THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 214/04

In the matter between :

MEDSCHEME HOLDINGS (PTY) LIMITED

First Appellant

MEDSCHEME (PTY) LIMITED
Second Appellant

and

YUSUF BHAMJEE

Respondent

Before:	**ZULMAN, CAMERON, NUGENT, CLOETE & JAFTA JJA**
Heard:	**3 MAY 2005**
Delivered:	**27 MAY 2005**
Summary:	**Contract – whether voidable for duress – economic duress to be distinguished from hard bargaining.**

J U D G M E N T

NUGENT JA:

[1] Dr Yusuf Bhamjee – the respondent in this appeal – graduated from the Medical University of South Africa in 1989. After completing his internship he joined Dr Karim in general practice in Kinross and two years later he took over the practice. Most of Dr Bhamjee's patients were employees of Sasol and their dependants, who benefited from one or other of two medical-aid schemes operated by Sasol. Although his patients were far from affluent, the practice, said Dr Bhamjee, was very lucrative.

[2] It was because the practice was costing the schemes more than comparative practices in the area that it came to the attention of Medscheme (the second appellant, which is a subsidiary of the first appellant, but the distinction between the two companies is not material) which is an administrator of medical aid schemes. It administered, amongst others, the two Sasol schemes, which were once racially divided. The members of Oilmed were Sasol's black, generally lower-earning, employees. Other employees belonged to Sasolmed. (The two schemes have since been combined.) Most of Dr Bhamjee's patients were beneficiaries of Oilmed.

[3] On two occasions – first on 23 June 1998 and then again on 17 February 2000 – Dr Bhamjee acknowledged himself to be indebted to Medscheme for the repayment of portion of the moneys that he had claimed from and been paid by the schemes. On the first occasion he acknowledgment himself to be indebted in the sum of R350 000, which he paid in instalments over about two years. On the second occasion he acknowledged himself to be indebted in the sum of R588 000. When that acknowledgment of debt was signed it was anticipated that portion of the debt would be set off against moneys that Dr Bhamjee had claimed from but not yet been paid by the schemes, and that the balance would be paid in instalments, and those terms were incorporated in the document. It is not disputed that that acknowledgment of debt, and its related undertaking, was conditional upon its terms being approved by the schemes, which did not occur. (The point was overlooked when the present proceedings were commenced.)

[4] Soon after the second acknowledgment of debt was signed the Sasol schemes decided that they would no longer accept claims made upon them directly by Dr Bhamjee. Instead, he would be required to recover his charges from their members, who would in turn be reimbursed by the

schemes to the extent of prescribed tariffs. The result was disastrous for Dr Bhamjee. It seems that most of Dr Bhamjee's patients preferred to consult practitioners whose charges were recoverable from the schemes directly and his practice soon collapsed.

[5] That seems to have been what prompted Dr Bhamjee to dispute the validity of the two acknowledgments of debt, alleging that they were signed under duress. He sued Medscheme in the Pretoria High Court for declarations that they were void, for recovery of the moneys that he had paid, and for recovery of the moneys that were retained by Medscheme for set off against the second acknowledged debt. In addition to resisting Dr Bhamjee's claims Medscheme counterclaimed for recovery of the balance of the second acknowledged debt (after deducting the moneys that were to be set off). Dr Bhamjee's claims succeeded and Medscheme's counterclaim was dismissed (by Claassen AJ). Medscheme now appeals with the leave of the court *a quo*.

[6] In general terms, an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable. The harm with which Dr Bhamjee alleges he was threatened was economic harm, the nature of which emerges from the relationship that existed between Dr

Bhamjee and the schemes.

