship to the *a-d.* He also testified that he had explained to the defendants that accepting the cession as security for legal services in respect of the pending case was subject to instructed counsel, Mr. Strydom, agreeing to its terms. He then discussed the matter with Mr. Strydom who did not agree.

[7] In the letter written of 5 July 2013 the plaintiff's Mr. Horn drew the defendant's attention to the fact that the outstanding fee for which they accepted liability remained unpaid and that they were not placed in funds to do the scheduled trial.
The plaintiff thereafter withdrew as practitioners of record for the Agency on 7 July 2011.

Defendants' case

The pleaded defences

[8] Upon reading the opposing affidavits deposed to by the defendants on 23 September 2011 in opposition to the plaintiff's provisional sentence summons, the distinct impression one forms is that the central pillar of their case is four-fold:

a) there was no outstanding debt for any legal services rendered to the Agency and the only liability there was, was to put the plaintiff in funds for the case that was set down for 11-15 July 2011[4];

[4] It is common cause that the Agency had a pending claim against the GRN in case no I 3298/2009 which was set down for trial on 11-15 July 2011.

b) the *a-d* was signed by the two defendants under pressure and duress by the plaintiff's Mr. Horn, who told them that if they did not sign it, he would withdraw from the case;

c) in order to secure the legal services of the plaintiff which was yet to be rendered, the Agency had passed a cession over its claim against the Government in favour of the plaintiff up to an amount of N$ 500 000;

d) the *a-d* was subject to the understanding agreement that the plaintiff would continue to represent the Agency and that upon the plaintiff withdrawing as legal practitioners of record, it was no longer enforceable.

[9] The clear implication of this is that the *a-d* was superseded by the cession. There was no suggestion of it being ancillary to the cession.

[10] In their plea to the provisional sentence summons, filed of record on 24 September 2012, the defendants set out their defence to the plaintiff's claim as follows:

'. . . . The defendants plead that the plaintiff's Annexure "A" constitutes a suretyship agreement signed under duress and/or undue influence exerted by an agent of plaintiff, and meant as security for the fulfillment of a future debt arising from a cession agreement entered into between plaintiff and a third party namely African Civil Aviation Agency (Pty) Ltd. The acknowledgment of debt on which plaintiff relies is a surety and ancillary to the cession agreement.

. . . . The defendants . . . plead that the obligation to pay was on the third party (cessionary) mentioned supra, and that such debt had not become due, and further that defendants were unduly influenced by plaintiff's agent to sign Annexure "A". The cause of indebtedness does not appear from plaintiff's Annexure "A" by virtue of the fact that it is ancillary to the said cession agreement.

In amplification of the aforesaid denials the defendants plead that the principal debt derives from the cession agreement which is not the agreement on which plaintiff places reliance for its claim. Defendants accordingly deny that the principal debt became due in the event of default by defendants as the principal obligation to pay is on African Civil Aviation (Pty) Ltd.' (Underlining for emphasis)

[11] The plea now states that the *a-d* was to be suretyship for the debt arising under the cession. There is no mention that the cession superseded the *a-d.* That aside, there are two recurrent themes in the opposing affidavit and the plea: duress and the Agency's liability for a future debt. In the affidavit and the plea there is no acceptance whatsoever that there was any existing liability for legal services rendered by the plaintiff to the Agency - let alone the defendants. It is clear from the plea that the defendants deny any existing indebtedness either by them in their personal capacities, or by the Agency. This observation is critical in view of how the defendants' case has metamorphosed subsequently.

[12] In the pleaded case, the defendants denied that there was any existing liability by the Agency for outstanding accounts and for which they could incur, or have accepted personal liability. The defendants' written pleadings create the impression that the only obligation the Agency had towards the plaintiff on 24 May 2011 was to avail funds to the plaintiff for the services of instructing and instructed counsel. As I understand the pleaded defences, the *a-d* was executed in order to meet that future liability for legal services but that it was, in any event, superseded by the cession passed on the same day and accepted by the plaintiff's Mr. Horn.

