



**IN THE HIGH COURT OF SWAZILAND  
JUDGMENT**

**Civil Case No. 726/13**

In the matter between

**SYDNEY KUNENE**

**PLAINTIFF**

And

**GCINA DLAMINI**

**DEFENDANT**

**Neutral citation**

*Sydney Kunene vs Gcina Dlamini (726/13)*  
*SZHC 228(12 September 2014)*

**Coram:**

**Ota J.**

**Heard:**

**9 September 2014**

**Delivered:**

**12 September 2014**

**Summary:**

**Civil Procedure: summary judgment application; triable issues; allegation of duress in signing acknowledgment of debt agreement constitutes an issue fit for trial; application dismissed.**

## **JUDGMENT**

### **OTA J.**

- [1] This is a summary judgment application wherein the Plaintiff claims for the payment of the sum of E560,000-00 (Five Hundred and Sixty Thousand Emalangeni) interest thereon calculated at 9% per annum from date of the breach of the agreement, as well as, costs of suit at attorney and own client scale.
- [2] As a sequel to the summary judgment application, the Plaintiff had sued out combined summons for the same reliefs. The summary judgment application was launched in the wake of the Defendant's notice of intention to defend the suit.
- [3] In his declaration the Plaintiff alleged that the Defendant is indebted to him in the sum of E560,000-00, which amount the Defendant agreed to pay as evidenced by the acknowledgment of debt agreement entered by the parties dated 20<sup>th</sup> January 2012, which is exhibited in these proceedings as annexure SK1.

[4] In annexure SK1 the parties agreed as follows:-

**“SYDNEY KUNENE**  
**(HEREINAFTER REFERED TO AS THE CREDITOR)**  
**AND**  
**GCINA DLAMINI**  
**(HEREINAFTER REFFERED TO AS THE DEBTOR)**

1. The Debtor acknowledges himself to be indebted to the creditor in the sum of E560,000-00 (Five Hundred and Sixty Thousand Emalangeni).
2. Cause of Indebtedness  
Amounts fraudulently extracted and dispossessed from the creditor by the Debtor at Debtors special instance and which sums the debtor, freely and voluntarily and without any undue influence or pressure, herein undertakes to repay in full to the Creditor.
3. The debtor further undertakes to pay the said sum of E560 000-00 (Five Hundred and Sixty Thousand Emalangeni) in the following terms:-
  - (a) Payment of the sum of E10 000-00 (Ten Thousand) will be made on Monday the 16<sup>th</sup> January 2012.
  - (b) The balance of E550 000-00 (Five Hundred and Fifty Thousand Emalangeni) will be payable in the following terms;
    - i. The balance thereof will be payable in 55 (fifty five) equal monthly installments of E10 000-00 (Ten Thousand Emangeni) beginning or before (sic) on before the final day of January 2012 and thereafter on or before the final day of each subsequent month until full payment of the entire amount owing.
4. The debtor hereby acknowledges himself to be truly and lawfully indebted to the creditor in the capital sum and legal costs referred to above and in respect of the said cause of action.
5. Should any one payment not be made on date or should the debtor breach any part of this acknowledgement, the whole amount owing by the debtor at such time will wholly be due and payable.
6. Notwithstanding the same, the debtor shall be afforded notification of its breach and afforded a period of 14 (Fourteen) days, including Saturdays, Sundays and Public Holidays, to remedy such breach.

