CASES / VONNISSE

COMPROMISE, UNDUE INFLUENCE AND ECONOMIC DURESS

Gerolomou Constructions (Pty) Ltd v Van Wyk 2011 (4) SA 500 (GNP)

1 Introduction

The matter of *Gerolomou Constructions (Pty) Ltd v Van Wyk* (2011 (4) SA 500 (GNP)) alludes to two rather problematic aspects of the law of contract: on the one hand it demonstrates that practically speaking the question of what constitutes an enforceable agreement of compromise is still no easy matter (see further Ismail "Contentious Issues Arising from Payments made in Full and Final Settlement" 2008 *PER* 154; and *cf* Zeffertt "Payments 'In Full Settlement'" 1972 *SALJ* 35), and despite the sound judgment delivered recently by the Supreme Court of Appeal in *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* (2008 (3) SA 327 (SCA)), it seems that the judiciary's interpretation as to when an offer of compromise exists remains difficult to predict. On the other hand the *Gerolomou* decision deals with improperly obtained consensus by way of undue influence, whereas the facts actually fit more comfortably into the niche of so-called economic duress, a form of procedural impropriety that has yet to be recognized as an independent ground for setting aside a contract in our law. This case note examines these issues against the backdrop of the manner in which the case was pleaded.

2 Facts

The plaintiff (Van Wyk) and the defendant (Gerolomou Constructions (Pty) Ltd) entered into oral subcontracting agreements in terms of which the former had to carry out certain construction work for the latter on a temple. Upon completion of the work, the defendant alleged that certain aspects of the work done or materials used were defective. At this stage there was an amount of R48 523,54 retained by the defendant, which the plaintiff believed was due and payable to him on the basis that the work had been done properly and without the alleged defects.

The plaintiff experienced financial difficulties at the time and he was desperate to receive the outstanding money to pay his workers. Eventually, after considerable delays orchestrated by the defendant, the plaintiff and his foreman met with the defendant's representative, K, to address the dispute regarding the retained money. The meeting took place at the construction site where the work had been performed, and just outside the plaintiff's workers awaited payment. At the meeting K produced a "full settlement" document headed, "Final account for Derek van Wyk". This document confirmed the total amount retained by the defendant and set out the contra

charges it raised for the defects alleged in the amount of R29 231,84. On the final page of the document this amount was deducted from the total retention amount, leaving a balance of R19 291,70 with the following words:

> "I Derek van Wyk, herewith accept the payment in the amount of R19 291,70 in full and final settlement of all accounts, claims etc that I or any of my workers may have … from Gerolemou Construction [*sic*]"

K informed the plaintiff that unless he signed the document he would not get any money at all. Under immense pressure, the plaintiff signed the document after protesting to K that it was unfair. Thereafter, the defendant paid R19 291,70 to the plaintiff and, subsequently, the plaintiff claimed the balance of the amount he believed was owing to him (amongst other claims) in the magistrates' court.

3 Issues and decision

The matter proceeded in the magistrates' court on the basis that it was seemingly common cause between the parties that an agreement of settlement (compromise) had been concluded when the plaintiff signed the settlement document (par 5). The magistrate found that the plaintiff was a very good witness and that the work in question had been done properly (par 2). In contrast, she found the testimony given by the defendant's witnesses to be false and rejected all the defences raised by the defendant. Accordingly, she upheld three of the plaintiff's claims, together with interest and costs (par 2). The defendant appealed against the decision of the magistrate.

On appeal, in the North Gauteng High Court, Tuchten J delivered the judgment (with Claassen J concurring) dealing with three issues in the process: firstly, he considered whether the defendant raised the defence in its plea that an agreement of settlement had been concluded between the parties; secondly, if such an agreement was evident from the defendant's plea, whether on the facts the agreement did in fact exist; and thirdly, if such an agreement did exist, whether the plaintiff was unduly influenced by the defendant in agreeing to it, rendering the agreement voidable at the instance of the plaintiff.

