REPUBLIC OF NAMIBIA **NOT REPORTABLE**

IN THE HIGH COURT OF NAMIBIA

JUDGMENT

Case no: I 3792/2012

Case no: I 367/2013

In the matter between

DOUWLEEN VAN ZYL **APPLICANT**

and

BENNIE VENTER LEGAL PRACTITIONERS **1ST RESPONDENT**

BIG J FEEDLOT (PTY) LTD **2ND RESPONDENT**

MESSENGER OF THE COURT GOBABIS **3RD RESPONDENT**

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

(MINISTRY OF JUSTICE) **4TH RESPONDENT**

Neutral citation: *Van Zyl v Bennie Venter Legal Practitioners and Others (I 3792/2012) [2013] NAHCMD 348 (22 October 2013)*

Coram: **Smuts, J**

Heard on: 22 October 2013

Delivered on: 22 October 2013

Flynote: Opposed application for consolidation of two actions. The respondents opposed the application on the grounds that case no. 3792/2012 a delictual claim, where the closure of pleadings is a distant prospect because of opposed interlocutory application, will unduly delay the finalization of case no. I 367/2013. The latter case is one for meat sold and delivered where only the extent of the debtor's

indebtedness is in issue. The pleadings in that matter have closed and case management is at an advanced stage. The court found in its discretion that it would not be convenient to consolidate the two actions. Application for consolidation dismissed with costs.

EX TEMPORE JUDGMENT

SMUTS, J

[1] The applicant, in this interlocutory application for consolidation of two actions, is the defendant in case no: I 367/2013 and the plaintiff in case no: I 3792/2012. There are four respondents in this application. The second respondent is the plaintiff in case no: 367/2013 and the other three respondents are cited together with the second respondent as defendants in case no: 3792/2012.

[2] In case no: 367/2013 the applicant is sued by Big J Feedlot (Pty) Ltd, hereinafter referred to Big J Feedlot for the sake of convenience. I refer to the applicant by that designation.

[3] In case no: 367/2013 Big J Feedlot claims the sum of N$358 394-70 from the applicant. This sum represents the purchase price for meat sold and delivered to the applicant. The claim is also on the basis of or with reliance upon an acknowledgment of debt which the applicant signed in favour of the Big J Feedlot, which I refer to as the acknowledgement of debt.

[4] The applicant filed a plea in that action which has recently been amended. In it, she admits being indebted to Big J Feedlot but does not admit the extent of that indebtedness and essentially puts Big J Feedlot to the proof of the sum claimed by it. The applicant also admits signing the acknowledgment at the debt but says that this was under duress by the legal practitioner for Big J Feedlot, Bennie Venter Legal

Practitioners. The applicant raises certain other points concerning the legality or enforceability of the acknowledgement of debt. The pleadings in this case are closed. It has been referred to judicial case management.

[5] In the course of a judicial case management meeting on 7 August 2013, the applicant indicated an intention to apply for consolidation of this action with case no. I 3792/2012. I placed the applicant on terms to bring such an application, if she elected to do so. That application is before me and is opposed by Big J Feedlot together with two of the other respondents, cited as defendants in case no. I 3792/2012 but not the Government of Republic of Namibia, also cited as defendant in that action. It has not entered the fray in this consolidation application even though it has been served with the application, as was pointed by Ms Petherbrigde who appears for the applicant.

[6] In case I 3792/2012, the applicant is the plaintiff in a delictual claim for damages of both a special and general nature. It is against the legal practitioner firm representing Big J Feedlot, Bennie Venter Legal Practitioners as first defendant, (which represented Big J Feedlot in Gobabis). Big J Feedlot is the second defendant, the messenger of court is cited as third defendant and the Government of Namibia as fourth defendant.

[7] The claim arises from a default Judgment which Big J Feedlot had obtained in the magistrates court, Gobabis against the applicant in respect of the same acknowledgment of debt. In the particulars of claim in that action, the applicant claimed that the acknowledgment of debt was signed under duress applied by the first defendant, the legal practitioners of Big J Feedlot. There are also further complaints that the acknowledgment of debt is defective which, so it is claimed, result in its invalidity and enforceable.