**Notification of the same shall be served upon the Offices of Leo Gama attorneys being the Debtors chosen *domicilium citiandi*.**

- 7. In the event the creditor having to assert its rights in terms of the agreement in a court of law, the Debtor shall bear the costs of suit and shall be liable at the scale of Attorney and Own Client.**
- 8 This acknowledgement of debt agreement does not in any way constitute abandonment or novation of any of the creditor's right to also pursue criminal conviction of the debtor and all the creditors rights herein are fully reserved. This has also been fully explained to the debtor before appending his signature herein.**
- 9. No additions, alterations, variations and cancellations herein shall be of any force of effect, unless reduced to writing and signed by the creditor and / or its Attorneys.**
- 10. All payment in relation hereto shall be paid directly to the offices of Masina Ndlovu Mzizi Attorneys.”**

[5] Based on the foregoing facts, the Plaintiff launched the summary judgment application alleging in the affidavit in support of same, that the Defendant has no *bona fide* defence to the claim and the appearance to defend is a disingenuous stratagem geared at stultifying the Plaintiff's early shout of victory.

[6] I count it now judicially settled in the Kingdom, that summary judgment is an extra-ordinary remedy that should be approached with caution. This is because of its drastic and stringent flavor, which is belied by the fact that it is granted without a plenary trial of the action. Thus, the warning for

extreme care to be taken in granting it, in order not to foreclose a Defendant who may otherwise have a good defence to the action.

[7] To achieve this aim, the court is required to interrogate the affidavit resisting summary judgment, if any, filed by the Defendant to ascertain whether **“there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part thereof.”** See Rule 32 (4) (a) of the Rules of the High Court.

[8] Once the Defendant’s affidavit discloses a triable issue or raises a *bona fide* defence, that should defeat summary judgment and allow the Defendant enter his defence.

[9] Speaking about the above stated principles of law in **Mater Dolorosa High School v R.J.M Stationery (Pty) Ltd Appeal Case No. 3/2005**, the court remarked as follows:-

**“It would be more accurate to say that a court will not merely ‘be slow’ to close the door to a defendant, but will in fact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the whole or part of the plaintiff’s claim, the court cannot deny him the opportunity of having such an issue tried.”**

See **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric, Civil Appeal No. 22/07.**

[10] Similarly, in **Maharaj v Barclays National Bank 1926 (1) SA 418 (A) at 426 A – E, Corbett JA** declared as follows:-

**“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has fully disclosed the nature and ground of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to whether the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”---connotes in my view that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least, disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence.”**

[11] Flowing from the above is that the Defendant is mandatorily required to allege the facts upon which he relies to established his defence. Thereafter, the duty rests on the court to determine whether such facts, if proved would in law constitute a defence to the Plaintiff’s claim, and also whether they satisfy the court that the Defendant was acting *bona fide* in alleging such facts.

[12] Let us now enquire into the affidavit resisting summary judgment filed of record to see whether it discloses any triable issue or *bona fide* defence.

[13] The relevant portions of the affidavit are paras 5 to 16 wherein the Defendant avers as follows:-

- “5 I humbly state that I have a valid defence to the plaintiff’s claim as more fully appears below.**
- 6. I humbly state that first and foremost the Plaintiff has intentionally failed and / or neglected to state in the summons how the alleged E560 000-00 (Five Hundred and Sixty Thousand Emalangeni) came about save for that in annexure “SK1” it says the cause of indebtedness are “amounts fraudulently extracted and dispossessed from the creditor by the debtor---**
- 7. I humbly state the court has to be made aware of the brief background of the matter, which is that; I was asked by the Plaintiff to help him release his money from Lomahasha boarder post which according to him had been cleaned, which money was held by the customs officials on the Mozambiquean side. The plaintiff said the reason why he was asking for my assistance in particular was that he has been told by the people whom the money had been confiscated from by the boarder officials.**
- 8. I reluctantly agreed to try and help him after a lengthy persuasion, to at least try. The Plaintiff gave me E15 000-00 (Fifteen Thousand Emalangeni), which he said I was to use to bribe the customs officials if need be and also to use it for operational expenses, such as travelling.**
- 9. I did not get any assistance from the customs officials of Mozambique as they said they were not aware of any monies that has been confiscated by them. The other difficulty I face (sic) was that the Plaintiff had not even given the names of the persons whom the money had been taken from by the customs officials. When I reported back to the plaintiff, for reasons known to him he concluded that I had received the money from the officials.**
- 10. The Plaintiff then reported me to the Manzini Police for having stealing (sic) from him a sum of E560 000-00 (Five Hundred and Sixty Thousand Emalangeni) and consequently I was arrested by the Manzini fraud unit.**
- 11. I was taken to the Manzini Regional Police Headquarters, where I told them the above information. I was beaten and suffocated during the interrogation in the presence of the Plaintiff. The police said I should pay the Plaintiff the above said monies and when I told them to**