Regarding the first issue, Tuchten J found that the defendant did not plead that the settlement document constituted a contract of any kind, let alone that a contract of compromise had been concluded between the parties (par 5 and 11). The essence of the defendant's defence to the claim for the retention amount was that the plaintiff had "accepted a final payment in the amount of R19 291,70 in full and final settlement in respect of all amounts due to the Plaintiff for the works". This defence was set out in the defendant's plea (par 2), which further contained an annexure evidencing that the plaintiff had signed the settlement document. Tuchten J found that this was not sufficient for the court to be satisfied that the defendant raised the defence in its plea that an agreement of compromise had been concluded (par 5 and 11). The court reached this finding notwithstanding the fact that the plaintiff acknowledged in his replication that he did conclude a contract in the sense that he had signed the settlement document (par 2–3 and 11). Nevertheless, the court found that the defendant could not rely on the defence that an agreement of compromise had arisen.

Tuchten J then proceeded to address the second issue. This was done on the assumption that, if his finding was incorrect on the first issue, it would be necessary to consider whether a compromise agreement had been concluded between the parties. He considered (with reference to *Absa Bank Ltd v Van der Vyver* 2002 (4) SA 397 (SCA) 404F–405C) whether the offer made by the defendant in the settlement document was intended to effect a compromise or alternatively to achieve a payment towards an admitted liability (par 12–13). Consistent with a line of case law, if the offer was intended to effect the former, then acceptance of same generally results in the creditor (plaintiff) forfeiting his claim to sue for the balance of the debt (see *Odendaal v Du Plessis* 1918 AD 470 475–478; *Van Breukelen v Van Breukelen* 1966 (2) SA 285 (A); *Absa Bank Ltd v Van der Vyver supra* 402B–F; Kerr *The Principles of the Law of Contract* 6ed (2002) 536; Christie and Bradfield *The Law of Contract in South Africa* 6ed (2011) 477–478; Zeffertt 1972 *SALJ* 41; and Ismail 2008 *PER* 156 172). In this regard it has been argued that the banking of a cheque by the creditor will usually, but not always, yield conclusive proof of acceptance of an offer of compromise (McLennan "Acceptance of Offers of Compromise – 'In Full Settlement'" 2002 *SALJ* 686; and see further the approach taken by the Appellate Division in *Patterson Exhibitions v Knights Advertising & Marketing* 1991 (3) SA 523 (A)). On the other hand if the offer was intended to achieve only a payment towards an admitted liability, the creditor may retain the money and proceed to sue for the balance (see *Harris v Pieters* 1920 AD 644 649–650; *Absa Bank Ltd v Van der Vyver supra* 404A–B; Kerr *The Principles of the Law of Contract* 536; Christie and Bradfield *The Law of Contract in South Africa* 475; Zeffertt 1972 *SALJ* 41–42; and Ismail 2008 *PER* 156–157 and 172).

Tuchten J found that, if the settlement document constituted an offer, it was an offer to pay what was owing to the plaintiff and not intended to effect a compromise (par 17). He reached this finding after referring to *Absa Bank Ltd v Van der Vyver* (*supra*), where it was reasoned that where there is an admission of liability by the debtor (the defendant in *Gerolomou*), it is a fine line whether the payment is intended to effect a compromise or make a payment towards an admitted liability (par 13–17). Despite acknowledging this fine line, the court (after distinguishing the facts in *Gerolomou* from those in *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA)) perhaps too easily concluded that the defendant's payment was intended to discharge an admitted liability (par 15–17). Tuchten J justified this finding on the basis that the defendant's calculation of R19 291,70 was based on what it believed to be the specific amount it owed to the plaintiff (par 14–18). This meant that the plaintiff was entitled to retain the payment of R19 291,70 and sue for the balance.

Regarding the third issue, if indeed a compromise had been reached between the parties, the court considered whether it was nevertheless rescindable on the basis of undue influence at the instance of the plaintiff. Tuchten J noted (par 19) that a party who relied on undue influence must establish what the plaintiff pleaded (with reference to the classic formulation in *Patel v Grobbelaar* (1974 (1) SA 532 (A) 533–534):

> "[T]hat the other party to the contract gained an influence over him, that this influence weakened his resistance and made his will malleable, and that the other party used that influence in an unconscionable manner to persuade him to agree to a transaction which operated to his prejudice, and which he in normal circumstances would not have concluded".