[13] The further line of defence, as I understand it, is that because the plaintiff withdrew as practitioner of record before the case was heard in July 2011, there was no longer any liability arising under either the *a-d* or the cession. Nowhere in the defendants' pleaded case is any concession made that the plaintiff was entitled to any fees from the Agency for services already rendered which were due and payable. In fact, the defendants' pleadings expressly deny that to be the case.

The evidence

[14] The defendants' evidence was that they initiated the 24 May 2011 meeting for the purpose of informing Mr. Horn of the plaintiff that the Agency had no funds to pay in advance for legal representation by the plaintiff and instructed counsel.

[15] First defendant testified that a cession agreement was then prepared to cede N$ 500 000 to the plaintiff in order to secure counsel for the July trial. His testimony is that Mr. Horn only signed on condition that the defendants signed the *a-d*, failing which the plaintiff would withdraw from representing the Agency in the pending case. Both defendants stated under oath that they would not have signed the *a-d* had it not been for the fact that they were under pressure to retain legal representation for the Agency's case to be heard in July.

[16] The second defendant supplemented the evidence of the first defendant by stating that the defendants could not secure the services of another legal representative because (i) the Agency did not have money (ii) the case was voluminous and that the plaintiff was more familiar with the facts and (iii) Mr. Horn refused to give the file to the second defendant.

[17] In their oral evidence at the trial the defendants under oath (especially the first defendant) adopted the posture that they were aware that the Agency owed some money to the plaintiff but that they did not know how much because the plaintiff's Mr. Horn never provided them with statements of account and that, in any event, some of the indebtedness must have been off-set by the favorable costs orders they received at various stages of the litigious matters being handled by the plaintiff on the Agency's behalf.

[18] Based on the answers given by the defendants under cross-examination I was left with no doubt that they could not seriously dispute that the Agency had some unpaid fees with the plaintiff. Their answers and demeanor in the witness box portrayed the picture that they did not refuse then, or now, to pay for the services rendered by the plaintiff to the Agency and that they would do so once the Agency was successful in its claims against the government and the plaintiff provided proof of the fees outstanding. What is unmistakable about their answers and demeanor is that the *a-d* was never intended as security on their part for any existing debt of the Agency. They took the view that it was obtained under duress and was, in the event,

superseded by the cession passed in favour of the plaintiff for services which were still to be provided by the plaintiff and instructed counsel.

[19] The acceptance under cross-examination of the possibility of an unpaid account of the Agency is in conflict with the pleaded case. Besides, the *a-d* was never mooted as being ancillary to the cession in the defendants' opposition to the provisional sentence summons and the later suggestion that it was in fact superseded by the cession leaves me to wonder just what the defendants' stance is about the status of the *a-d*.

[20] The myriad defences put up by the defendants seem to me to be anomalous and inconsistent – clutching at straws really. It seems to be a case of ''throw anything and everything in the textbook at them, just in case something sticks''. I will explain: Reliance on duress is a tacit admission that the underlying transaction[5] is valid and the document evidencing it[6] a true reflection of that transaction, but for the *metus*. It seems to me to be an entirely different thing to say that the document evidencing the transaction was intended as something other than what it says[7]. The waters become even more muddled when it is suggested that the document evidencing the transaction was replaced by another transaction[8] between the plaintiff and another legal entity.[9] But these are all the defences I am called upon to fashion a remedy from in favour of the defendants.