take me to court they refused and said I should make means and arrangement to repay the money. My phone was taken away from me by the Police and they answered every call that I got and they told those who called during that period, that I was a criminal and I have conned a lot of people lots of monies and they even invited them to come and see me at the Police Headquarters.

12. I ask (sic) to be given permission to at least consult my attorney but I was denied that right on the ground that they had 48 (Forty Eight) hours in which to investigate the matter and I would see my lawyer after that.
13. As a result of the above I agreed to pay back same as per the terms of the annexed agreement, which was hastily prepared by Plaintiff's lawyer (Mr Bhembe), who was also at the Police station, who asked to be given 15 (Fifteen) minutes to prepare same.
14. A certain Khanyisile Motsa happened to be one of the people who called me and my phone was answered by the police and she was told the above information to the effect that I was a criminal who had coned a lot of people a lot of money and she was invited to come and see me. Indeed she came to see me and upon her arrival she found the plaintiff's lawyer at the station with the agreement and she was made to sign as a witness. I told the said Khanyisile Motsa that I was signing the agreement under duress.
15. I was then allowed to call my lawyer (Mr Gama), whom upon arrival said he did not want any thing to do with the agreement as I had signed same under duress and without proper legal advise and he was not present when same was signed. He said he would rather be a witness should any legal issue arise out of the agreement.
16. I was then released by the police and I was not even told why, nor was I told what would happen to the criminal charges that had been laid by the plaintiff. Up to date nothing has happened concerning those alleged charges."

[14] It is on record that Khanyisile Motsa filed a confirmatory affidavit to the Defendant's affidavit wherein she averred as follows:-



- “2. I have read the Answering Affidavit of the Respondent and I confirm the contents therein in as far as they relate to me. I confirm in particular that;**
- 3. I called the Plaintiff on the day on which the agreement was signed and his phone was answered by a male who introduced himself as police and he told me that the Defendant was a criminal and he had coned a lot of people lots of monies and I was told to come and see him at the Manzini Police Headquarters. I went to see the Defendant and upon my (sic) I was made to sign an agreement which the Defendant had entered into as a witness. The Defendant told (sic) that he was signing the agreement under duress.**
- 4. I must also add that I found the Defendant in bad shape as it was evident that he had been beaten and his clothes were wrinkled.”**

[15] In his replying affidavit, the Plaintiff while confirming that he reported the Defendant to the police who eventually arrest him, however, denied all the other material allegation of fact proffered against him by the Defendant. He categorically denied that the Defendant was coerced, torture, assaulted or forced into signing the Deed of Settlement. He averred that the police officers’ involvement was merely to help the parties sort out the impasse between them in an amicable manner. He alleged that the Defendant voluntarily entered into the settlement agreement which was signed by the parties in the presence of Counsel on both sides, to wit: Mr Bhembe for the Plaintiff and Mr Gama for the Defendant. The agreement was also witnesses by the Plaintiff’s wife whom Plaintiff had telephoned to come to the police station.

[16] The Plaintiff also stated that Defendant's wife was the only lady who came to the police station and Plaintiff is not aware of any certain lady called **"Khanyisile Motsa"** who attended the police station.