[8] The applicant as plaintiff claims that Big J Feedlot and its lawyer had wrongfully instituted the action against her and the messenger of the court had wrongly and unlawfully proceeded with the execution of the judgment thus obtained in the magistrate court. Although wrongfulness is not specifically alleged against the

Government, it was pointed by Ms Petherbridge in argument that the clerk of the court who she referred to as, ‘resorting under the Government’, is referred to in the particulars of claim as having acted wrongfully.

[9] In case no. I 3792/2012, a request for further particulars was filed and further particulars were supplied some months later. The defendants in that action claim that certain of the answers are not complete. This complaint is now the subject of an application to compel further particulars.

[10] The applicant in this application for consolidation, states that both actions involve the same acknowledgment of debt, and that the causes in both claims are based upon it. The submission is made by Ms Petherbridge that it would then be convenient to consolidate the two actions which would avoid the duplication of evidence, contending that the circumstances surrounding the acknowledgment of debt are raised in both matters and would entail evidence which would be necessary in both actions.

[11] This application is however opposed by certain of the respondents as I have pointed out. The basis of opposition is primarily raised by Big J Feedlot as it is entitled to do. It contends that the balance of the purchase price of the meat sold and delivered to the applicant is what is essentially in dispute in case no. I 367/2013 and that the acknowledgement of debt is relied upon in support of that claim. The point is then taken that the actions are not similar although Ms Petherbridge correctly pointed out that the causes of action do not need to be similar for convenience to dictate their consolidation. But it was pointed out by Mr P Barnard on behalf of Big J Feedlot that the claim for payment in respect of the meat is only disputed as to the extent of the sales and payment for them. There is thus no dispute that meat was in fact sold and delivered. The reason for non-payment provided in the pleadings would appear to be that the applicant is not sure as to what amount is outstanding and would want that to be determined. But it is also stated that the applicant at the time when the plea was filed did not have the ability to make payment of the whatever amount may be found to be payable as far as she was concerned. As I have indicated, the acknowledgement of debt is also relied upon. The applicant says

in her plea that it had been signed under duress and that it is also void or voidable for certain further reasons of a legal nature.

[12] The respondents also point out that the delictual claim in case no. I 3792/2012 does not relate to the debtor/creditor relationship which forms the basis of the claim in case I 367/2013 which primarily concerns the question as the extent of the applicant's indebtedness in that action. Case no. I 3792/2012 rather concerns alleged wrongful action in proceeding of upon an acknowledgment of debt in the magistrate court and alleged wrongfulness in the execution process.

[13] As a consequence, Big J Feedlot contends that it would not be convenient to consolidate the matters because there would be an undue delay in case no. I 367/2013 which, Mr Barnard pointed out, is a commercial claim where only the extent of indebtedness is essentially an issue. He pointed out that the pleadings have closed in that matter and judicial case management is at an advanced stage and that it is nearly ripe for trial with discovery having been given by both sides. The pleadings in the other matter are said to be far from closure.

[14] Mr Barnard submitted there is in fact the spectre of protracted delays caused by opposed interlocutory matters looming largely in case no. I 3792/2012. He referred to the opposed application to compel. He also indicated that the respondents he represented in that action would, depending upon the particularity provided pursuant to the application to compel, except to the particulars of claim in that matter with reference to the manner in which the claim is pleaded in the particulars of claim. He thus pointed out that the closure of pleadings in that action is a relatively distant prospect.

[15] Mr Barnard also submitted that the applicant's attack upon the acknowledgment of debt was essentially a red herring. He further submitted that the issues raised attacking the validity of the acknowledgment of debt on other grounds were devoid of any have merit. It would not be appropriate for me to enter into that debate at this stage except to say that certain of the other points raised against the acknowledgement are matters which would not require much evidence and are

rather the subject of legal contention. The allegation of duress, Mr Barnard submitted, was not properly set out and that no specificity had been provided even after expressly and pertinently sought.

