JORDAN V FARBER (1352/09) [2009] ZANCHC 81 (15/12/2009)

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1 Introduction

This case deals with several aspects of the general principles of contract, the influence of the constitutional values of dignity and equality as regards public policy on the validity of contracts, error, cancellation of contracts and the unethical conduct of an attorney who found himself in a conflict of interests situation. The matter was brought by way of application.[1] This is probably the reason that not all possible remedies available to the applicants were properly explored or ventilated. Although the outcome of the case is probably correct, one cannot help but feel that the applicants were afforded minimum justice in the circumstances of the case.

2 Facts of the case

The applicants (married in community of property) were the owners of a farm. Because of their age and poor health they became unable to manage the farm and fell into arrears with their monthly instalments to the Land Development Bank.[2] The applicants received a letter of demand for the arrear instalments of R250 000. The first applicant consulted with the respondent (a practising attorney) who undertook to defend the applicants. He arranged with the Land Bank that all correspondence be directed to him and informed the applicants that he had entered into an agreement with the Land Bank and that they (the applicants) "should leave everything to him".[3]

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1 *Jordan v Farber* Case 1352/09 [2009] ZANCHC 81 15 December 2009 (unreported) – hereafter *Jordan*.

2 Hereafter the Land Bank.

3 *Jordan* para 3.

The first applicant also instructed the respondent to find a lessee for the farm. After a while, the respondent indicated that he was interested in leasing the farm. The parties agreed on rental of R100 000 payable every six months, commencing on 1 October 2006. The applicants intended to lease the farm for a period of three years but the respondent advised them that the Land Bank would only accept a lease of nine years and eleven months. The respondent drew up the lease agreement in his capacity as legal representative of the applicants, as well as in his personal capacity. Relying on the advice of his attorney, the first applicant signed the contract, in terms of which the rent was to be paid directly to the Land Bank. The parties also entered into a second lease agreement with regard to the remaining livestock. Although the applicants were married in community of property, the second applicant did not sign either of the lease agreements.

The respondent took occupation of the farm and it only transpired later when the applicants were sued by the Land Bank for R400 000 that the respondent had not paid the Lank Bank as required in terms of the contract. The respondent also did not enter into an agreement with the Land Bank pertaining to the payment terms of the outstanding balance. The outstanding balance of R250 000 had escalated to R400 000.

The applicants approached the court for a declaratory order in terms of which the leases were declared void alternatively cancelled and the respondent was ordered to vacate the farm and pay the costs of the application.

3 Arguments by the parties

3.1 The applicants

The applicants presented a three-pronged argument.[4] The first was that the contracts were void and of no effect as they were *contra bonos mores*. In support of this allegation, the applicants argued that the respondent acted in conflict of interests when he drew up the contracts both in his personal capacity and as an attorney for

4 *Jordan* para 9.

the applicants and as such acted to their detriment. According to the applicants, the respondent had a duty to advise them (his clients) to seek independent legal advice. They further argued that the respondent misled them into believing that the Land Bank required them to enter into such a long lease while, in fact, there was no such requirement.

The second argument by the applicants was that the respondent disputed the amount of rent and that this was indicative of the fact that the parties never reached consensus on an material term of the contract. For this reason, it was argued that the contract never came into being, "as there was never a meeting of the minds".[5]

The third argument by the applicants was that the respondent failed to pay the rent and in so doing effectively cancelled the contracts. In the alternative, they sought an order for the cancellation of the contract on the ground that the respondent was destroying the property. "For these reasons the applicants contended that the contract[s] cannot be enforced."[6]

3.2 The respondent

The respondent opposed the application on the ground that he had entered into a valid lease agreement with the applicants. Secondly, he denied that he was under any duty to advise the applicants to seek independent legal advice. Thirdly, he contended that there were material disputes of fact such as alleged undue influence and misrepresentation that could not be decided on the papers and had to be referred to oral evidence.[7]

5 *Jordan* para 9.2.
6 *Jordan* para 9.3.
7 *Jordan* para 10. After hearing oral evidence in this respect and referring to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A), Mjali AJ decided that the matter should be decided on the papers (*Jordan* para 11).