[17] Plaintiff further alleged that the Defendant has failed to annex any confirmatory affidavit from his Counsel Mr Gama to support his allegation of coercion, especially as he alleged that Mr Gama undertook to be a witness **'should any legal issues arise out of the agreement.'**

[18] This, and the fact that the Defendant has since substituted Mr Gama for another legal practitioner, goes to show that the Defendant knew that Mr Gama would refuse to perjure himself or may be he actually refused, further contended the Plaintiff.

[19] The Plaintiff called for summary judgment to be granted in these circumstances.

[20] It is clear from the affidavit resisting summary judgment and the reply thereto by the Plaintiff in his replying affidavit, that the Defendant advances two issues as defences to summary judgment.

[21] Firstly, the Defendant contends that the Plaintiff has not stated in the summons how the debt arose.

[22] In my view, this issue does not qualify as a defence and must fail. I say this because the Plaintiff's action is founded on a liquid document, that is the settlement agreement. In the text **The Civil Practice of the High Court of South Africa (5<sup>th</sup> ed)**, the learned editors **Herbstein and Van Winsen** defined a liquid document as follows:-

**“---a document in which the debtor acknowledges in writing over his signature, or the signature of his duly authorized agent, his indebtedness in a fixed and determinate sum of money.---**

**To constitute a liquid document, the document must speak for itself. If it does not and extrinsic evidence is necessary to prove the defendants indebtedness, the document is not regarded as liquid ... it will only be a liquid document if it contains an unequivocal acknowledgment of indebtedness in a fixed amount of money and if the creditor is bound to advance that amount.”**

[23] I agree entirely with Learned Counsel for the Plaintiff, Mr Ndlovu, that it is trite that the liquid document need not reflect the *causa debiti*. The *prima facie* proof demonstrated by the acknowledgment of an indebtedness due and payable to the Plaintiff by the Defendant, as certified by the signature of the Defendant or his Agent on the liquid document is the requisite ingredient sufficient to found an action. In the circumstances the *causa debiti* is irrelevant.

[24] This trite principle of law was recounted in apposite terms by the court in **Jenkins v De Jager 1993 (3) SA 534 (N) at 537 1-J, 539 1-J and 540 E-F** as follows:-

**“It is well settled, ---- that --- the liquid document concerned need not reflect the *causa debiti* at all--- if it is unnecessary that a *causa debiti* be recorded in a liquid document, ---then there seems to be no reason why the *causa debiti* should have any relevance---**

**After all it is the strong *prima facie* proof afforded by the unconditional acknowledgment, above the signature of the defendant or his agent, of an indebtedness due and payable to the plaintiff that is the essential, --- and as such the *causa debiti* in not directly relevant.**

**---the essence of the case which is made against the defendant is that he signed a liquid document which evidences his unconditional acknowledgment of indebtedness to the plaintiff. The essences of the case he has to meet is, in other words that, whatever the underlying *causa debiti* may be, he acknowledged his liability to the plaintiff---**

**In short--- the case the defendant has to meet is simply that he has signed a document in which he acknowledges his unconditional indebtedness to the plaintiff, and in that regard the *causa debiti* is not relevant.”**

[25] The first defence is unmeritorious. It is accordingly rejected.

[26] Secondly, the Defendant alleges that he was coerced into signing the agreement. From the facts of this case he unequivocally alleges duress.

[27] Since the underlying factor in this case is the agreement of settlement signed by the parties, it is pertinent that I observe here, that the parole evidence rule operates to prevent a party to a written contract from seeking to

contradict or vary its terms by reference to extrinsic evidence. The learning is that when a contract has been reduced in writing, no extrinsic evidence may be given of its terms except the document itself nor may the contents of such document be contradicted or varied by oral evidence as to what passed between the parties during negotiation leading to the conclusion of the contract and the written contract becomes the exclusive memorial of the transaction. Exceptions to this trite principle of law is where the contract is vitiated by mistake, fraudulent misrepresentation, illegality or duress. See **Fathoos Investment Pty Ltd and Others v Misi Adam Ali Civil Appeal Case No. 49/12, Johustia v Leal 1980 (3) SA 927 (A) at 943; Soor v Mabuza 1982 – 1086 SLR 1 at 2G -3A.**

[28] It is incontrovertible from the above, that allegations of duress is one of the grounds for setting aside a written contract.