[16] The allegation of duress is contained in the amended plea in case no. I 367/2013 in paragraph 7.1 in the following way:

> 'The document was signed under duress and false pretences made by Mr B Venter legal practitioner for applicant to me.' (sic)

[17] I have also had regard to the other documentation on the court file (in case no. I 367/2013)including the opposing affidavit which was provided in an application for summary judgment brought by Big J Feedlot after the applicant had entered an appearance to defend. Inexplicably, the issue of duress is not specifically referred to in that affidavit, despite rule 32 which requires that a party must set out her defence fully in order to establish a *bona fide* defence to an action. What is however stated in paragraph 8 in that affidavit is merely the following:

> 'Mr Bennie Venter lawyer for the applicant came to my office on 16 April 2012 and indoctrinated me to sign annexure POC2 (the acknowledgement of debt) which I did. The creditor only signed and Mr Venter only stamped the annexure subsequent to an attempt to snatch judgment and execute an illegal warrant in the magistrates' court in Gobabis. I was petrified to lose my business and he unduly influence me to sign POC2.' (sic)

[18] The word duress is not even used in that affidavit at a time when she was legally represented.

[19] I turn to the action in I 3792/2012 and the particulars of claim and way it is raised in the pleadings. There is a reference to duress in paragraph 16, in the following terms:

> ' The plaintiff had signed annexure A1 under undue duress by the first defendant (Mr Venter, Big J Feedlot's legal practitioner) without having been apprised of the contents thereof and consequence thereof.'

[20] That is the extent of the allegation as to duress in both actions. There was a request in the request for further particulars in case no. I 3792/2012 for amplification of this allegation. The applicant was specifically asked what alleged actions by the first defendant (Mr Venter) constituted undue duress. Full particulars were required. The applicant was also asked what was meant by 'undue'. In answer to these questions, the applicant as plaintiff in that action astonishingly answered that the particularity requested constituted evidence and not strictly necessary to plead and was accordingly refused. The law is however quite clear on this. If a party wants to rely upon duress, that party must allege and prove five specific elements in order to do so, as is made clear by Harms, JA in *Amler's Precedents of Pleadings*[1]. The elements are

(a) the threat of considerable evil to the person concerned or to her or his family which induced fear;
(b) that the fear was reasonable;
(c) that the threat was imminent or inevitable evil and induced fear;
(d) that the threat or intimidation was unlawful or *contra bonos mores;* and
(e) that the contract was concluded as a result of the duress.

Those five elements must thus be alleged and proven by a party seeking to rely on duress. The allegations must thus be in the pleadings. Those elements do not merely constitute questions of evidence. I also refer to *Arend v Astra Furnitures Pty Ltd*[2] which has been frequently followed by this and other courts and *Savvide v Savvide.*[3]

[21] In order for me to exercise my discretion in determining whether it would be convenient to consolidate these matters, I would need to have some understanding or appreciation as to the ambit and extent of the evidence which would be avoided in duplication.

[22] It is not clear to me from the impermissibly vague and unspecified allegation of duress in the pleadings, compounded by the mere reference to indoctrination and

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[1] (4ed) p 185-186.
[2] 1974 (1) SA 298 (C) at 306.
[3] 1986 (2) SA 325 (T) at 330 as well as the authorities which have been usefully collected in *Amler's Precedents and Pleadings*.

not even duress deposed by the applicant. When the applicant thus made an affidavit where she was required to fully set out her defences, she did not even refer to the legal concept of duress or even explain the requisite components of it with any specificity, except to use the word 'indoctrinated' and that she was petrified to lose her business. This does not necessarily imply that there was duress, as is contemplated by the authorities. The actual verb used in respect of Mr Venter's conduct is 'indoctrinate'. It is defined in the authoritative New Shorter Oxford Dictionary[4] as being 'imbue with an idea or doctrine, teach systematically to accept (especially partisan and tendentious) ideas uncritically and to brainwash'. That is a far cry from the threatening conduct contemplated by duress as a legal concept. What further compounds matters in this instance is that this allegation is directed against an officer this court at a time when the applicant was legally represented. It constitutes a delict and wrongful conduct which, I would have thought, would have been better explained and specified – not only with reference to what is required by pleading that cause of action, but also when it comes to persuading me, as the applicant must do, bearing in mind the onus, that the consolidation of the actions would be convenient and would avoid the duplication of evidence.