[7] A medical aid scheme is an association of its members who contribute (their contributions might be augmented by contributions from their employer) to a fund from which their medical expenses are defrayed. Often the member will pay, or incur liability to pay, the provider of the medical service, and will be reimbursed by the scheme to the extent of a prescribed tariff. Or the scheme might choose to accept claims directly from service providers, which holds out advantages for members and for service providers alike. But that entails some risk to the scheme. Clearly the scheme will be unable in practice to verify each of what will often be numerous claims. The avoidance of excessive or fraudulent claims will thus depend largely upon the integrity of the service provider. On the other hand the discretion to accept claims directly also affords considerable bargaining power to the scheme when dealing with those service providers who depend for their economic survival upon their claims being paid by the scheme.

[8] Dr Bhamjee was one such service provider. And it was the assertion by Medscheme of that bargaining power, so he alleges, that constituted what he complains of as duress. It occurred in the circumstances that follow.

[9] Medscheme offers to the schemes that it administers, at an additional

cost, what was referred to as a ‘managed health care’ service, which enables the costs being incurred by the scheme to be monitored and controlled. One of the techniques that is used to monitor costs is the comparison of a medical practitioner’s cost-profile against the average cost-profile of comparable practices. If there are material discrepancies steps will be taken to investigate and if possible reduce or eliminate the discrepancies, first by alerting the practitioner to the discrepancies, then by referring the matter to the practitioner’s professional body, and then by direct discussion with the practitioner. Ultimately the scheme might exercise its discretion against accepting claims from the practitioner directly with the effect that its members will be discouraged from using the services of that practitioner to the overall benefit of members.

[10] During 1998 Dr Bhamjee’s claims profile came to the attention of Medscheme and ultimately a meeting was arranged with him to discuss the matter. The meeting was held on 23 June 1998. Medscheme was represented by Mr Daylan Moodley, who was employed by Medscheme as a Senior Manager: Provider Profiling. (Mr Moodley said that the meeting was also attended by Mr Deva Moodley but that is not material.) The function of Mr Moodley’s department was not directed towards detecting or

investigating fraud or other dishonest abuses (that was the task of another department) but rather towards monitoring the cost-effectiveness of service providers and taking steps to contain those costs.

[11] Much of what occurred at the meeting is in dispute. What is not in dispute is that Mr Moodley had before him Dr Bhamjee's claims profile for a period of three months and a comparative profile of the average claims of comparable practices in the area. Mr Moodley said that his principal concerns were Dr Bhamjee's average cost-per-patient, which was substantially higher (about 50%, or R110 per patient) than the average cost of comparable practices, and the frequency of repeat consultations. Mr Moodley calculated that the cost to the schemes of Dr Bhamjee's practice over the preceding six months was roughly R400 000 higher than the cost would have been had the services been provided by the average comparable practice in the area (calculated at R110 per patient for an average of 600 patients per month) and he told Dr Bhamjee that the schemes were considering terminating direct payments to him. He said that Dr Bhamjee became perturbed and asked whether the schemes would reconsider the matter if he repayed at least part of the excess. Mr Moodley told him that that was a matter for the decision of the schemes. Dr Bhamjee then signed

the first acknowledgment of debt, which Mr Moodley undertook to put before the schemes' trustees. A day or two later he discussed the matter with the chairman of the schemes' trustees who accepted Dr Bhamjee's offer.

[12] Dr Bhamjee's account of the meeting was that Mr Moodley said that he (Dr Bhamjee) was earning too much, that he was dispensing expensive medicines, that he had been instructed to demand from Dr Bhamjee repayment of all his earnings in excess of R150 000 per month for the past six months, and that if he refused the schemes would terminate direct payments. He said that Mr Moodley then calculated his alleged excess earnings to be about R370 000 but said that, as a favour, he would reduce it to R350 000. Dr Bhamjee said that in desperation, and in fear that his practice would collapse if the threat was carried out, he signed the acknowledgment of debt. At the end of the meeting, he said, Mr Moodley warned him that direct payments to him would be terminated immediately if he discussed the matter with an attorney.