[29] The test for setting aside a contract on grounds of duress was laid down by the **Supreme Court of South Africa in Arend & Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 at 305**, where the court remarked as follows:-

**“It is clear that a contract may be vitiated by duress (metus), the *raison de’etre* of the rule apparently being that intimidation or improper pressure**

**renders the consent of the party subtracted to duress not true consent-- Duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing him to fear by means of threats. Where a party seeks to set aside a contract or resist the enforcement of a contract, on the grounds of duress based on fear, the following elements must be established:**

- (i) The fear must be a reasonable one;**
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family;**
- (ii) It must be the threat of an imminent or inevitable evil;**
- (iv) The threat or intimidation must be unlawful or *contra bonos mores*;**
- (v) The moral pressure used must have caused damage.”**

**See Fathoos Investments (Pty) Ltd and Others v Mini Adam Ali (Supra).**

[30] *In casu*, the Defendant has advanced the facts and circumstances upon which the allegation of duress as inducement for him signing the settlement agreement is predicated. What can be extrapolated from his averments is that fear induced him to sign the settlement agreement. This is clear from the allegation that he was arrested by police officers from the Manzini Regional Headquarters on the behest of the Plaintiff and taken to the police station where he was intimidated and assaulted by the police. He alleged that his cell phone was taken away from him and he was denied his right to legal representation. As a result of these conditions he signed the agreement. That the agreement was signed before this lawyer Mr Gama arrived at the police station. The Defendant's allegation of duress was confirmed by Khanyisile Motsa in the confirmatory affidavit which is reproduced in para [14 ] above.

The Plaintiff even though denying the allegation of duress, has however confirmed that the Defendant was arrested and taken to the police station.

[31] It appears to me that the allegations of the Defendant raise triable issues, which if proved are capable of founding a defence to the claim which is *bona fide* and good in law. This should disable summary judgment.

[32] Mr Ndlovu has contended that since the agreement was entered into in 2012 and the Defendant failed to take steps to set it aside on grounds of duress, this makes his sudden allegation of duress in the summary judgment application, launched two (2) years after in 2014, lacking in *bona fides* and should be rejected by the court.

[33] In my considered view, the mere fact that the settlement agreement was entered into in 2012 and the Defendant failed to have it set aside on grounds of duress is of no moment. The paramount factor to my mind for the purposes of this summary judgment application, is that the Defendant did not honour any portion of the said agreement even after the alleged fear was no longer in existence . He clearly did not ratify it.

[34] As **A J Kerr et al** observed in **The Law of Contract (6<sup>th</sup> ed) page 318.**

**“If the consent of one of the parties to a contract was obtained by improper pressure (usually in the form of threats) of the kind and severity recognized by law in this context which may be implied, ie not expressly in words or deeds (the onus of proving this being on the person subjected to the pressure), the contract normally is voidable and restitution maybe claimed in appropriate circumstances. If after the fear has been removed a person voluntarily performs what he promised under pressure or otherwise ratifies the transaction he is regarded as having given fresh consent and the transaction stands.”**

[35] **CONCLUSION**

It is inexorably apparent from the totality of the foregoing, that the summary judgment application must fail.

[36] **ORDER**

I order as follows:-

1. The summary judgment application be and is hereby dismissed.
2. The parties be and are hereby referred to trial.
3. The matter be and is hereby referred to the Registrar to take its normal cause.
4. Costs to follow the cause.



**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
THE ..... DAY OF .....2014**

**OTA J.  
JUDGE OF THE HIGH COURT**

**For the Plaintiff:**

**T.M. Ndlovu**

**For the Defendant:**

**T. Fakudze**