[21] It is a deeply troubling thought for the court to be left to guess at the end of the case just what a party's case is. As Lord Tempelsman cautioned in *Ashmore v Corporation of Lloyd's*[10] :

'The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the

[5] The acknowledgement of indebtedness of the two defendants to the plaintiff recorded in the *a-d*.
[6] The *a-d*.
[7] I.e. that it was a security for the payment of legal services which were to be rendered by the plaintiff and instructed counsel in connection with the case which was to be heard on 11-15 July 2011.
[8] The cession passed by the Agency in favour of the plaintiff on its claim against the Government, up to a maximum of N$500 000.
[9] The Agency.
[10] [1992] 2 ALLER 486 at 493.

issues and leave the judge to draw his conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination'. [My underlining]

[22] Not only do the defendants fall foul of the wise counsel of Lord Tempelsman in that the plethora of defences leave the court to guess just exactly what their case is, but the evidence led at the trial was also not consistent with the pleas and changed depending on the circumstances. The defendants' defence is thus gravely undermined by the inherently inconsistent versions put up at various stages and in the plea.

[23] Under cross examination, the first defendant conceded that the defendants were aware as at 24 May 2011 that the Agency had an outstanding account with the plaintiff for services rendered. He stated unequivocally that, as directors, he and the second defendant never disputed the Agency's indebtedness to the plaintiff and that they intend to pay the plaintiff's outstanding account when the Agency succeeds in recovering the moneys due from the Government. This concession flies in the face of previous denials. He was also unable to explain significant aspects of the averments made in the plea. For example, he could not explain the basis for the allegation that the *a-d* was a suretyship.

[24] The second defendant testified that the cession agreement was prepared to serve the purpose of securing the fee deposit required by plaintiff to continue to represent the Agency on 11 July 2011, including advocate's fees. According to the second defendant, the plaintiff's Mr. Horn knew that the Agency's source of funds were 'Nigeria' and 'Libya'. He maintained that the cession passed did not relate to any debt due and payable arising from legal services rendered. He further testified that the *a-d* was executed by them as security in the event that the Agency did not make good under the cession and that since the plaintiff withdrew as practitioner of record before the pending case was heard, the cession lapsed as did the *a-d*.

[25] The second defendant was emphatic that the only reason for both the cession and the *a-d* was to serve as security for the payment of the legal services that were still to be rendered in connection with the July 2011 trial as plaintiff's Mr. Horn insisted upon funds being kept in trust. This defendant relied on plaintiff's letter of 5 July as proving that therein Mr Horn indicated that the plaintiff needs to be placed in trust funds in order to proceed with the trial.

[26] As regards the date of 25 June being inserted in the *a-d* at their request, the second defendant's evidence was that it was the date on which they were to have placed the plaintiff in funds for the forthcoming trial. The second defendant was less forthcoming than his co-defendant in admitting that the Agency was indebted to the plaintiff for legal services rendered but still not paid for. According to him, the Agency paid for all legal fees of the plaintiff as and when it received funding from its funders overseas and that whatever account there still might have been was off-set by the favourable cost orders against other parties.

[27] In apparent contradiction, the second defendant stated in cross-examination that if the plaintiff proves that the Agency remains liable for unpaid legal services, the defendants would pay any amount still due.

[28] Significantly, the cession records that it was not a novation of any debt then due and outstanding. It records in part as follows:

'This Cession is <u>not a novation of any existing indebtedness</u> and shall not prohibit the creditor to take action against the cedent for and in respect of any monies owing by the cedent to the creditor. . .' (My underlining for emphasis)

[29] This puts to paid any suggestion by the defendants that the cession was intended as security for the legal services still to be rendered and had nothing to do with any outstanding and unpaid debt for legal services rendered.

[30] Worse still for the defendants, the resolution which authorised the cession records as follows:

'It was resolved: that the company signs a cession over its claim against the Government of Namibia in favour of MB De Klerk for the amount of N$ 50 000.00 (Five Hundred Thousand Namibia Dollar) in respect of an outstanding account at the latter for legal costs.' (My underlining for emphasis).

[31] The second defendant's proposition that the date of 25 June 2011 was inserted, not as the deadline by which an outstanding account had to be paid, but as the deadline by which the funds required for the pending case was to be paid, is at odds with his own evidence that the cession served as security for the fees required for the pending case. How could a deposit by payable on 25 June if the cession, on his version, served that purpose?