[13] The learned judge in the court *a quo* rejected the evidence of Mr Moodley (as he rejected the evidence of all Medscheme's principal witnesses) and accepted that of Dr Bhamjee. His assessment of their

evidence was based on their demeanour, and on what were said to be discrepancies in their evidence none of which seem to me to be material.

[14] It has been said by this court before, but it bears repeating, that an assessment of evidence on the basis of demeanour – the application of what has been referred to disparagingly as the 'Pinocchio theory' – without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the court *a quo*. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities.

[15] But on the critical issues of fact the discrepancies are in any event not material. Clearly Dr Bhamjee must have signed the acknowledgment of debt in the belief that his failure to do so placed the future of his lucrative practice at risk. Whether his belief was induced by a threat made directly or only by implication is of no consequence. The question is only whether the direct or indirect threat constituted duress as it is understood in law.

[16] There can be no quibble with the finding of the learned judge that the

threatened harm was imminent. But his finding that the threat was unconscionable, and therefore constituted duress, was based on two interrelated grounds that were both incorrect.

[17] The learned judge said that the situation in which Dr Bhamjee found himself was 'not one where [Dr Bhamjee] really gained anything by conceding to [Medscheme's] threats'. That is not correct. Dr Bhamjee had everything to gain: if he agreed to repay the money he would be able to continue what until then had been a lucrative practice. The learned judge also said that Dr Bhamjee was simply 'obtaining what was his in any event'. That was also incorrect. Dr Bhamjee was not entitled to insist that the schemes continue supporting his practice by accepting his claims directly. It was within their discretion to do so or not. (It was suggested in argument that a contractual right to receive direct payment had accrued to Dr Bhamjee by past conduct but that takes the matter no further: Even if he enjoyed such a right it clearly did not extend in perpetuity and was capable of being terminated by the schemes.)

[18] English and American law both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in *Van den Berg & Kie*

Rekenkundige Beamptes v Boomprops 1028 BK 1999 (1) SA 780 (T), that principle has yet to be authoritatively accepted in our law. While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it 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.

[19] The bargain in the present case was in any event not a particularly hard one. The schemes, in the interest of their members, were entitled to

encourage members to consult practitioners whose costs were reasonable, and to refrain from consulting others. The bargain that they struck with Dr Bhamjee had the effect merely of demanding, as a condition for the continuations of their relationship, that Dr Bhamjee's charges, including those that had already been incurred, were consistent with those of comparable practices. Contrary to the finding of the court *a quo* Dr Bhamjee had no right to insist that the schemes continue supporting him on other terms. No doubt Dr Bhamjee made the trade-off – and then paid the acknowledged debt over the following two years – precisely because he considered it to be economically worthwhile, even though he would no doubt have preferred not to have been required to make it.

[20] The second acknowledgment of debt has its origin in a telephone call that was made to Medscheme about sixteen months later (in October 1999) by a former associate of Dr Bhamjee with whom he had fallen out. In a signed statement the informant told Medscheme, amongst other things, that Dr Bhamjee had been submitting false and inflated claims to the schemes, and that he purchased and repackaged medicines that had been stolen from state hospitals. (After the commencement of the action the informant retracted the allegations and in giving evidence at the instance of Dr

Bhamjee he repeated that the allegations were untrue.)

[21] Medscheme's special investigations unit, under the management of Ms van Zyl, commenced an investigation of Dr Bhamjee's claims. An analysis of his claims for the period 1 January 1998 to 30 September 1999 reflected features that were consistent with the allegation that false claims had been submitted. Amongst other things it reflected an abnormal number of consultations, that Dr Bhamjee would have to have seen over 100 patients a day on occasions (and on one day 172 patients), that some of the procedures that were claimed for were unusual for that type of practice, that medicines were prescribed more frequently than normal, and that 25 accounts submitted by Dr Bhamjee purported to have been issued before the treatment was administered. It also reflected that claims for medicines amounted to R1 289 289 of which R829 599 had been paid by the schemes.

