
SOUTH AFRICA / JUDGMENT

Isaacs v Potgieter and Others (5010/2014) [2019] ZAGPJHC 92 (27 March 2019)

[2019] ZAGPJHC 92

COURT

South Gauteng High Court, Johannesburg

BEFORE

SE Weiner, RT Sutherland, TP Mudau

CASE / FILE NUMBER

5010/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 5010/2014

In the matter between

SHAYNE PATRICIA ISAACS APPELLANT

(First Defendant a quo)

and

DEON ETTIENNE POTGIETER FIRST

RESPONDENT (Plaintiff a quo)

THE REGISTRAR OF DEEDS SECOND

RESPONDENT

STANDARD BANK OF SOUTH AFRICA THIRD

RESPONDENT

J U D G M E N T

Headnote – appeal – trial judgment reversed

Duress and undue influence – distinctions between the two causa

Plaintiff seeking enforcement of a written agreement granting him 50% of the defendant's property – Defendant the plaintiff's

life partner – Defendant resisting enforcement on grounds of duress or undue influence of Plaintiff – allegations by

defendant that plaintiff dominated her, assaulted her and rendered her pliable to his will

Trial Court considered only duress defence and held that it was unproven and thus gave judgment in favour of Plaintiff to enforce agreement.

On appeal,

Held: the case turned on the proof of undue influence, not duress– on the facts, proven that Plaintiff exercised undue influence to procure Defendant's signature to agreement

Held: agreement unenforceable

Held: appeal upheld and judgment altered to be in favour of defendant

THE COURT:

Introduction[1]

[1] The critical issue in this appeal is whether a written agreement concluded between the appellant (Isaacs) and the first respondent

(Potgieter) should be enforced or set aside for want of Isaacs entering into the agreement freely and voluntarily.[2] Isaacs' defence to the enforceability of the agreement was that her erstwhile romantic partner, Potgieter, induced her, unlawfully, to conclude it and that she did so under duress or his undue influence.[3]

[2] The trial court concluded that the agreement was to be enforced. The basis for that finding was that the history of abuse by Potgieter towards Isaacs, which the judge seemingly accepted had been established on the evidence, was nevertheless, not causally connected to the decision by Isaacs to sign the agreement. We disagree. The correct question to ask was whether the evidence, holistically

evaluated, was corroborative of Isaacs' averment that she signed the agreement as a result of duress or undue influence by

Potgieter. The trial court approached the case on the basis that Isaacs bore an onus to establish duress. The elements of duress as captured in the decision in *Savvides v Savvides* 1986 (2) SA 325 (T) required proof of an imminent unlawful threat to life of the person or a family member or reputation or property, which threat

induced acquiescence. This, the court a quo found unproven, but did not address the question of undue influence.

- [3] The requirements for undue influence were set out in *Patel v Grobbelaar* 1974 (1) SA 532 (AD), namely that the aggrieved person was subjected to influence by another, that the influence weakened the aggrieved person's capacity to resist and rendered the aggrieved person pliable, that the other person exploited this influence to persuade the aggrieved person to agree to a transaction which was both to the aggrieved person's detriment and was a transaction that would not have been concluded had the aggrieved person acted of own free will. The judgment of Rabie JA at 533F – 534 A held thus:

“Soos die Verhoorregter tereg opmerk, is dit duidelik dat die respondent se skuldoorsaak gegrond is op wat in ons regspraak bekend staan as onbehoorlike beïnvloeding. In die gewysde Preller and Others v Jordaan, 1956

- (1) SA 483 (AA) op bl. 492G - H, sê FAGAN, A.R.:

"Myns insiens blyk uit die aangehaalde regsbronne dat die gronde vir restitutio in integrum in die Romeins - Hollandse reg wyd genoeg is om die geval te dek waar een persoon 'n invloed oor 'n ander verkry wat laasgenoemde se teenstandsvermoë verswak en sy wil plooibaar maak, en waar so 'n persoon sy invloed dan op gewetenlose wyse laat geld om die ander te oorrede om toe te stem tot 'n skadelike transaksie wat hy met normale wilsvryheid nie sou aangegaan het nie."