The court concluded that there was no doubt that the defendant had gained an influence over the plaintiff. This was established by the following facts: the defendant knew that the plaintiff was under financial pressure and needed payment from the defendant to pay his workers; the disparity in the respective economic powers of the parties; and the defendant's knowledge that the plaintiff could not afford a protracted dispute (par 20). There was further no doubt that the defendant took advantage of the plaintiff's situation by persuading him to enter into a transaction that was to his disadvantage (par 21). Finally, in so far as the element of unconscionability was concerned, the court noted that, while it is entirely permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved, it is quite another thing when an economically powerful party withholds what is admittedly owing to an economically weaker party to gain a commercial advantage. Using contractual breach as a threat to induce the latter party to act to his disadvantage was subversive of freedom and human dignity, and furthermore in the present matter trenched upon the plaintiff's constitutional right to have the dispute adjudicated by fair legal or other process. Accordingly, the court sustained the plaintiff's rejoinder of undue influence (par 24).

4 Commentary

4 1 Pleadings

The court adopted a fairly strict and technical approach in finding that the defendant could not rely on the defence that an agreement of settlement had been concluded for failing to plead same (par 11). Before referring to the pleadings in *Gerolomou*, it is appropriate to define a compromise and set out how it should ordinarily be pleaded. A compromise is a contract that terminates a previously disputed or uncertain obligation (*Karson v Minister of Public Works* 1996 (1) SA 887 (E) 893F–H; Christie and Bradfield *The Law of Contract in South Africa* 473; and Ismail 2008 *PER* 154), and therefore serves as an absolute defence to any litigation to pursue the original claim (*Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A)). The onus of proving a compromise rests with the litigant who alleges its existence (*Hubbard v Mostert* 2010 (2) SA 391 (WCC); and Christie and Bradfield *The Law of Contract in South Africa* 475). A defendant relying on a defence of compromise should in response to the plaintiff's action based on the original claim ideally set out the defence in the plea document (Harms "Compromise" in *Amler's Precedents of Pleadings* 7ed (2009) 97 99) as follows:

> "1. On [date] at [place], plaintiff and defendant settled the dispute which is the subject-matter of the present claim. A copy of the settlement agreement is annexed hereto.
> 2. Plaintiff did not reserve his rights to proceed on the original cause of action."

It was common cause between the parties in *Gerolomou* that the defendant did not set out its defence in the plea document with sufficient precision. Whilst it is true that generally proper pleading entails stating all the material facts to be proved (*Wildner v Compressed Yeast Ltd* 1929 TPD 166), a defendant should nevertheless not be precluded from relying on a defence which is plainly, although perhaps not accurately, raised in the pleadings (see *eg, Absa Bank Ltd v Blumberg and Wilkinson* 1995 (4) SA 403 (W) 408I; and *Absa Bank Ltd v IW Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) 672I–674C).

In the defendant's plea document the defence was set out that the plaintiff "accepted a final payment in the amount of R19 291,70 in full and final settlement in respect of all amounts due to the Plaintiff for the works". It was further averred in the plea that the signed acceptance document was annexed thereto (and same was attached accordingly).The context in which the words "accepted" and "payment … in full and final settlement" are used (together with the signed acceptance document attached to the plea) elicit a clear inference that the defendant was relying on the defence that it made an offer to the plaintiff to settle the dispute, which the latter accepted (see *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) 436, where it was held that especially in the magistrates' court (which was the court of first instance in *Gerolomou*), it is permissible to make deductions when interpreting a pleading and also to determine a necessary allegation by way of implication). The acceptance was evidenced by the plaintiff's signature on the settlement document attached to the plea. Therefore, although the defendant did not expressly allege a compromise defence in the most precise language, it seems sufficiently clear to infer that the defendant was in fact raising such a defence.

Generally a pleading should define the issues (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 198) and be sufficiently clear to enable the opposing party to reply thereto reasonably and fairly (*Trope v South African Reserve Bank* 1992 (3) SA 208 (T) 210G). In essence, to avoid prejudicing the other party, a plea document is required to let the opposition know what issues are placed in dispute so that it is duly informed of the case to be met (*Hlongwane v Methodist Church of SA* 1933 WLD 165; and *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) 541H–542D). It is fairly evident that the plaintiff in *Gerolomou* knew what the case was that he had to meet. He understood that the defendant relied on an agreement of compromise as a defence because in his replication the plaintiff admitted entering into the very same contract (par 3). In the circumstances this admission can only be construed as meaning that the plaintiff understood the basis of the defendant's defence and actually admitted its existence.