[22] Ms van Zyl reported the findings to the chairman of trustees of the Sasol schemes and they agreed that a meeting should be held with Dr Bhamjee. Payment of claims that had been submitted by Dr Bhamjee but had not yet paid would meanwhile be withheld.

[23] Ms van Zyl (and others) met with Dr Bhamjee on 19 January 2000 and expressed her concerns. Clearly she was not satisfied with his

explanations. When asked for his patient files Dr Bhamjee said that he kept none. (He said that the only record of patients was the record he had on his computer.) Dr Bhamjee was also asked to produce the invoices for his purchase of medicines, which he undertook to do. After the meeting Dr Bhamjee went in search of the invoices only to discover, so he alleged, that some of his files were missing from one of his surgeries. (He surmised that the files must have been stolen about a month earlier.) He nevertheless submitted to Medscheme those invoices that he had in his possession, which reflected the purchase of medicines by Dr Bhamjee during 1999 and 2000 for R110 472.

[24] A manual that is issued by the pharmaceutical industry reflects the recommended wholesale and retail prices of medicines. (The schemes pay for medicines at the recommended retail price.) The mark-up from the recommended wholesale price to the recommended retail price is generally 50%. Applying that percentage mark-up, the recommended retail price of the medicines reflected on Dr Bhamjee's invoices ought to have been no more than R165 000. That was about R663 000 short of the amount that had been paid to Dr Bhamjee for medicines over the relevant period.

[25] At another meeting held on 17 February 2000 Ms van Zyl confronted

Dr Bhamjee with the apparent shortfall, for which he offered various explanations. The explanations that he offered, either at the meeting or in his evidence, were that the discrepancy was to be accounted for partly by the missing invoices, partly by the acquisition of medicines from the estate of a deceased uncle for which he had no invoices, partly by what he referred to as 'deals' that he was given by pharmaceutical sales representatives (by which he meant that he was given free medicines which he dispensed at the recommended retail price), and partly by the acquisition of generic medicines from wholesalers at far below the recommended wholesale price with the result that his mark-up (when claiming at the recommended retail price) was 1 000% or more and not 50%.

[26] Ms van Zyl also confronted Dr Bhamjee with the fact that his claims reflected that he had seen as many as 172 patients on one day (that number, as it turned out, ought to have been 167) which Dr Bhamjee explained on the basis that he worked extremely long hours.

[27] Clearly Ms van Zyl was still not satisfied with Dr Bhamjee's explanations, for which there was no independent corroboration, because she insisted that he repay some of the moneys that had been paid to him. At first she wanted him to repay what she believed was an unsubstantiated

charge for medicines (which she calculated, in the manner I have described, to be about R663 000). Adopting an alternative approach she calculated that if Dr Bhamjee had seen an average of 40 patients a day – which would have been be closer to the norm – at an average charge of R150 per patient his average monthly earnings would have been R126 000 and not R175 000 (a difference of R49 000 per month). Calculated on either basis she believed that Dr Bhamjee must have overcharged about R588 000 during the preceding year and she wanted that amount to be repaid.

[28] Dr Bhamjee's account of the meeting was that Ms Van Zyl was adamant that if he failed to pay that amount the schemes would refuse to continue accepting his claims. Whether Ms van Zyl issued that threat expressly (which she denied) is again not material. It is clear from the tenor and the purpose of the meeting that the threat was at least implicit in what she said. (Dr Bhamjee alleged that there were also other threats but there is no suggestion that those alleged threats induced him to act as he did and they are not relevant.) Dr Bhamjee thereupon signed the acknowledgment of debt, and agreed that portion of the debt could be set off against moneys that had been claimed but had not yet been paid, and that the balance would be paid in instalments.