Die geleerde Appèlregter haal dan sekere sake in ons Howe aan waar die tersydestellingsgrond "undue influence" genoem word en gaan soos volg voort (op bl. 493A - C):

"In sulke sake vind ons dikwels dat die woorde 'undue influence' as aanduiding van die rede vir die nietigverklaring van die transaksie gebruik word. Ek kan met daardie woorde - of sulke ooreenstemmende uitdrukkings soos 'onbehoorlike beïnvloeding', 'improper influence' - in hierdie verband geen fout vind nie. Dit is m.i. 'n heel gepaste benaming vir die grond van aksie in omstandighede soos dié wat ek hier bespreek. Dat dit 'n oorname mag wees van woorde wat gangbaar is in die Engelse reg, beteken nie dat ons die grond van aksie op die Engelse reg baseer nie, ook nie dat ons aan Engelse beslissings op die punt groter waarde heg nie as bloot voorbeelde van die beskouings van Engelse Regters van die omvang van sulke enigsins vae woorde soos 'undue', 'improper', 'unconscionable', wat in regterlike omskrywings van hulle begrip van 'undue influence' voorkom."

Die onus om hierdie skuldoorsaak te bewys, het klaarblyklik op die respondent gerus en die geleerde Verhoorregter het, na my oordeel, tereg bevind dat die respondent die volgende moes bewys:

- (i) dat die appellant 'n invloed oor hom gekry het;
- (ii) dat hierdie invloed sy teenstandsvermoë verswak en sy wil plooibaar gemaak het; en
- (iii) dat die appellant hierdie invloed op gewetenlose wyse gebruik het

om die respondent te oorrede om toe te stem tot 'n transaksie (a) wat tot sy nadeel strek en (b) wat hy met normale wilsvryheid nie sou aangegaan het nie."

(See too: *Preller & Others v Jordaan* 1956(1) SA 483 (AD) at esp 490 -492 where Fagan JA distinguishes duress from undue influence; also; *BOE Bank Bpk v Van Zyl* 2002 (5) SA 165 (C) at [36] – [37])

[4] In our view, the evidence adduced shows that Isaacs discharged the onus to establish undue influence. Accordingly, the agreement must be set aside.

The agreement of 24 May 2010

[5] The agreement sought to be enforced by Potgieter provided thus:

....

DEON POTGIETER

.Unmarried

(hereinafter referred to as “Deon”)

SHAYNE PATRICIA ISAAC

Unmarried

(hereinafter referred to as “Shayne”)

RECORDAL

1. Shayne is the registered owner of Holding 5 Glen Austin Agricultural Holdings, Registration Division J.R., Province of Gauteng. In extent 2, 5696 Hectares. Held under Deed of Transfer Number R100462/2002 (hereinafter referred to as “the Property”).
2. Three Mortgage Bonds for amounts totaling R1 692 000.00 are registered over the Property in favour of Standard Bank of South Africa Limited.
3. Deon and Shayne have improved the Property in partnership over the period of approximately five years for the purpose of conducting a bed and breakfast business thereon.
4. Deon and Shayne each have a 50% interest in the Close Corporation registered under the name of Wild Goose Guest Lodge for the purpose of conducting such a business.
5. Deon has contributed amounts totaling approximately R1 500 00.00 towards the partnership.
6. It is considered necessary to record the terms of the Agreement between the parties as hereinafter set out.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. Notwithstanding that Shayne is the registered owner of the Property; Deon is entitled to at 50% (fifty per centum) share of the equity in the property.

2. In the event of either party wishing to dissolve the business partnership between them the following shall apply:

2.1 Either party shall be entitled to purchase the 50% interest of the other in the Property at a price to be agreed, failing which at a valuation of an independent third party acceptable to both of them. Such transaction to be finalised within a period of 3 (three) months.

2.2 Deon shall have the option of acquiring the vacant portion of the Property measuring approximately 4 acres without payment to Shayne in lieu of his financial contribution to the partnership aforesaid: subject to him discharging all costs of sub-division of the Property and registration costs.

3. In the event of the parties deciding to sell the Property, the nett proceeds of the sale after payment of all expenses and the amount required to discharge the mortgage bonds aforesaid shall be divided equally between the parties.

4. Shayne undertakes not further encumber the Property by way of registration of a further mortgage bond thereover or to enter into an agreement for the sale of the Property or any share therein without the prior written consent of Deon.

5. The terms of this agreement shall be binding on the parties, their heirs, executors, administrators or assigns and shall override and have preference over any provision in any will or document which may be in conflict therewith.

6. Both parties undertake in favour of the other that they have not signed and will not sign any deed of suretyship on behalf of a third party which could result in a claim against either of them.

Thus done and signed at JOHANNESBURG ON 24 MAY 2010.