Credibility findings

[32] Given the rather confusing and conflicting versions put forward by the defendants, I am left with no choice but to accept the plaintiff's version on the disputed factual issues.[11] I accordingly find that the defendants had executed the *a-d* in favour of the plaintiff as security for the Agency's indebtedness to plaintiff for legal services rendered.

[33] I also find that the cession passed by the Agency in favour of the plaintiff was intended for the case which was to be heard on 11-15 July 2011, but was not accepted after Mr. Strydom stated that it was not acceptable to him. I reject as false the defendants' version that the *a-d* was a suretyship for a future debt which had not arisen on account of the plaintiff withdrawing as legal practitioners of record.

[11] U v The minister of Education, Sports and Culture and Another 2006 (1) NR 168 (HC) at 184B-F.

[34] The notion of the *a-d* being a suretyship is an afterthought which surfaced for the first time in the plea but further compounded by the fact that on the one hand it was suggested to be ancillary to the cession while, when the circumstances suited it, it was suggested to have been superseded by the cession.

The probabilities

[35] It is common ground that the Agency had a case pending in the High court on 11-15 July 2011. The defendants under oath admitted some form of liability by the Agency in respect of services already rendered: a version which, as I have shown, is at odds with the defendants' pleaded case. The plaintiff's letter of 5 July threatening withdrawal in the event of non-payment draws a distinction between fees due and fees required for services which were still to be rendered. The probabilities overwhelmingly favour the plaintiff's version that the *a-d* was executed by the defendants in order to accept personal liability for the Agency's indebtedness to the plaintiff for legal services rendered which were due and payable. The amount recorded in the *a-d* is not some Ballpack figure but is precise down to the last cent. It is most improbable that if the *a-d* was meant to be security for legal services which were to be rendered in future it would be so precise. It was more likely to have been expressed and recorded as a global round-sum.

[36] It was apparent from what the first defendant stated under oath that he and the co-defendant considered that they personally stood to lose substantially if the case did not proceed. They were fully aware that the Agency was on hard times financially and could not meet its indebtedness to the plaintiff. I find no significance in the fact that the plaintiff did not explain the Latin terminology in the *a-d*. They were aware ex facie the document that the plaintiff laid claim to an amount of N$ 132 587.47; as we now know for legal services rendered to the Agency at the instigation of none other than the two defendants who were , at all material times , the alter ego and directing minds of the Agency.

[37] I am satisfied that the probabilities do not favour the version that an instructing legal practitioner would be satisfied with a cession of a claim against a third party – a

claim still to be litigated and being defended by the opposing side – as security, not only for the plaintiff's fees for professional services, but also for the fees of instructed counsel. That leads me to conclude that there was no relationship whatsoever between the *a-d* and the cession - a cession which Mr. Horn testified was subject to agreement of instructed counsel who did not agree to those terms and therefore was no longer relied on by the plaintiff and thus its withdrawal as legal practitioner of record.

[38] I also reject as improbable the second defendant's version that to his knowledge the Agency was not indebted to the plaintiff for any outstanding fees. In the first place, his own subsequent concession to the contrary undermines that view but, in addition, it ignores real live reality to argue that a favourable award of costs is sufficient to meet a client's attorney and own client costs liability towards its legal practitioners: the truth of the matter is that a client's liability for the fees owed to its own legal practitioners invariably far exceeds the costs recoverable from the opponent. [12]

[39] The result this leads me to is that the probabilities favour the version that the second defendant too knew on 24 May 2011 that the Agency was indebted to the plaintiff for unpaid legal fees and that it was that liability that the defendants were accepting by executing the *a-d.*

[40] I am satisfied that the plaintiff on preponderance of probabilities established that the two defendants on 24 May 2011 executed the *a-d* to accept joint and several personal liability for the Agency's unpaid account for professional legal services rendered by the plaintiff to the Agency. That is, however, only as far as I am prepared to find as regards the plaintiff's right of recourse against the defendants.