4 Decision

4.1 Whether the contracts were contra bonos mores *or against public policy*

The court firstly considered whether the contracts were *contra bonos mores*. Mjali AJ stated that it is "trite"[8] that a court would invalidate and refuse to enforce agreements that are against public policy and quoted the following *dictum* from the Constitutional Court's judgment in *Barkhuizen v Napier*:[9]

> The proper approach to the constitutional challenge to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.

Despite the fact that the first applicant signed the contracts and thereby acknowledged that the terms thereof were reasonable and essential for the mutual benefit of the parties, the court felt it necessary to enquire whether, despite the signing of the agreements, such agreements were consistent with the Constitution,[10] and were reasonable and not contrary to public policy.[11]

The court referred to *Afrox Healthcare Bpk v Strydom*,[12] in which the Supreme Court of Appeal recognised that unequal bargaining power is a factor that together with other factors plays a role in the consideration of public policy. According to Mjali AJ this was a recognition of the potential injustice that may be caused by inequality of bargaining powers.[13]

8 *Jordan* para 12.
9 2007 5 SA 323 (CC) para 30 (hereafter *Barkhuizen*).
10 Constitution of the Republic of South Africa, 1996.
11 *Jordan* paras 12–14.
12 2002 6 SA 21 (SCA) – hereafter *Afrox Healthcare*.
13 *Jordan* para 15.

The court acknowledged the tremendous power that attorneys wield over vulnerable, emotional clients who depend on them to handle their affairs in stressful situations. *In casu*, the applicants were in grave financial trouble, as nobody wanted to lease the farm and they were in danger of losing it. They were in no position to refuse or scrutinise the advice given to them by the respondent. This was also an indication to the court of the immense bargaining power the respondent had *vis-à-vis* the applicants.[14]

The court stated that another reason for holding that the contract was against public policy – and which was of great concern to the court – was the fact that the respondent breached the standards of professional ethics by knowingly entering into a business transaction with his clients while failing to advise them to seek independent legal advice before entering into the lease agreements with them. By misleading the clients to enter into such a long lease and drafting an agreement without taking the best interests of the clients into account the respondent placed himself in a conflict of interest situation.[15]

The court placed great emphasis on the loyalty and professional ethics expected from an attorney[16] and had no difficulty in finding that the respondent had placed himself in a situation in which his loyalty was divided or he compromised the interests of the applicants. In this regard, the court mentioned that the respondent himself admitted that he had to take his own interests into account, his view that he was under no duty to refer the applicants for independent legal advice, and the unprofessional manner in which the lease agreements were drafted (no provision was made for the escalation of rent, there was no non-variation clause and certain provisions were ambiguous).[17]

14 *Jordan* para 16.
15 *Jordan* para 17.
16 The court described (*Jordan* para 22) the respondent's lack of appreciation of the seriousness of his transgression of the rules of professional conduct as "an extremely worrying feature". This was evident from his allegation that he was under no duty to advise the applicants to seek independent legal advice as well as the submission made by his counsel that "[the first applicant] is not a zombie, he is somebody with a mind of his own and for sure he can think about what his attorney says to him. Otherwise each and everybody will just sit back and say I trust my attorney I don't even read the papers because I trust my attorney. Jy kan nie net blindelings jou prokureur vertrou nie".
17 *Jordan* para 18.

Based on a *dictum* by Kirk-Cohen J in *Law Society, Transvaal v Mathews*,[18] Mjali AJ not only regarded the respondent's conduct in this matter as "reprehensible and unbecoming",[19] but held that, by any standard, he acted "disgracefully, dishonestly and unfairly".[20] The court therefore came to the conclusion that the contracts in question were against public policy, bearing in mind the following statement by Smalberger JA in *Sasfin (Pty) Ltd v Beukes*:[21]

> No court shall shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.

Mjali AJ felt convinced that the agreements between the parties fell squarely within the category of the clearest of cases that were contrary to public policy. The court therefore declared the contracts void *ab initio* on this ground alone,[22] but for the sake of completeness proceeded to consider the questions whether the relevant contracts had been cancelled and whether there had been a meeting of the minds of the parties.