The meeting to conclude the agreement

[6] This document was signed in the presence of an attorney, Mathews. What he has to say about the encounter with Issacs' and Potgieter is significant.

[7] Mathews had been approached by Potgieter alone. He was asked to prepare an agreement for Potgieter. Mathews was, thus, Potgieter's

adviser, not an attorney approached by both parties. The mandate he was given was to address Potgieter's anxiety about protecting

his "interest" in Isaac's property, a 6-acre plot on which two dwellings had been erected, in Glen Austin (the

property). Mathews was told by Potgieter that the relationship between Potgieter and Isaacs was, in Mathews words - "not as harmonious as it might be, and that the purpose of the agreement was to protect what he considered to be his rights as far as the property and the business was concerned". Mathews further described his mandate as follows:

“[Potgieter] asked me to prepare a document recording his situation with Mrs Isaacs relating to a property and a guesthouse business, which had been in operation for some time. And he felt that, having contributed a fairly substantial amount of money to this business, he needed to protect his rights in the event of the business or the relationship terminating, and that was the purpose of the agreement.”

- [8] Thus, being alerted to the adversarial nature of the relationship, it follows that Mathews was not misled by assuming that what he drafted on Potgieter’s instructions represented an existing consensus; it contained Potgieter’s demands.
- [9] The parties came to Mathews’ office to sign the agreement. Mathews says that this was Potgieter’s decision, and having given him a draft, it was unnecessary to have returned to his office to perform the formalities. Mathews has no personal knowledge of whether Isaacs had seen a draft before she arrived. Isaacs says she had not seen a draft; an allegation contradicted by Potgieter. However, on the probabilities, if both parties had copies, there would have been no point in going to visit Mathews and no premise, upon which Potgieter could rely, to bring her to such meeting. Why Potgieter chose to arrange things this way is a point of significance, addressed hereafter.
- [10] Mathews says he did not explain the agreement to Isaacs and Isaacs says so too. Potgieter says Mathews did explain it, which statement must be false. As Potgieter’s attorney, Mathews says he bore no responsibility to explain it to Isaacs as it was not he who was asking her to sign. He observed tension between Potgieter and Isaacs; he says: “ ... the body language of the parties on that occasion indicated to me that there was a possible difference of opinion relating to this matter...” Potgieter did not deny this; rather he fobbed it off on the basis that his relationship with Isaacs was “ ...getting volatile because I was being - I was contributing money and putting in work and effort into this property, and ‘she’ was - ...making my life difficult....” In cross examination Potgieter says that relationship was tense from a month before 24 May, which tension arose from misunderstandings and promises not kept by Isaacs. In his words they had “trust issues”. These earlier events shall be addressed hereafter.
- [11] Significantly, Mathews, at one point, excused himself to allow the two parties to discuss the matter in his absence. This departure from the room came directly after Isaacs said that she did not want to sign at that stage. On his return, she said she would sign.

Obviously, what happened in that interval is beyond his ken, but what is patent is that Potgieter had persuaded her to change her mind.

- [12] Isaacs says she read the document for the first time in Mathews’ presence. Equally important, she was not prior thereto told what was in the agreement. Isaacs says when she saw the reference to his R1.5m contribution, she looked at Potgieter in a questioning way, and he responded with an aggressive irritated look. Mathews, in cross-examination conceded this could have occurred, but some two and half years later when testifying, he could not recall it. Significantly, Potgieter in cross-examination conceded that he had never provided proof that he had indeed expended R1.5m on Isaacs and/or the property at any

time.

- [13] Issacs' explanation for signing on 24 May was that she was in fear of Potgieter's violence. They had arrived together and were to return home immediately after the meeting. The substance of her claims is addressed hereafter. Potgieter alleges that her description of him as a violent person is untrue.
- [14] What is to be made of this episode, before engaging with the broader context and earlier occurrences which colour the event? Save for her signature on the document, there is a litany of indications that she signed it reluctantly. She saw it and read it for the first time in a strange attorney's office to which she had been escorted. The theatre of the signing ceremony in a strange attorney's office was, in our view, a dimension of intimidation, consistent with a pattern of behaviour addressed hereafter. On the probabilities, her questioning of the R1,5 m must be accepted as true. Why did Mathews have to leave the room? Mathews observations are an independent source of evidence that there was no consensus before the meeting, and at least one point of dispute. Why did she fold so spectacularly, after being alone with Potgieter? She was, as will be seen, accustomed to consulting an attorney for advice; when she expressed a reservation about signing there and then, why was she not afforded an opportunity to obtain her own legal adviser's input?
- [15] As it turned out, within a fortnight the relationship ended with a violent assault by Potgieter on Isaacs. The conflict, on Isaacs' version, was sparked initially by him being too drunk to collect paying guests. Then, one of the children was responsible for accidentally causing the screen of Potgieter's laptop computer to be broken. The discussion over this led to a row. He was smoking dagga the time. He hit Isaacs with his fist. He kicked the dogs. The following morning, he gratuitously approached her and headbutted her, saying that he was not finished with her yet. He then left the premises and was locked out. Isaacs obtained a protection order against him and he never returned. We turn now to examine the circumstances and events which led up to 24 May 2010.