[41] The undisputed evidence of the defendants is that the plaintiff's Mr. Horn had not rendered them an account showing how much the Agency owed the plaintiff and for what services. Mr. Horn was and remains under an ethical obligation to properly account to his client and that ethical duty is not displaced by an *a-d* whose limited

[12]Nel v Waterberg Landbouers Ko-operatieve Vereeniging 1946 AD 596 at 607.

purpose, on the facts before me, was to make the defendants liable for the debts of the Agency when, otherwise, they would not be, given that the Agency has a separate legal identity from the defendants. I will return to that issue once I have dealt with the defence of duress.

[42] The remaining defence is whether the plea of duress is supported by the facts of the case.

[43] The defendants' defence of undue duress is premised on the basis that the plaintiff's Mr. Horn's threat of withdrawal:

a) came about two months before the trial;
b) against the backdrop of their knowledge that this was a complex and involved case consisting of a big volume of paper;
c) the Agency was impecunious and did not have money to pay another lawyer;
d) as their lawyer he was in the vantage position of being capable of exerting pressure by refusing to give them the contents of the file.

[44] It is implied that Mr. Horn knew that given the above, the defendants would have no choice but to sign the *a-d,* thus acting to their detriment.

[45] When the defendants failed to pay the debt on the due date, Mr. Horn directed a letter to them on 5 July 2011 in the following terms:

> 'Dear Sirs
>
> **RE: AFRICAN CIVIL AVIATION AGENCY (PTY) LTD / MINISTRY OF WORKS & TRANSPORT**
>
> We record that you have undertaken to pay our account on/or before 25 June 2011, which you have failed to do.
>
> We have further no funds on trust to proceed with the trails as scheduled, and set down for.
>
> Notwithstanding numerous promises that Libya and Nigeria will secure and pay the necessary funds, nothing has come of it.

> In the premises we record and after having consulted with Advocate Strydom we are not in a position to continue. In order to facilitate progress we have requested from Mr. Marcus as to whether they are amenable to a postponement, each party to pay its own costs to which they have agreed.
>
> Should you not be agreeable to this proposal we shall have no option but to withdraw as your legal practitioner.
>
> We await payment as per the acknowledgment of debts signed by both yourselves within five (5) days.[13]
>
> We await your written further instructions.'

[46] A number of points bear special mention about the letter of 5 July. Firstly, it was written just six days before the pending case was to be heard. Secondly, it makes clear that the plaintiff would withdraw unless the Agency agreed to the matter being postponed. Thirdly, it demonstrates that the plaintiff had negotiated favorable costs terms in the event of a postponement; and fourthly, the plaintiff prominently raised the non-payment of an unpaid account as a separate issue from that of the funds required by the plaintiff to act in the matter scheduled for 11th July 2011.

[47] In the reply of the same date on behalf of the Agency, the second defendant wrote as follows:

> **'RE: AFRICAN CIVIL AVIATION AGENCY (PTY) LTD / MINISTRY OF WORKS & TRANSPORT**
>
> We are in receipt of your letter ref: SH/EER/Hr 09.6286 dated 05th July 2011 on the above mentioned subject.
>
> We regret the situation with Nigeria and Lybia which we have explained to you in detail and because of which you accepted and signed a cession for N$ 500 000 in lieu of payment.
>
> Please be advised that, having consulted with Captain Harry Eggerschwiler, we are not in agreement with your postponement proposal and instruct that you proceed with the case as scheduled.

[13] It is most improbable that the plaintiff would demand payment of a deposit for a case from which they withdrew as legal practitioner of record. It is clear therefore that the payment demanded was for fees then outstanding.

> Should you still not be in a position to be our legal practitioners please urgently advice by 12.00 noon 06th July 2011.' (My underlining for emphasis)

[48] The first comment to be made about the reply is that the second defendant did not appear to treat a threat of a withdrawal, so close to the trial date[14], as bad as the one made on 24 May 2011[15]. How else could he insist on the matter proceeding against the backdrop of an unconditional threat to withdraw unless a postponement was agreed to?