4.2 Cancellation

The court noted that the respondent failed to perform in terms of the contracts, which prompted the applicants to take steps to cancel the contracts, which they eventually did. Mjali AJ was satisfied that the steps taken constituted a valid cancellation of the contracts and that, for that reason, the contracts could not be enforced.[23]

18 1989 4 SA 389 (T) 395F.
19 *Jordan* para 23.
20 *Jordan* para 24.
21 1989 1 SA 1 (A) 9B (hereafter *Sasfin*).
22 *Jordan* para 25.
23 *Jordan* para 32.

4.3 Absence of consensus

The applicants submitted that the respondent disputed the amount of rental for the farm and therefore the parties never reached consensus on a material term of the contract, and consequently that it should be declared void *ab initio*.[24] The respondent argued that the parties entered into only one agreement in respect of the livestock and the farm, and that the written agreement was not a true reflection of what the parties agreed upon.[25] The court considered these disputes of fact between the parties and their influence on consensus:[26]

> [I]f the version of the respondent that he has at all material times laboured under the impression that amount of rent is R100 000.00 per annum, payable in R50 000.00 instalments, is to be believed it cannot be said that there was any meeting of the minds between the parties.
>
> Further the fact that according to the respondent it was the intention of the parties to conclude one agreement in respect of livestock and the farm whereas the applicants state the contrary indicates that there was no consensus.

For these reasons, Mjali AJ held that the contract(s) should be declared void *ab initio*.

4.4 The order made

The court declared the lease agreements void, alternatively cancelled, and ordered the respondent to vacate the leased premises and pay the costs of the application. The Registrar was ordered to forward a copy of the judgment to the Law Society of which the respondent was a member.

24 *Jordan* para 26.
25 *Jordan* para 28.
26 *Jordan* para 33.

5 Comments

5.1 Contracts against goods morals or public policy

Although the court interchanges between describing the contracts as being *contra bonos mores* and/or against public policy,[27] nothing really turns on this, since in both instances the offending contracts are illegal and the fundamental distinction between the two categories is unclear.[28]

It is submitted that the court's decision in this regard is in accordance with the cautionary approach of the Supreme Court of Appeal,[29] endorsed by the Constitutional Court as being a sound approach,[30] to the effect that judges should use their power to intervene and declare contracts or contractual terms freely entered into void/unenforceable, sparingly, with perceptive restraint and only in the clearest of cases in which the impropriety of the transaction and public harm are manifest. It is further submitted that the decision is in accordance with the most recent judgments of our highest courts to the effect that the principle of *pacta sunt servanda*[31] does not reign supreme[32] and that contracts or contractual terms that are inimical to the fundamental values of, *inter alia*, dignity and equality[33] will not pass

27 *Jordan* paras 12, 14, 15–19 and 24.

28 Van der Merwe *et al Contract* 193, especially n 10; Hutchison and Pretorius *Contract* 174 ff; see *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 3 SA 389 (SCA) – hereafter *Brummer*.

29 See eg *Sasfin*; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *Brummer*; *De Beer v Keyser* 2002 1 SA 827 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA) – hereafter *Brisley*; *Afrox Healthcare*; *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 6 SA 66 (SCA); *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) – hereafter *South African Forestry Co Ltd*; and *Napier v Barkhuizen* 2006 4 SA 1 (SCA) – hereafter *Napier*.

30 *Barkhuizen* para 30.

31 "On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted ... gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity" – per Ngcobo J in *Barkhuizen* para 57.

32 "All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control" – per Ngcobo J in *Barkhuizen* para 15.

33 "Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity. In its modern guise, 'public policy' is now rooted in our Constitution and

constitutional muster, being against public policy.[34] Finally, the judge took great care to bring the decision in line with that of Brand JA in *Afrox Healthcare*,[35] endorsed by Ngcobo J in *Barkhuizen*,[36] namely that unequal bargaining power[37] is not the only factor, but a factor that together with other factors should be considered when determining whether a contract or contractual term is against public policy.[38]

On the other hand, one may argue that the respondent's unethical conduct, misrepresentation and abuse of position rather relate to the improper manner in which the first applicant's consent to the leases was obtained, than to the legality of the agreements as such. Put differently: despite the difference in bargaining power and the absence of an escalation clause, the leases would have been to the mutual benefit of the parties, provided that there was reciprocal performance – why should the contracts now be considered invalid because of public policy or public interest just because one of the parties defaulted?