Judging from his replication, the only issue placed in dispute by the plaintiff appears to have been that he was unduly influenced when he concluded the compromise agreement. He was certainly not taken by surprise with the compromise defence (*cf Bowman v De Souza Roldao* 1988 (4) SA 326 (T) 331G), and this was definitely not a case of the defendant canvassing one defence in its plea and then relying on a different defence at the trial (such conduct has been prohibited in several cases, see *eg*, *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) 279B; *Nieuwoudt*

v Joubert 1988 (3) SA 84 (SE) 89J–90A; *Improfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) 107G–H; and *cf Presidency Property Investments (Pty) Ltd v Patel* 2011 (5) SA 432 (SCA) 440). Therefore, it is suggested that the issues in dispute were understood by both parties and that the plaintiff would not have suffered prejudice from a procedural viewpoint if the defendant was allowed to rely on the compromise defence (compare further *eg, Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003) 24 *ILJ* 133 (LAC) 149). Furthermore, in the absence of such prejudice, Tuchten J should not have unduly magnified the pleadings (*cf Shill v Milner* 1937 AD 101 105) as he had a wide discretion (*Robinson v Randfontein Estates GM Co Ltd supra* 198) to allow the defendant's reliance on this defence. In the result we suggest that the court erred in its interpretation of the pleadings and should have recognized that a defence of compromise had been pleaded, albeit not in the clearest of terms.

4 2 Compromise

As with any other contract, a contract of compromise is usually formed by way of a process of offer and acceptance (see *eg*, *Patterson Exhibitions v Knights Advertising & Marketing supra* 528 and *Absa Bank Ltd v Van der Vyver supra* 402A–F, which incidentally override the decision in *Louw v Granowsky* 1960 (2) SA 637 (SWA) 641E–G to the contrary; and see further Zeffertt 1972 *SALJ* 38; and Ismail 2008 *PER* 154). In certain instances a compromise may also be concluded in terms of the reliance theory (*Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd supra* 332D–E 333D–334C). However, it has been suggested that use of this theory within such circumstances could at times be contentious (Ismail 2008 *PER* 174–176).

Crucial to the enquiry whether an offer of compromise existed in *Gerolomou* is determining if the defendant intended to make an offer of compromise when it presented the settlement document to the plaintiff for his signature. Tuchten J rather emphatically held that the defendant's offer (if it was an offer at all) was definitely not an offer of compromise (par 14–17). He reached this finding (with reference to *Absa Bank Ltd v Van der Vyver supra*) after pointing out that the settlement document evidenced the exact amount that the defendant believed it owed to the plaintiff (par 14) and that this admitted debt was all that the former was willing to pay. In *Absa Bank Ltd v Van der Vyver* (*supra* 404H) the court formulated the relevant enquiry simply as "whether the payment made is intended to effect a compromise or to pay an admitted liability". Although it may not have been intended, a perception created by this enquiry is that the one option should exclude the other. In other words, one may be inclined to believe that, if a person intends to make payment towards an admitted liability, he or she cannot in the same breath also intend to effect a compromise. This stance was addressed by Didcott J (as he then was) in *Andy's Electrical v Laurie Sykes (Pty) Ltd* (1979 (3) SA 341 (N)), wherein he correctly criticized judgments that all too easily "distinguished offers of compromise from payments of admitted debts, as if one sort of transaction necessarily excluded the other" (344B).