A narrative of the parties' relationship: December 2005 – June 2010

- [16] The thrust of Isaacs' case is that she signed the document on 24 May because she was both fearful of Potgieter and desperate to maintain the peace and appease Potgieter, who mounted huge pressure to provide him with security for what he believed was his financial interest. Potgieter's case is that she freely agreed thereto and that there is a pattern of conduct to show that consensus. What is there to back this up?
- [17] When Isaacs began her intimate relationship with Potgieter in late 2005, she was separated from her husband, and lived with twin five-year children in her parents' home. In about December, Potgieter moved in with her, in a cottage on the property of the parents, a plot in Glen Austin. Not too long after that an incident occurred to render close habitation with the parents uncomfortable. Issacs says he was rude to her mother; he says Isaacs argued with her mother.

[18] Fortuitously, the 6-acre plot next door was owned by Isaacs and her then husband. They had bought it in 2002 for R350,000. Thereafter, they spent further sums on renovations, repairs and the like. The sum she gives is R200,000. This included some restoration to the existing “farm house” and the building of a new dwelling, a thatched house. Both dwellings were tenanted. One tenant, in the farmhouse left, and Isaacs, Potgieter and the children moved there in early 2006. This move meant a forfeiture of rental income to Isaacs. Potgieter said he would pay R5000 pm to compensate for that loss but according to Isaacs he did not do so. Potgieter claims he honoured that undertaking, but in the trial when this claim was disputed, Potgieter was unable to prove that the payments he allegedly made, were paid to Isaacs. Be that as it may, it was not in dispute that they both made some indeterminate contribution to the running of the household, albeit Potgieter’s contribution may have been erratic.

[19] The farmhouse in which they lived needed repairs to address damp. Potgieter, who says he had a ‘building background’

undertook the repairs. The exercise morphed into an extension to the kitchen and the enclosing of a patio. The project was ultimately

funded by Isaacs who took out a bond and paid R80,000 to Potgieter in respect of the job. She testified that he constantly made demands to be reimbursed. This episode evidences the disposition of Potgieter to take charge of a situation and drive through his point of view about what was appropriate.

The Guesthouse project

[20] There was, seemingly, a hiatus in building activity after that exercise in 2006, until late 2009. (Thus the reference in the May 2010 agreement to 5 years of improving the property in partnership, appears to be factually inaccurate). Like many other South Africans, the 2010 World Cup inspired grand thoughts in the minds of the parties to make money from tourists. The idea of using the thatch house as a guesthouse blossomed.

[21] Two developments thereupon took place. The first was to incorporate a close corporation on 13 August 2009, called “Wild Goose Guest Lodge CC”. Nothing more can be said about the CC per se, because, as far as is known, no accounts have ever been drawn up and it was defunct by the time of the trial. It did conduct some

business, but the scale and success is unexplored.

[22] The second development concerned the thatch house itself which was to become the “guest lodge”. The parties were in agreement that it needed to be upgraded to be fit for purpose. The evidence discloses that they were not in agreement about what was to be done and the extent to which expenditure was to be risked on the venture.

[23] According to Isaacs, money was an issue. Potgieter said he had R60,000 available to fund an upgrade. Isaacs was prepared to spend that sum. However, Potgieter was enthusiastic to undertake a major overall. His plans involved the 5 bedrooms, all be with en suite bathrooms and with doors leading directly outside onto a wooden deck cum patio. The patio he largely built himself, he says. Artisans were brought in for the break out phase and to replace windows and doors and build bathrooms. According to Isaacs, Potgieter would brook no resistance to his transformed creation and, through his domineering attitude, secured passive acquiescence in his plans. Predictably, the costs escalated way beyond that with which Isaacs

was comfortable. The sum allegedly spent, on Potgieter's version was R200,000, a sum that was out of reach for Isaacs. By

contrast, according to Potgieter, the extent of the renovations were indeed agreed, and he was to be the "main financier". It bears mention that Potgieter is a "contract pilot" who flew throughout Africa from time to time. It must be understood that this means he was a freelancer. He worked as and when he pleased. At the time the guesthouse scheme was hatched, he was earning six thousand US dollars per month. Ostensibly, he was feeling flush. The renovations were complete shortly before the World Cup Football Tournament began, about April or May 2010.