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the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism" – per Cameron JA in *Brisley* para 91. He reflected the same sentiments in *Napier* para 7.

34 "What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable. In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them" – per Ngcobo J in *Barkhuizen* paras 29–30.

35 *Afrox Healthcare*.

36 "Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely, that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours" – per Ngcobo J in *Barkhuizen* para 59.

37 The following statement by Christie C*ontract* 18 is quite apposite *in casu*, namely that inequality of bargaining power "is a problem that has long bothered contract lawyers throughout the world because it often seems unfair to enforce a contract when it is obvious that the one party was in such a weak bargaining position that consent, even if genuine, was at best reluctant".

38 See, by way of comparison, *Breedenkamp v Standard Bank of South Africa Ltd* 2009 5 SA 304 (GSJ) and *Breedenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ), in which the same set of facts regarding unequal bargaining power gave rise to two divergent decisions. The appeal against the latter decision was dismissed in *Bredenkamp v Standard Bank* Case 599/09 [2010] ZASCA 75 27 May 2010. See Nortje 2010 *THRHR* 517 ff for an informative discussion of these decisions.

5.2 Fraudulent misrepresentation

Bearing in mind that the applicants alleged that they were misled in so far as the Land Bank never required such a long lease, it is surprising that the court mentioned this separate ground (intentional or fraudulent misrepresentation through which consensus is obtained by improper means) almost only in passing, linking it to the respondent's unethical conduct by stating:

> Further by misleading his clients into entering into a long lease agreement and then drafting a contract without taking into account the best interests of the clients. In this way the respondent placed himself in a conflict of interest situation.

It is submitted that the respondent's fraudulent misrepresentation should have been severed from the conflict of interest situation and considered separately as another independent ground for setting aside the contract and claiming damages.[39] If the contracts were in fact valid,[40] this was perhaps the best route for the applicants to follow, since in this manner they could have recouped the any damages[41] that they had suffered in the process.[42] Even where the leases were invalid, as in the present case, we submit that a claim for damages would lie, being a broad delictual claim for fraudulent misrepresentation giving rise to pure economic loss.[43] However, this would probably not have been a viable option, as the case was brought by way of

39 See eg Christie *Contract* 296: "In a straightforward case between the parties to a contract the innocent party may bring his claim for damages for fraud together with a claim for rescission, because damages for fraud, unlike damages for breach of contract, are in no sense an enforcement of the contract and are therefore not inconsistent with rescission for fraudulent misrepresentation." See generally Christie *Contract* 271 ff; Van der Merwe *et al Contract* 105 ff; Hutchison and Pretorius *Contract* 125 ff; Visser *et al Damages* 375 ff.

40 See as regards the distinction between *dolus dans locum contractui* and *dolus incidens in contractu* Christie *Contract* 298; Erasmus and Gauntlett "Damages" para 65; Van Rensburg *et al* "Contract" para 150; Visser *et al Damages* 376; and Van der Merwe *et al Contract* 139.

41 Erasmus and Gauntlett "Damages" para 65 explain as follows: "Where the misrepresentee chooses to resile, the measure of damages is easily stated: it is that sum which will restore the misrepresentee to his or her patrimonial position prior to the misrepresentation, or the sum of all losses sustained as a direct consequence of having been induced to enter into the contract."

42 As far as legal causation is concerned, Christie *Contract* 296 succinctly summarises the position as follows: "As with all claims for delictual damages, the plaintiff must prove that the delict, in this case the fraudulent misrepresentation, was related to the loss suffered as cause and effect in a sufficiently direct fashion to be regarded as the legally effective cause of the loss."