To rectify this perception, it is submitted that the word *merely* should be included in the enquiry in *Absa Bank v Van der Vyver* (*supra*). In this regard

Zeffert (1972 *SALJ* 48) correctly suggests that the enquiry should be "whether an offer of compromise has been made or payment of an amount which the debtor merely regards as reflecting the extent of his indebtedness". By inserting the word *merely* into the enquiry, the possibility exists for the debtor to intend or offer to make payment towards an admitted liability, as well as to also intend or offer to effect a compromise (Ismail 2008 *PER* 162). In analysing the real purpose of the offer in *Andy's Electrical v Laurie Sykes (Pty) Ltd* (*supra* 344C), Didcott J appropriately reasoned that "[t]he real dichotomy is then evident between an offer to settle the whole claim by the payment of a particular amount, for which liability may or may not simultaneously be conceded, and the payment of a sum admittedly due on the footing that the rest of the claim is not covered and remains in issue". If the former is intended, an offer of compromise exists, and "not the mere discharge of an acknowledged liability" (*Andy's Electrical v Laurie Sykes (Pty) Ltd supra* 344C; and see also Ismail 2008 *PER* 165). It follows that in *Gerolomou* the apt enquiry was to consider whether the defendant *merely* intended to discharge an admitted liability or if it intended to go further and settle the whole dispute by paying or offering to pay a specific amount to the plaintiff. The probabilities favour the latter, as will be motivated below.

In *Gerolomou* the defendant's "full and final" settlement offer was for "all accounts, claims, etc" (par 9), which begs the inference that it intended to settle the whole dispute between the parties without any further claim remaining in issue. Also any future claim was clearly barred, which further favours a construction of an intended offer of compromise (see *eg*, similarly *Van Breukelen v Van Breukelen supra* 290D–E, where the Appellate Division interpreted an offer for "any amount" which may be due as an evidently clear indication that an intended offer of compromise existed; and *RCG Trade and Finance v Garstang* 2002 JDR 0451 (W) 24, where use of the words "all claims" by the debtor, in an attempt to settle the debt, was considered to be crucial when the court held that an offer of compromise was intended and not merely an intention to pay an admitted debt; see further Ismail 2008 *PER* 169–170). Furthermore, if it had been the defendant's intention merely to offer to pay an acknowledged debt, it would probably just have paid the plaintiff the amount it believed was owed instead of taking the trouble to secure the plaintiff's signature on the settlement document in a specially convened meeting. Consequently, we suggest that, objectively construed, the conduct of the defendant and the wording of this document clearly convey that the defendant did not *merely* intend to make payment towards an admitted debt, but in fact intended to bring finality to the whole dispute when it presented the settlement document to the plaintiff for his signature.

The facts in *Gerolomou* are also similar to the facts in *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* (*supra*), to the extent that facing a claim for payment by the respective creditors, the debtors raised *contra* charges that they considered to be justifiable deductions to the claims. To address their disputes, the debtors in *Gerolomou* and *Be Bop* made offers in full and final settlement of their accounts, and in *Gerelomou* the offer covered all claims as well. In *Be Bop* (*supra* 332E–333D) the Supreme Court of Appeal had no hesitation in correctly finding that, objectively construed, the debtor intended an offer of

compromise (see Ismail 2008 *PER* 164–171; and see further *Andy's Electrical v Laurie Sykes (Pty) Ltd supra* and *Tractor and Excavator Spares (Pty) Ltd v Lucas J Botha (Pty) Ltd* 1966 2 SA 740 (T) which yielded the same result, under similar circumstances. However, for a different view on the Supreme Court of Appeal's ruling in *Be Bop* see Sharrock "The General Principles of the Law of Contract" 2008 *Annual Survey* 445 447–448).

Given the resemblance of the facts in *Gerolomou* and *Be Bop* there seems to be no compelling reason why the outcomes should have been any different. In both cases an offer to make payment for a specific amount believed to be owed was made, and in both cases there were disputed amounts that the debtors were not willing to pay. Therefore there is a strong case to be made that the defendant in *Gerolomou* did intend an offer of compromise and it did not *merely* intend to offer payment for an admitted debt. Objectively construed the creditor (plaintiff in *Gerolomou*) should also understand the offer in the same way (see *Be Bop supra* 332B; Zeffert 1972 *SALJ* 38; Ismail 2008 *PER* 168), and from the facts of *Gerolomou* this appears to have been the case.