[23] I also take into account the spectre of delays in case no. I 3792/2012, given the refusal to supply particularity which the defendants are is clearly entitled to on the strength of the authority I have already referred to. What further concerns me in that matter, as was specifically intimated by Mr Barnard, the respondents (defendants) he represents in that action would in all likelihood except to the particulars of claim in the current formulation.

[24] This would all necessarily entail the determination of not only an opposed interlocutory motion for the particulars to be supplied, but also a hearing in relation to an exception. That may in turn give rise to further pleadings to be exchanged before the pleadings will eventually be closed in that matter.

[25] Although both actions do involve the acknowledgment of debt, case no. I 3792/2012 primarily concerns the execution process in respect of the default

[4] (1993 edition) Vol 1 at p. 1353.

judgment against the applicant. Although the attack of duress is raised in that matter, I have already indicated that it is entirely unspecified, despite the request for particularity made but which was refused.

[25] In the weighing process, I should consider these factors I have set out against the fact that case no I 367/2013 is ready to proceed to trial after the pre-trial conference takes place. That can be arranged at short notice and the trial could then be set down. I would anticipate that that is capable of being heard and determined in the first term of 2014.

[26] Although there would be some overlap of evidence, the applicant bears the onus of establishing that overlap. But she has not been able to do so properly, given the fact that the allegation regarding duress is so hopelessly and impermissibly unspecified. As against that, I take into account that the issues are fundamentally different in the two different matters. Whilst there may be some advantage if both cases could be heard together, that may conceivably in my view arise if both had reached the same stage of pleadings. But in this instance there is a limited (and as yet indiscernable) degree of overlap which I am unable to determine as that issue is not been properly pleaded, given the lack of essential averments. I take that into account the prejudice which Big J Feedlot would endure by the real prospect of delays in its matter claiming payment for meat sold and delivered which is ready to go to trial and where the applicant only disputes the extent of her applicant's indebtedness (though the acknowledgement raised in support of that claim is also disputed). I also take into account the potential advantage of consolidation but this has not been properly made clear by the applicant given the lack of specificity on the question of duress and the way in which it has been pleaded, including in the answering affidavit where it was not explained or even given that label. I also take into account the real prospects of delays because of the pending opposed interlocutory application and the prospect of an exception which would need to be determined.

[27] It would seem to me that it is not, in the exercise of my discretion, convenient as is contemplated by Rule 11, to consolidate these actions. The costs in my view

are also not likely to be significantly reduced by consolidation. In the exercise as of my discretion, I decline this application for consolidation.

[28] It follows that case no. I 367/2013 should proceed to a pre-trial conference. It has been pointed out to me that both parties have discovered and that the pre-trial conference should proceed and a date for that trial should be allocated.

[29] As for case no. I 3792/2013, I was informed in the course of argument by the parties that a date for the hearing of the application to compel had not been allocated because of the intention to bring the consolidation application. I have resolved to direct that that action (case no. I 3792/2013) be referred to judicial case management and that the parties are to be given notice as to the date of the first judicial case management meeting in due course. I am not in a position to do that today because of the fact that the office of the Government Attorney which has filed a notice to defend is that matter, has not participated in these proceedings. Before I make my order it remains for me to express my appreciation to both counsel for their preparation and argument in this application.

[30] The order I accordingly make in this application is as follows:

1. The application for consolidation is dismissed with costs. Those costs include the costs of one instructed and one instructing counsel.
2. Case no. I 367/2013 is postponed for a pre-trial conference to be held on 20 November 2013 at 15h30.
3. Case no. I 3792/2012 is to proceed to judicial case management, despite the fact that the pleadings have not as yet closed.

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DF Smuts

Judge

APPEARANCES

APPLICANT/DEFENDANT:	M Petherbridge
Instructed by:	Petherbridge Law Chambers
RESPONDENT/PLAINTIFF:	P. Barnard
Instructed by:	Sisa Namandje & Co. Inc