[24] It was in this regard, so claimed Potgieter, that he and Isaacs came to an agreement that recognised his financial interest. Moreover, Potgieter points to certain correspondence and other acts that supposedly reflect express acknowledgment by Isaacs of his interest in the guesthouse business and the property in particular. This is the seed of the controversy in this case.

[25] Potgieter sets the agenda for his case thus:

"....Regarding the relationship, during the period while this was – if I could say this was going on, that we were starting to discuss renovating this and creating a guest lodge, [Isaacs] and me were having quite a few arguments. The arguments would surround the ongoing – I felt she was not coming to her – bringing her side of the arrangement that we as life partners where I was contributing to give me some kind of....assurance in writing, because the arrangement was reached, was that in lieu of me - of my ongoing contributions, I would become a 50% partner in the property that [Isaacs] was staying on

Q: So then, my understanding is that there were ongoing arguments with regard to the amount of shares that you would get from the guesthouse.

A: No M'Lord, it had to do with – I've created financial statements to try and bring my point across. I was contributing a very large amount of money on a monthly basis, and on a yearly basis, both into the defendant's personal account, to carry our overheads, plus on the property renovations, and the verbal arrangement that was made – reached between us, was that the property would be – she would put the property in both of our names through the Deeds Office. This was the verbal arrangement that we had in place, but I would go away on tour and she would tell me that she was going to do it, and I would come back and she would have excuses why it isn't

done.

Q: Ja, so I'm right to say that the argument was about you having shares in the property, because you are contributing.

A: Correct, correct Sir."

The visit to Trevor Swartz Attorney

[26] As foreshadowed earlier, the trip to attorney Mathews was not the first time an attorney was called upon to address the parties'

respective interests. Swartz was handling Isaacs' divorce. On about 3 December 2009 Isaacs and Potgieter went to see him. This encounter is of cardinal significance in the decision of the dispute in this litigation. The crux was the issue of a recognition of a 50% "interest" by Potgieter in the property. The meeting was a disappointment for Potgieter. Swartz bluntly told them that he would not draw up an agreement giving Potgieter a 50% share in her property because he did not show that he deserved it; more specifically, he could not show that he had spent what he claimed to have spent. They left empty handed. Swartz, ultimately, did not draw up anything.

[27] The significance of this event lies in the fact that, at this stage of the project, there was a stiff demand from Potgieter for financial recognition and an absence of proof that such a division was fair. At this stage he was already a 50% member of the CC which it was intended would be the trading vehicle and generate profits to be shared equally. But the property was not an asset of the CC. No evidence was adduced of how the parties, assuming they applied their minds thereto, contemplated how the CC would account to Isaacs for the use of that asset.

[28] The immediate aftermath of the Swartz visit was an argument. At home, according to Isaacs, Potgieter smoked dagga, and in his enraged state threatened to burn down the Lodge, prevent it operating, kill her dogs and bring her to despair, if she did not sign an agreement. He punched Isaacs and knocked her to the ground. She says that she offered as an excuse that so long as she was married, she could not conclude such an agreement because her husband had signed deeds with her and they were married in community of property. His response was to call her a liar; perhaps she was, and if so, this serves to corroborate her unwillingness to pass over a share of the property to Potgieter. Potgieter says she never offered her marriage as an excuse. Potgieter admits making the exaggerated threat at some stage and Isaacs says the threat to burn the lodge, kill the dogs and so forth was repeated on other occasions. He denies ever assaulting her, save one instance when he slapped her face while she was berating him. His evidence does not deal specifically with the immediate aftermath of the Swartz visit.

Further correspondence and the "Heads of agreement" concluded about Potgieter's "interest"

[29] During Potgieter's absence from home for a short while after the Swartz visit, Isaacs sent him an email. [record 152] It is undated, but the contents help to place it in time. The substance and the tone are notable for the painstaking entreaties extended to Potgieter.

"Hi Deon,

I deduce (for lack of finding another word) you must have had a response from Trevor? He told me what he had replied to you?