43 The circumstances surrounding the invalid leases would be part of the evidence regarding the way in which the fraud was perpetrated and the resulting losses were sustained.

application and therefore had to be decided on the papers alone without the benefit of oral evidence, cross-examination and so forth.

5.3 Cancellation

As mentioned earlier, the court was satisfied that the applicants took sufficient and proper steps to cancel the contracts in question following the respondent's default. The judgment is very brief in this regard and not much is revealed as to the steps taken by the applicants, which means that its correctness on this point cannot really be evaluated. What is startlingly incorrect, however, is the allegation made by the applicants that the respondent, by failing to pay the rental to the Land Bank, "effectively cancelled the contract". Without the benefit of having the original court documents available, one can only wonder whether this was in effect the actual allegation made by counsel. Of course, the respondent's failure to pay rent in terms of the lease amounted, at best, to breach of contract in the form of *mora debitoris*, which would have entitled the first *applicant* to cancel the contract – something that he apparently did.

One may also perhaps construe the first applicant's statement that the respondent "effectively cancelled the contract" as in effect alleging that the respondent had *repudiated* his obligations in terms of the contract and that he was therefore guilty of this form of breach of contract. The test for repudiation is an objective one,[44] namely whether the conduct of one contractant was such that a reasonable person in the position of the other contractant would infer that he/she, without lawful grounds, did not intend to comply with his/her duties in terms of the contract.[45] Although this possibility appears attractive, one must be careful to categorise the respondent's conduct as repudiation, since something more than a mere failure to perform is

44 The fact that the respondent himself alleged that he had a valid contract with the applicant is therefore irrelevant.

45 See eg *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA); *South African Forestry Co Ltd* per Brand JA at para 18: "Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor." See also the discussions by Van der Merwe *et al Contract* 362 ff, Christie *Contract* 516 ff and Van Rensburg *et al* "Contract" para 241; Hutchison and Pretorius *Contract* 295 ff.

apparently required for repudiation.[46] However, if in the present case the respondent's total failure to pay any rent may have been construed as repudiation, this ground would have sufficed for cancelling the contracts and claiming damages without all the requirements and prerequisites that *mora debitoris* entails.[47]

5.4 Formalities

Section 1(1) of the *Formalities in respect of Leases of Land Act*[48] does not prescribe any formalities for the valid creation of leases of land. Therefore, one finds it surprising that while the court said that it "is worth noting" that the leases were not signed by the second applicant (Mrs Jordan),[49] this was never mentioned again in the judgment. Surely, if it was worth noting, one would have expected the judge to elaborate on the effect of the fact that one of the parties to the marriage in community of property did not sign the leases in question after it was apparently agreed by the parties (first applicant and respondent) themselves to make use of formalities (reducing the leases to writing and signing them).[50] In addition, one would perhaps have expected an explanation of the possible operation and effect[51] *in casu* of Section 15(2)(a) and (b) of the *Matrimonial Property Act*,[52] which provides that a spouse in a marriage in community of property shall not without the written consent of the other spouse

> (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
> (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate.[53]

46 See Van der Merwe *et al Contract* 362.
47 See generally Van der Merwe *et al Contract* 339 ff; Christie *Contract* 497 ff; Van Rensburg *et al* "Contract" para 219 ff; Hutchison and Pretorius *Contract* 278 ff.
48 18 of 1969.
49 *Jordan* para 6.
50 See generally Christie *Contract* 105–109; Van der Merwe *et al Contract* 153 ff.
51 See *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (A); *Gounder v Top Spec Investments (Pty) Ltd* 2008 5 SA 151 (SCA).
52 88 of 1984.
53 In terms of S 15(5), such written consent shall be attested by two competent witnesses.

Although the contract of lease itself does not confer a real right in respect of the property to the lessee, the latter does acquire a real right in the circumstances explained as follows by Kerr:[54]

> In itself the contract of lease no more gives rise to a real right in the lessee than the contract of sale in itself gives rise to ownership in the buyer. In the case of a short lease the lessee has a real right when he has gone into occupation of the property; in the cased of a long lease he has it after registration.