[49] The demand to be immediately informed if the plaintiff still elected not to act for the Agency, implies that the second defendant entertained the possibility to engage the services of another lawyer, or, as he said under oath upon questioning by the court, to proceed without legal representation. This does not square with the circumstances which (on the defendants' version) operated as undue pressure on 24 May 2011, to wit –

a) they would not have access to the file contents as the plaintiff refused to release same while its fees remain unpaid;
b) the Agency had no funds to engage another lawyer;
c) the case was quite complex.

[50] The defendants, through their letter of 5 July, were placing the Agency in a position where it had to proceed to trial without legal representation, or to attract an adverse costs order in the event of a postponement.

<u>The test for duress as a ground for avoiding a contract</u>

[51] If a proper case for duress is made out the agreement which resulted therefrom is voidable on the basis that there is no true consent.[16] The improper influence must have been the direct cause of entering into the transaction. The

[14] About 6 days before 11 July 2011.
[15] About 2 months before 11 July 2011.
[16] Broodryk v Smuts N.O 1942 T.P.D 47 cited in Kahn E, *Contract and Mercantile Law through the cases*, at 147-148.

person alleging such duress bears the onus of proof. The pressure must be directed to the party, or to his/her family, must relate to an imminent injury to be suffered by the party himself in person or in property. Additionally, it must be proved that the pressure was exercised unlawfully or *contra bonos mores.* For example, to intern someone because he is unwilling to join the army has been held to be *contra bonos mores* and unreasonable.[17]

[52] Various decisions have debated the issue of the kind of pressure necessary to justify cancellation of an agreement executed under duress. It was held in *Smith v Smith*[18] that:

'The fear ought to be justified in the sense of being grievous enough. It should be such fear as properly descends even upon a steadfast person. For idle alarm there is no excuse; and it is not enough for one to have been alarmed through the influence of any sort of freight. Nevertheless in assessing what fear must be said to be serious enough regard must be taken of the age, sex, and standing of person. Hence the question, namely what fear is sufficient, is one for the investigation and discretion of the judge.'

[53] A leading case on the nature of the threat is *Union Government (Minister of Finance) v Gowar* [19] where Wessels, AJA stated at 452 that:

'. . . an act could be set aside where it was done under circumstances which showed that the act was not voluntary, because it was done under pressure. What the exact amount of pressure is which will enable a judge to set aside an act, depends very much upon the surrounding circumstances. It is true that the judge may use his discretion, but it must be a judicial discretion, and an act must not lightly be rescinded as having been induced by *metus.* The pressure necessary to set aside a payment must be of such a nature that it is clear to the court that, but for this pressure, the payment would not have been made.'

Namibian Broadcasting Corporation v Kruger and Others 2009 (1) NR 196 at 209A-B; Broodryk v Smuts N.O 1942 T.P.D 47.

[17] Broodryk (*supra)* at p 148. See further Alphine Caterers Namibia (Pty) Ltd v Owen and Others (2) 1991 NR 342(HC).

[18] 1948 (4) SA 61 at 67.

[19] 1915 AD 426 at 452.

[54] Duress is not satisfied if one exerts pressure in circumstances in which it is open to the affected party to adopt an alternative course of action for dealing with his predicament.[20] And certainly there can be no duress where the party exerting pressure acts lawfully and within its rights. Thus, in *Namibian Broadcasting Corporation v Kruger and Others*[21] the Supreme Court had to determine whether the defaulting party signed the Deed of Settlement under duress from the creditors to 'fully and finally settle all disputes between the parties and neither party shall have any claim against the other'.

[55] The court pointed out (at 208H-I) that duress embraces the use of compulsion or other pressure in order to induce the victim thereof to do an act or make an omission which the victim would not normally want to do or omit to do. In determining whether the circumstances alleged in law amounted to duress, the court observed that the defaulter was a self-confessed defaulter in relation to the payment of water and electricity bills as well as payment of the insurance premiums and held that the threats to disconnect the utilities from the second respondent's residence and to cancel his policies did not in law amount to duress. The court reasoned that all the obligations which the party was being compelled to honour related to services which had either been rendered to him already, or for which he was obliged to pay in order to continue enjoying them.[22]The court added that a threat amounting to duress must be such as to overcome a mind of ordinary firmness from which the victim cannot protect him or herself.