I asked if he had explained why he had changed the agreement (while we were sitting there) from the whole property to only the front two acres, he stated 'no he did not explain that to you in his response', 'but he said he did what was fair at the time' regarding what you had put into the property so far' and what 'I had paid to this point', and apparently we left quite contented?

Concerning the point you made re: the deeds office and putting the bond into both our names: this is what Trevor explained and did advise while we were in his office; that this was the route to go, as it was probably the only legal route to go. The reason that we were unable to do this, is my fault, as we explained to Trevor, I am unemployed, and the bank would like 3 months' bank statements of a salary going into my account, the fact that I paid approx. R380k into my account is of no concern to Standard Bank. Please not even though the bond is in my name, they would not approve the application, as it is treated as a new application with both our names on the Bond.

If you remember from April 2009 I had been trying to do this (Ref: I attach all reference numbers pertaining to Standard Bank, actual emails unfortunately were on my laptop, I have no access any longer to that pc – its collapsed, but I am sure SB have all the emails on record for you to peruse). They would not accept me as co-owner on the property, for the reasons stated above. You are more than welcome to phone them with all the reference numbers, you will find out that I did tell you the truth, and had tried my best.

We discussed with Trevor that we would put an agreement into place 'so long' (the front two acres – his advice) and once the lodge was up and running, and I can prove an income, you and I can then put the bond into both our names.

I have sent you a letter stating that you are co-owner on the property, as soon as the business is up and running, we can then re-apply to the bank and put the bond into both our names. I have also sent you a Deed of Sale agreement, which is a form of security for you, which means you can buy the property and have it in our name. (Not sure if you have received either?)

It has never been my intention not to have you in my life, you are my partner, who I adore. Times have been hard for us, possibly we made it this way the last four months, our debauched (drinking & smoking dope & taking acid) way of life was not ideal while we tried to practice being. Instead we got nothingness & total unconsciousness. We will get from this what we put in, and unfortunately we were immoral and unprincipled souls, so this is a lesson for me. To try and live my life this moment, and appreciate all that I have, and the beauty of life. As we always said we are very lucky!

I have also been in touch with Carlitos, for the agreement, he is busy preparing it, he is not in the country, he left the next day for the Isle of Man (16th Jan) after arriving back from Ballito. He did say we will correspond via email, until he is back (I have attached this email

for your info).

I have listened to ET and the NE – that’s all I do now, and Ethel (the little lady from the concentration camp) resonated with me, court cases, suing this person, hating that person, it’s all my fault, it’s all their fault – does this all really matter? So I shall move lawyers, so I can resume my divorce case, as I think Trevor has gotten a little too involved in this situation. I shall collect files, I’ve paid what is outstanding and moving along. The same with pieces of paper saying I own this I own that, it’s not true, I am not wealthy, I don’t own anything, all I have in this world is my essence, and I shall just listen to my breath.

This too, shall pass.

To update you on the lodge, we have a huge presence now in the area, I have been to market the lodge with a few co’s. I guess Zelda is not interested, as I am off her mailing list. I am getting enquiries as far off as Israel, for 15 days at a time, I have bookings from first week of February (I have quoted for B&BD – so per person it is R2010 for three nights – this is the Majuba Project from Eskom), we are getting there. I am already speaking to Giulio, who I will probably see on Thursday (Carlito’s and Lisa’s friend) who has 6 people for our lodge for the WCup.

I truly hope you are well, as not really sure you are even getting my odd emails, trying my best not to exasperate you.

Te quiero

Namastè

Shayne

[30] Indeed, as indicated in this plainly placatory epistle, a blank deed of sale was drawn, undated and signed by Isaacs.

[31] In my view the tenor of the email and the thrust of its contents reflect a response to pressure to sign away half her property to Potgieter and her making supplications to smooth things over to sustain the personal relationship.

[32] On 6 December 2009, a document styled “heads of agreement” was signed by both parties. Isaacs says this occurred the day he arrived home from Nelspruit. Potgieter says she told him the document had been drawn by Swartz. In truth, she downloaded it from the internet. It is not improbable that she lied about the source, although her version was that he was present when she downloaded it. If it is true that she lied, the implication is only to fortify the inference that she was at pains to placate him.

[33] The text reads:

HEADS OF AGREEMENT

Shayne Patricia Isaac

Deon Ettienne Potgieter

194 Allan Road, Glen Austin Agricultural Holdings /

Holding 5, Glen Austin, Glen Austin Agricultural Holdings

DATED THIS DAY 6th DECEMBER __ MIDRAND GAUTENG.