Consequently, we suggest that since the content of the settlement document presented by the defendant in all probability did constitute an offer of compromise, it is fairly safe to conclude that under the circumstances when the plaintiff signed same he accepted the offer. This is further confirmed by the fact that, if the offer was rejected, the payment made in accordance with the settlement document should ordinarily be returned (see *eg, Harris v Pieters supra* 650; *Neville v Plasket* 1935 TPD 115 120; *Turgin v Atlantic Clothing Manufacturers* 1954 (3) SA 527 (T) 533; and *Blumberg v Atkinson* 1974 (4) SA 551 (T) 553H–554A; *Be Bop* 333D–334C), and there is no indication that this happened.

4 3 Undue influence v economic duress

While it must be said that it is difficult to fault the court's finding that the settlement agreement, if concluded, was voidable at the instance of the plaintiff, the basis for this aspect of the decision was more contentious. As previously mentioned (par 1 *supra*), the facts appear to be more in line with a form of duress than undue influence. Duress (*metus*) is characterized by a threat or some other form of intimidation which precludes the free exercising of the victim's will in concluding a contract, whereas "in the case of undue influence, the pressure is more subtle, involving an insidious erosion of the victim's ability to exercise a free and independent judgment in the matter, rather than threats or intimidation" (Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2009) 141). In most instances of undue influence one encounters a close relationship between the parties, either a fiduciary relationship, such as between doctor and patient, or one of trust, authority or veneration, such as between pastor and congregant (see further Christie and Bradfield *The Law of Contract in South Africa* 322–323). Although such a relationship is not a strict requirement for undue influence, its presence certainly may go some way to discharging the onus of the party invoking the doctrine (Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 3ed (2007) 125–126; and Hutchison and Pretorius *The Law of Contract in South Africa* 142).

The essential difference between these two forms of procedural impropriety then appears to be that duress involves engaging in contractual relations through some or other fear engendered by the *threats* of the other contractant (*Voet Commentarius ad Pandectas 4 2 1*; and Christie and Bradfield *The Law of Contract in South Africa* 313), while undue influence suggests subtle *manipulation* of the will of the victim by the more dominant party to the point where the former agrees to something that he or she ordinarily would not have agreed to (Hutchison and Pretorius *The Law of Contract in South Africa* 141). Notionally duress and undue influence may intersect in some instances (*cf Savvides v Savvides* 1986 (2) SA 325 (T) 329; Van der Merwe *et al Contract: General Principles* 131–135). It is, however, unnecessary to compare them exhaustively for present purposes (see further Collins *The Law of Contract* 4ed (2003) 136*ff*).

In *Gerolomou* the pressure exerted by the defendant was clearly in the form of a threat, and more specifically a threat to commit breach of contract (par 507C–D) by not paying the plaintiff at all if he refused to sign the settlement document (502H). The evidence of the plaintiff was also that he in fact signed the agreement under compulsion (502F), which is but another way of saying "under duress" (*cf* Van der Merwe *et al Contract: General Principles* 118). Furthermore, can it really be said, as the court did (506B), that "the defendant gained an influence over the plaintiff"? The parties were independent business entities dealing at arm's length and it seems far more likely that the defendant merely took advantage of the plaintiff's parlous financial situation by threatening to make it even worse (see par 21). More plausibly, the facts in *Gerolomou* involve what is commonly referred to as economic duress, a form of compulsion that generally has had somewhat of a chequered past, but steadily has achieved recognition in several legal systems (see generally Whincup *Contract Law and Practice: The English System and Continental Comparisons* 4ed (2001) 287*ff*). Usually duress concerns a threat toward the person or property of a contractual party, or his or her immediate family (Wessels *The Law of Contract in South Africa* Vol 1 Roberts (ed) 2ed (1951) par 1167; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol 1 5ed (1992) 50; and Hutchison and Pretorius *The Law of Contract in South Africa* 138), but in the case of economic duress the object of the threat is the economic interests of the victim.