[56] It is trite that the relationship of client and legal practitioner does not constitute a special relationship from which undue pressure can be presumed.[23] Any influence that arises from a special relationship of any sort between two people does therefore not create a presumption of undue influence and all that will be sufficient are the necessary allegations to sustain a defence of undue influence[24]. The defendants'

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[20] Lombard v Pongola Sugar Miling Co Ltd 1963 (4) SA 860 (A).
[21] 2009(1) NR 196 (SC).
[22] At 210A-C.
[23] Miller v Muller 1965 (4) SA 458 at 462.
[24] *Supra*

assertion that the plaintiff's Mr. Horn occupied a special relationship from which undue pressure could be presumed is not borne out by authority.

[57] The defendants were afforded ample opportunity to explain to the court the nature of the undue pressure or influence exerted by Mr. Horn on them which caused them to sign the *a-d.* The first defendant became rather argumentative and agitated and offered a most incoherent and long-winded explanation of what the pressure amounted to. What sense I could make of it was that the threat, pressure or duress (call it what you will) consisted in Mr. Horn threatening to withdraw from what was a complex and 'big' case close to the trial. The defendants could however not offer a plausible explanation why they simply could not part ways with Mr. Horn and instruct another lawyer as there were about two months left before the case was to be heard. They had a viable and reasonable alternative course of action open to them. This must be seen against the backdrop that a withdrawal threat more closer to trial did not seem at all to bother them. According to the first defendant, he opted to sign the *a-d* because his co-director (second defendant) persuaded him to, only to again suggest that it was because of the pressure exerted on him by Mr. Horn.

[58] Neither defendant furnished a satisfactory explanation why the plaintiff's Mr. Horn was not entitled to withdraw if plaintiff's fees were not paid or if they were not placed in funds for the forthcoming trial. It is perfectly within the rights of a legal practitioner to cease to act for a party who does not pay him or her and it is trite that a lawyer has a lien[25] over the file in his or her possession of a client who owes him unpaid fees. The threat of withdrawal and retention of the file was therefore not unlawful and could not in law amount to duress.

[59] Given that the withdrawal related to the Agency which was a separate legal entity from them personally, the defendants were asked to explain what prejudice they would have personally suffered if Mr. Horn executed the threat to withdraw. Their answer to this question was telling and clearly demonstrated to me why it was not contra bonos mores for them to accept personal liability for the Agency's

[25] Botha NO. EM Mchunu & Co 1992 (4) SA 740

indebtedness. The defendants' answer was that they stood to lose a great deal if the Agency's case collapsed.

[60] I do not find anything inherently unconscionable about two sole directors, who are also the sole shareholders and thus the alter ego and directing minds of a corporation, accepting personal liability for the debts of the company arising from legal services rendered to the company at their instigation. It is the difficulty, or undesirability, to clearly distinguish the owners and directors of very small corporate entities from such corporations that has led to the principle, now trite, that such individuals are not barred from personally acting in legal proceedings on behalf of a corporation.[26] These are no ordinary individuals: They are business men and professionals. The very first affidavit they prepared without legal advice demonstrates their intelligence and acumen.

[61] I am therefore un-persuaded that the same circumstances which, close to the trial date did not operate to influence the two defendants, operated to unduly pressure them to execute the *a-d* on 24 May 2011. The defence of duress therefore stands to be rejected.

Is the debt under the *a-d* due and payable?