[29] Again the court *a quo* found that Dr Bhamjee was placed under an unconscionable threat that amounted to duress. Again I disagree. It is quite apparent that Ms van Zyl believed that Dr Bhamjee had been cheating the schemes and it was for that reason that she sought the repayment. Bearing in mind the allegations that had been made by the informant (which had not been retracted at that stage and which there was no apparent reason not to believe), the information that had emerged from the claims analysis (which tended to support the allegations), and the absence of any independent corroboration for Dr Bhamjee's explanations, some of which were themselves improbable, she had adequate grounds for that belief. There can be no suggestion, in those circumstances, that Ms van Zyl was overreaching Dr Bhamjee by attempting to extract moneys from him that she knew were not due. What resulted was no more than a settlement of the parties' respective contentions, prompted by legitimate commercial considerations that fell far short of duress.

[30] But what was overlooked by both parties when the action was tried, and even when the appeal was argued in this court, is that the evidence established that the proposal made by Dr Bhamjee was in any event conditional upon its acceptance by the schemes, which did not occur, and on

those grounds no enforceable obligations came into existence in the first place. Counsel for Medscheme conceded, correctly, that although that was not the basis on which the trial was conducted, the matter was fully explored in the evidence, and Medscheme's counterclaim must be dismissed on that ground. But it does not follow that Dr Bhamjee's claim for payment ought to have succeeded. Nor ought it to have succeeded even if his undertakings were void on the grounds of duress. Medscheme was not obliged to pay the claims that Dr Bhamjee had submitted, and that were to be set off against the acknowledged debt. Those debts, if they were incurred at all – which was not established by the evidence – were incurred by Dr Bhamjee's patients and not by Medscheme. No foundation having been laid for Dr Bhamjee's claim for payment, either in the pleadings or the evidence, that claim should properly have been dismissed.

[31] The appeal succeeds with costs including the costs of two counsel. The order of the court *a quo* is set aside and the following is substituted:

'1. The claims are dismissed with costs.

2. The counterclaim is dismissed with costs.'

_____

R W NUGENT
JUDGE OF APPEAL

ZULMAN JA)
CAMERON JA) CONCUR
CLOETE JA)
JAFTA JA)

See, for example, *Broodryk v Smuts NO* 1942 TPD 47 at 53; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) 305H-306C.

'…according to which dishonesty on the part of a witness manifests itself in a fashion that does not appear on the record but is readily discernible by anyone physically present …' see AM Gleeson QC 'Judging the Judges' 53 *Australian LJ* 338 at 344 quoted in Tom Bingham *The Business of Judging: Selected Essays and Speeches* (2000) Oxford University Press 10.

See, for example, *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) 979I. See too *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 79; *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 16; HC Nicholas 'Credibility of Witnesses' (1985) 102 *SALJ* 32, 36-37 and cases there quoted including *Arter v Burt* 1922 AD 303 at 306; and in a criminal context see *S v V* 2000 (1) SACR 453 (SCA) 455f-h.

See, for example, *Chitty on Contracts* Vol 1 paras 7-011 to 7-015; *Dimskal Shipping Co. S.A. v International Transport workers Federation* 1992 2 AC 152 (HL) per Lord Goff of Chieveley at 165F-H; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA); *Cheshire, Fifoot and Furmston's Law of Contract* 14th ed by MP Furmston 340-343.

Restatement of the Law (Second) Contracts 2d Vol 1 Paras 175 and 176.

In *Malilang v MV Houda Pearl* 1986 (2) SA 714 (AD) this court was bound to apply admiralty law as administered by the English Courts and it considered the English law on economic duress in that context. In *National Education Health & Allied Workers Union v Public Health & Welfare Sectoral Bargaining Council* (2002) 23 ILJ 509 (LC) the court appears to have overlooked the context in which the subject was considered by this court in *Malilang*.

See, for example, *CTN Cash and Carry v Gallaher*, footnote 4, in which a hard bargain was held not to constitute duress.

See, too, Christie *The Law of Contract* 4th ed 354.