Whether this form of duress should be recognized as a legitimate ground for the rescission of a contract in our law remains an open question (see generally Christie and Bradfield *The Law of Contract in South Africa* 317–318; Van der Merwe *et al Contract: General Principles* 124; and Hutchison and Pretorius *The Law of Contract in South Africa* 138). It has been argued convincingly that the courts have in fact adjudicated instances that qualify as economic duress, but without recognizing them as such (Glover "Developing a Test for Economic Duress in the South African Law of Contract: A Comparative Perspective" 2006 *SALJ* 285 286–287). It seems that Roman-Dutch law was generally averse to the notion of economic duress (*Digest 4 2 9 1; Voet 4 2 6*; and De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 50–51). However, where our courts have had to apply English admiralty law in salvage cases they have on occasion been prepared to grant a remedy in circumstances where a plea of economic

duress could be accommodated (see *eg, Blackburn v Mitchell* (1897) 14 SC 338). In one such matter, *Malilang v MV Houda Pearl* (1986 (2) SA 714 (A) 730B–F), although a defence of duress failed, Corbett JA expressly accepted that economic duress was part of English law and therefore by implication applied to the matter at hand. But in *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK* (1999 (1) SA 780 (T) 792C) the Transvaal Provincial Division was quick to point out that in *Malilang* the court was constrained to apply English admiralty law (787F–G) and that the judgment of Corbett JA therefore did not support the notion that generally economic duress was part of our law (792C). Thereafter in *Medscheme Holdings (Pty) Ltd v Bhamjee* (2005 (5) SA 339 (SCA) 346A–B) the Supreme Court of Appeal rather ambivalently affirmed the position adopted in *Van den Berg & Kie*, but also suggested *obiter* that there seems to be no reason in principle why the threat of economic ruin should not in appropriate instances be recognized as duress (346B) (see further Glover 2006 *SALJ* 285–287). The court cautioned further, however, that such cases would be a rarity and explained as follows:

> "[I]t is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beamptes* at 795E–796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."

English law has played no small part in the development of our law pertaining to defects of will in the conclusion of a contract and is an apt point of comparison. The concept "undue influence" is an English import (see De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 51–52; Van der Merwe *et al Contract: General Principles* 124–125; and Hutchison and Pretorius *The Law of Contract in South Africa* 141) and so is the doctrine of quasi-mutual assent or reliance theory that applies to the issue of material mistake (see Christie and Bradfield *The Law of Contract in South Africa* 26–30; and Pretorius "The Basis of Contractual Liability in English Law and its Influence on the South African Law of Contract" 2004 *CILSA* 96 122–124), to name but two prominent examples. It is likely, given the sentiments expressed in *Medscheme Holdings* (*supra*), that economic duress will eventually be adopted as well, perhaps *via* the portal of English admiralty law. The principle is well established in English law (see *eg, Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Lloyds Rep 293 335; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (*The Atlantic Baron*) [1978] 3 All ER 1170 (QB) 1182; *Universe Tankships Inc of Monrovia v International Transport Workers' Federation (The Universe Sentinel)* [1980] 2 Lloyds Rep 523 (CA) 530–531 541; *Pao On v Lau Yiu Long* [1980] AC 614 635–636; see further Beale (gen ed) *Chitty on Contracts Volume 1: General Principles* 29ed (2004) 515–519; and Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 14ed (2001) 340–344).

Although entrenched in English law, the parameters of economic duress are still in the process of being fleshed-out by the courts, one of the main concerns being the rather fine line between this form of procedural impropriety and legitimate commercial pressure (Adams and Brownsword *Understanding Contract Law* 4ed (2004) 71). In *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* ([1983] 1 All ER 944 (Ch) 960 – referred to in *Malilang v MV Houda Pearl supra* 730D–F) the court suggested as follows:

> "A plaintiff who seeks to set aside a transaction on the grounds of economic duress must therefore establish that he entered into it unwillingly (not necessarily under protest, though the absence of protest will be highly relevant), that he had no realistic alternative but to submit to the defendant's demands, that his apparent consent was exacted from him by improper pressure exerted by or on behalf of the defendant, and that he repudiated the transaction as soon as the pressure was relaxed."