This Heads of Agreement serves to confirm that the following parties: which will now be referred to as the “partners”.

Who have a joint household at the above address:

Shayne Patricia Isaac ID:

Deon Ettienne Potgieter ID:

Have entered into an agreement on __ in the Midrand District _____.

The partners have settled to have a shared agreement on the above property (in equal proportions).

(Which includes mortgage / bond repayments / electricity / rates and taxes / insurance costs / employed workers and the general maintenance of the property ie all expenditure relating to the said property):

194 Allan Road, Glen Austin (25,592sqm)

Also known as:

Holding 5, Glen Austin, Midrand District.

Should either partner decide to withdraw / sell / revoke their portion of the property, 120 (one hundred and twenty days) notice must be agreed to both “partners”.

This agreement is binding between Shayne Patricia Isaac and Deon Ettienne Potgieter.

Signed this day 6th day of December 2009.

[34] The content tends to be waffle, but Potgieter signed it nevertheless. Unsurprisingly, he later, probably upon reflection, realised it said little of value. He demanded more.

[35] In response, on 10 January 2010 she wrote a note as follows:

To whom it may concern:

This letter serves to confirm that

Shayne Patricia Isaac ID

Deon Ettienne Potgieter ID

have a half share (50%) each, divided equally on the following property namely:

Erf 5, Holding 5, Glen Austin a/h: 194 Allan Road, Glen Austin, Midrand, measuring 2,5696 (two comma five six nine six) hectares, Transfer Deeds: TT00233/2002.

[36] These events, in our view, reflect a pattern of acquiescence in Potgieter's demands. The contrary contention that they reveal a long-standing consensus is incorrect when the exchanges are understood in the context of their broader relationship. What were the contextual circumstances that explain the repeated refrain of assurances?

The history of Abuse

[37] Isaacs gave an account of several spectacular events in which on her version she was violently attacked, punched, kicked, verbally abused and threatened with extreme violence. The challenge in cross examination by Potgieter's counsel, was not to deal with the detail of the allegations but to scoff at the litany as a gross exaggeration and fabrication to disguise her own violent temper and physical attacks on Potgieter. The old refrain of "why didn't you leave; no-one would have tolerated such abuse' was used to attack her credibility. An evaluation of the probabilities must determine the outcome. In our view, the danger of exaggeration in such accounts is real and it is appropriate to guard against that exaggeration. It is unnecessary to accept that each episode is faithfully recounted. What can sensibly be undertaken is an assessment that has, as its origin, the common cause facts and inferences that can be drawn from the probabilities.

[38] Potgieter admits using dagga and alcohol and also at some stage a medicine to counter the effects of a bipolar condition. At some stage Isaacs too used drugs and drank liquor; she claims to have stopped drinking. His evidence about the use of these drugs was defensive and dismissive of the effect they had on him. He denies he needed anti-bi-polar medicine even though he took it.

[39] A brief account of the several spectacular incidents includes the following:

39.1 On several occasions whilst out at a social function or dinner, after consumption of liquor and dagga or both, Potgieter assaulted her and addressed her viciously, calling her a whore on occasion. One such event, early in their relationship, after having attended a concert, Potgieter, influenced by the taking of drugs tried to strangle her. Potgieter says this was a pure fabrication.

39.2 Another event was whilst driving in the Drakensberg with the children, in a rage he pulled up the handbrake whilst at speed to cause panic among the occupants.

39.3 An incident occurred in which, whilst in the car returning home with the children, he accused her of being an irresponsible mother. She and the children got out of the car and eventually got a lift from a stranger to their home. At home the berating and assault by Potgieter continued. He punched her in the face. Isaac's daughter, ten years of age, was so frightened that she fetched a knife to defend her mother. He punched a fist through a window pane. This episode was witnessed and corroborated by Mrs Legodi, the domestic helper.

39.4 Immediately after the visit to Swartz, as already alluded to, he threatened her and assaulted her whilst in a rage.

39.5 On an occasion in early January 2010, during an argument about his financial demands, he kicked her karate style off a bed where she was lying. She sought medical help after this incident.

[40] The letters alluded to earlier were written by her, she says to placate him in a context of a relationship marred by such events. She claims that she habitually diminished herself to a state of total obeisance, at times bowing before him and begging forgiveness to placate him when he was in a violent mood.