[62] Both defendants during the trial conceded some indebtedness by the Agency towards the plaintiff for legal services but consistently stated that they did not know the true extent thereof and how it was made up as they had three matters being attended to by the plaintiff simultaneously. They both also testified, a suggestion never contradicted through cross examination, that they on behalf of the Agency made payments to the plaintiff as and when the Agency had funds in order to service the various accounts. I asked Mr. Horn if there was any particular reason why the invoices evidencing the amount reflected in the *a-d* were not discovered and tendered in evidence to support the plaintiff's claim that as at 24 May 2011 when the *a-d* was executed, the Agency was in fact indebted to plaintiff in that amount. He said there was none. Given Mr. Horn's claim that accounts were rendered at different

[26] Nation Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd 2008 (1) NR 290.

stages to the Agency, the failure to discover the unpaid accounts and how they were made up, is all the more curious.

[63] The defendants also consistently maintained that they believed that some of the outstanding accounts were defrayed from favorable cost orders granted by the court to the Agency at certain stages of the litigation which was being conducted by the plaintiff at the instance of the Agency. This allegation too was not disputed by the plaintiff's Mr. Horn.

[64] It is settled that a client is entitled to have an account of a legal practitioner taxed before payment.[27] Malan JA in *Blake Maphanga Inc. v Outsurance Insurance Co Ltd*[28] at 239 held that the purpose of such taxation is to determine the extent of the indebtedness as an untaxed bill of costs does not constitute a liquid amount in money, especially where the bill is being disputed.[29] Although it has also been held that an attorney may sue on an untaxed bill if the client is satisfied with the *quantum,* it is an established practice that the courts assume discretion to order a bill to be taxed.[30] In such circumstances, the taxing master must determine whether the costs have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee.

[65] The court also held that the taxing master's duty to tax is not ousted by an agreement between an attorney and a client and that even in such circumstances the taxing master must satisfy himself/herself that the fees charged are justified by the work done and are reasonable.[31] I see no reason either in principle or logic why an instrument acknowledging personal indebtedness to the plaintiff by directors of a company who would not otherwise be but for such acknowledgement of debt, would deny them the right that the legal practitioner justifies how that amount was made up. In my view the situation is no different from a client agreeing to an agreed fee, which must still be reasonable and borne out by the work actually performed.

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[27] See Blakes Maphanga Inc. v Outsurance Insurance Co Ltd 2010 (4) SA 232 (SCA) at 240B-D.
[28] Supra.
[29] Supra, at 241A-C.
[30] Benson and Another v Walters and Others 1984 (1) SA 73 (A) at 85B-D.
[31] At 241.

[66] The court has the duty to ensure that its officers do not take undue advantage of the public. I will therefore require, in furtherance of that duty, that the plaintiff has the account taxed by the taxing master and that payment shall not become due until same has been duly taxed. As an officer of this court, Mr. Horn cannot hide behind an *a-d* to exact payment from a client that he is not otherwise entitled to.

[67] In the premises, it is ordered that:

1. The defendants are liable to the plaintiff under the *a-d* executed by them in favour of the plaintiff on 24 May 2011 as security for the Agency's liability for legal services rendered by plaintiff to the Agency, jointly and severally, the one paying, the other to be absolved, in the amount to be determined by the taxing master as ordered below;

2. The plaintiff must within 30 court days of this order prepare a separate bill of costs for attorney and own client costs in respect of legal services rendered by the plaintiff to the Agency, and set same down for taxation before the taxing master, on five court days' notice to the defendants who shall be entitled to be present and to object to any item included in such bill, either personally or by counsel;

3. The amount taxed off by the taxing master after having entertained representations from the plaintiff and the defendants shall, upon such taxing off, become due and payable and shall bear interest at the rate of 20% calculated from 1 April 2011 to date of payment;

4. The plaintiff is awarded costs of suit on party and party scale, to include the costs of one instructing and one instructed counsel.

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P T Damaseb

Judge-President

APPEARANCES:

PLAINTIFF:	C DE JAGER Instructed by BEHRENS & PFEIFFER ATTORNEYS, WINDHOEK
DEFENDANTS:	J DIEDERICKS of DIEDERICKS & CO, WINDHOEK

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