The rub of course lies in the words "improper pressure," it being hard at times to distinguish this notion from hard bargaining. It nevertheless seems that a plea of economic duress will not pass initial muster unless the pressure that is applied is illegitimate (Adams and Brownsword *Understanding Contract Law* 71; Cooke and Oughton *The Common Law of Obligations* 3ed (2000) 474; and McKendrick *Contract Law: Text, Cases, and Materials* 4ed (2010) 636). Adams and Brownsword (*Understanding Contract Law* 71) suggest that the "paradigm of illegitimate pressure is the situation where one party simply seizes on the vulnerability of the other to take what effectively is a monopoly profit". Nonetheless, exactly what further qualifies as illegitimate or improper pressure is uncertain and still requires a fair measure of fine-tuning in English law (see further Collins *The Law of Contract* 140–143; Adams and Brownsword *Understanding Contract Law* 71–72; and Cooke and Oughton *The Common Law of Obligations* 473–475).

Important for present purposes though, is that in English law a threat to breach a contract by a party unless he or she is afforded an advantage not provided for in the agreement, satisfies the requirement of an illegitimate act (*The Atlantic Baron supra*; Beatson, Burrows and Cartwright *Anson's Law of Contract* 29ed (2010) 353; Samuel *Law of Obligations* (2010) 126; Collins *The Law of Contract* 140; McKendrick 639; Whincup *Contract Law and Practice* 287–288; *cf* Cooke and Oughton *The Common Law of Obligations* 474; and Adams and Brownsword *Understanding Contract Law* 70–71). And apparently this is the most common instance of economic duress (Peel *Treitel: The Law of Contract* 12ed (2007) 443). However, the rule is not absolute and even to this general premise there may be exceptions (see *eg, Pao On v Lau Yiu Long supra*; and see further in this regard Peel *Treitel: The Law of Contract* 443–445).

It is fairly evident that the facts in *Gerolomou* would most probably satisfy the requirements for rescission on the basis of economic duress in English law quite comfortably. In fact, arguably, the threat to breach an agreement to secure an unwarranted advantage would probably constitute some or other form of unlawful conduct in most Western legal systems. Economic duress would also have provided a far better theoretical rationale for the decision in *Gerolomou* than undue influence, but the court probably steered clear of this defence because the case was pleaded in terms of undue influence and the plaintiff may rather unjustly have been non-suited if the court found that he

had pleaded the wrong defence. More is the pity because notionally the factors that the court took into consideration in determining whether the defendant's conduct was unconscionable would have been equally relevant in adjudicating the matter on the basis of economic duress (see par 3 *supra* and especially par 24 of the decision).

5 Conclusion

Although the outcome in *Gerolomou* appeals to one's sense of justice, we feel constrained to point out that the court's interpretation of the pleadings and the settlement document lacks conviction. The facts of the matter were not overly intricate and indicate quite clearly that a defence of compromise was pleaded by the defendant on the one hand and that an agreement of compromise was concluded between the parties on the other. Yet the court went to some length to come to the opposite conclusion in both instances. It seems as though it went out of its way to assist the plaintiff and some might argue that the court's findings, despite its formal reasoning, appear to be more consistent with general notions of equity and fairness than the correct application of contractual principles. Unfortunately, such an approach does little to build coherency of president in an area of law that seemingly has clear principles yet is still fraught with inconsistency.

Furthermore, although the court granted a remedy on the basis of undue influence one cannot help but question whether it pursued the matter along these lines, again to effect a fair outcome, when the case actually fell squarely within the confines of economic duress, a form of procedural impropriety that has yet to be overtly recognized as a ground for setting aside an agreement in our law. It seems that since the case was pleaded in terms of undue influence the plaintiff might have been non-suited if duress was recognized as the appropriate defence in the circumstances. Hence the plaintiff might have found himself up the creek without a paddle for not pleading the case correctly. Nevertheless, the *obiter dictum* in *Medscheme Holdings (Pty) Ltd v Bhamjee* (*supra*) that there seems to be no reason in principle why the threat of economic ruin should not, in appropriate instances, be recognized as duress should provide the impetus for legal development in this regard. And perhaps it is better to recognize a new doctrine than run the risk of judicial obfuscation. Consequently, we suggest that the time is overly ripe for the recognition of economic duress in South African law. Although its exact parameters may at first not be certain, cases such as *Gerolomou*, where a party threatens to breach an existing contract purely to obtain an unwarranted advantage should primarily fall within the ambit of the doctrine, while other instances may be recognized and fleshed-out by the courts as the need arises.

CJ Pretorius and R Ismail
University of South Africa (UNISA)