[41] These events are, of course, the "highlights" of the abusive side of the relationship. Although not directly mentioned it can be inferred that, in between these events, the relationship experienced some degree of harmony and displays of affection,

however, always conditional upon Potgieter's mood. What is manifest however is the pattern of domination practised by Potgieter,

physically and emotionally.

[42] It can be inferred that when his pet project the Guesthouse was underway, and the unstable relationship had become overlaid with an important financial interest, he was prone to anxiety about losing his investment and obsessed about it. In the run-up to the meeting with Mathews, the demands for recognition were ceaseless.

[43] On 7 May 2010, an important event occurred: Isaacs got divorced. The pressure to sign a further contract became intense. Hence, a mere fortnight thereafter, they found themselves in a meeting with Matthews.

[44] The Court a quo rejected the evidence of Isaacs that she lived in fear of him and reasoned that duress was not proven. The history of abuse was accepted. The Court a quo stated that abuse had become a way of life for Isaacs and that it followed therefore that, having reconciled herself to that condition, it was not fear that induced her signature. This perspective does not afford sufficient weight to the peculiar circumstances at the meeting with Mathews nor the pattern of behaviour which has been traversed in this judgment, nor self-evidently the cause of action based on undue influence.

[45] In our view, the evidence demonstrates that Isaacs succumbed to bullying and undue pressure and signed the agreement to placate her lover and not because she freely and voluntarily was in agreement with the terms of the agreement put before her. No expert evidence was adduced of her psychological state. Potgieter's counsel argued that this was an issue that required expert evidence.

Notwithstanding the absence of such evidence, upon an ordinary commonplace assessment of the circumstances, the assertion of Isaacs

that she did not really want to sacrifice her property or a share in it when there was no objective basis to justify such a gesture, is more probable than her genuinely wanting to sacrifice half of her valuable and only asset. Without a proper accounting exercise having been performed by the parties during this period to determine exactly what each had contributed, financially and value-by-effort, there could be no rational foundation for a 50% share of the equity in the property. She displayed by her conduct an emotional dependence on Potgieter's approval and acted under that influence.

[46] None of this reasoning ignores the fact that Potgieter indeed did make a contribution in money and effort. But that fact per se does not demonstrate what value to attribute to a fair recognition of his uncertain contribution. Once Swartz, acting with impeccable

professionalism, point blank refused to be a party to a manifestly unsubstantiated deal, the next obvious step could only be to gather up the necessary substantiation and submit it to Swartz. Potgieter concedes this was never done. An adverse inference must be drawn. The subsequent placatory acts performed by Isaacs must be understood to be the result of badgering and displays of anger and violence.

[47] In our view, the causal link between Potgieter's ill-treatment and badgering of Isaacs and her emotional dependence on him, was well established.

Conclusions

[48] In the result in our view, the agreement of 24 May 2010 was not signed by Isaacs voluntarily but rather as a direct result of undue influence by Potgieter.

[49] The undue influence is demonstrable, not merely from the very circumstances which prevailed at the meeting with Mathews, but is corroborated by the pattern of events that led up to it.

[50] The appeal must therefore succeed.

The Costs

[51] It is appropriate that costs follow the result.

[52] The Order

(1) The appeal is upheld with costs.

SE WEINER

Judge of the High Court

Gauteng Local Division, Johannesburg

RT SUTHERLAND

TP MUDAU

Date of hearing: 13 March 2019

Date of judgment: 27 March 2019

For the Appellant:

Adv C J Mouton,

Instructed by Michael Krawitz & Co

For the Respondent:

Adv E Liebenberg,

Instructed by Scheepers and Pretorius Inc

[1] The appeal had lapsed for want of timeous prosecution and the filing of the appeal record. The attorney for the appellant gave a satisfactory explanation for the failure. The application for condonation met with token resistance and accordingly condonation

was granted and the appeal reinstated.

[2] The appellant challenges the judgment, inter alia, on the basis that there ought to have been a finding on whether or not a partnership

as alleged in the claim existed or not. Strictly speaking, a finding should have been made, but such a finding would in the particular

circumstances have in any event been superfluous and the true gravamen of the dispute was the enforcement of an agreement to give Potgieter 50% of the equity in the fixed property.

[3] The second and third respondents took no active part in the litigation. The terms of the agreement, dated 24 May 2010, relate to fixed property owned at all material times by Isaacs. No relief is sought in the claim against these parties and no averments were made affecting them and consequently they ought not to have been joined.

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