Although the Act is silent on the consequences of non-compliance, it is submitted that in the present case the lease in respect of the farm was void because of the lack of consent as required by Section 15.[55]

5.5 Undue influence?

Another avenue that could have been explored is whether the two leases could have been rescinded because of undue influence.[56] In this regard, the following statement by Morris,[57] referring to *Armstrong v Magid*[58] and *Miller v Muller*,[59] is quite apposite to the facts of the case under discussion:

> Perhaps one of the most important duties owed by an attorney to his client is not to take advantage of the influence which, in many cases, he may be able to exercise over the client. Inevitably the client trusts his attorney, or one would find him taking his business elsewhere, and inevitably the attorney will become acquainted with the financial position of the client to an extent which goes beyond the bounds of the matter in hand. It is very easy for the attorney

54 *Sale and Lease* 438. This statement is repeated by Kerr and Glover "Lease" para 43.

55 See Van Schalkwyk *Family Law* 160; *Amalgamated Bank of South Africa Ltd v Lydenburg Passenger Services CC* 1995 3 SA 314 (T); *Bopape v Moloto* 2000 1 SA 383 (T). The respondent in the present matter was an experienced attorney who probably knew or reasonably ought to have known that the contracts in question were entered into in contravention of S 15(2) and 15(9) of the Act therefore does not apply. See also Steyn 2002 *SALJ* 253.

56 This ground of rescission was recognised by the Appellate Division in *Preller v Jordaan* 1956 1 SA 483 (A). See also *Patel v Grobbelaar* 1974 1 SA 532 (A) and *Hofer v Kevitt* 1998 1 SA 382 (SCA). The requirements as expressed by the courts are: The contractant who wishes to raise undue influence must prove that the other party acquires an influence over him which weakened his resistance and made his will pliable; and that such party then used his influence in an unscrupulous manner in order to persuade him to agree to a prejudicial transaction into which, with normal freedom of will, he would not have entered. See also Van der Merwe *et al Contract* 126; Hutchison and Pretorius *Contract* 141 ff.

57 *Technique in Litigation* 12.

58 1937 AD 260.

59 1965 4 SA 458 (C) 462–463.

> to be in a position to benefit himself by means of transactions with his client or to take advantage of his client's circumstances. For this reason, at any rate where the client has not had the benefit of independent legal advice, there is the risk that any transaction entered into between them may be set aside on the ground of undue influence.

As pointed out by Van der Merwe *et al*,[60] if undue influence is regarded as a delict[61] a claim for damages should lie provided that damages can be proved. However, the courts have not yet considered a claim for damages on this ground.[62] The case under discussion, having been brought by way of application, was probably not the correct forum for entertaining the possibility of making good the applicants' financial losses in this way.

6 Conclusion

When one considers the end result of this judgment, it seems fair to say that the applicant received what he asked for, namely an order forcing the respondent off the farm as quickly as possible.

However, what remains worrisome is the fact that the applicant lost a great deal of money in the process, since the respondent did not pay any rent in terms of the "leases" and as a result, as mentioned at the start of this discussion, the applicant's outstanding balance owing to the Land Bank had escalated from R250 000 to R400 000. Seeing that the leases were declared invalid[63] for being in conflict with public policy, there were no contracts in terms of which the arrear rentals and escalated indebtedness to the Land Bank could be recovered from the respondent. No attempt was made to recover any damages on any of the other possible grounds discussed above. It almost appears that the applicant was so bent on getting rid of the respondent as soon as possible that the question of damages passed him by. It is submitted that the applicant's last hope would have been, apart from eviction of the respondent, to bring a claim for arrear rentals based on unjust enrichment.

60 *Contract* 129.
61 See their discussion of the various requirements or elements in *Contract* 126–129.
62 See also Van Rensburg *et al* "Contract" para 158.
63 If the contracts were valid, the applicant would have been entitled to rely on the *lex commissoria* and remedies for recovery of arrear rentals and damages provided for in Cl 7 of the lease pertaining to the farm quoted in *Jordan* para 6.

Whichever way one looks at it, the case still seems to have an unfortunate outcome as far as the applicants are concerned. Perhaps a better tactic would have been to ventilate the whole matter by way of action procedure so that all possible avenues might have been explored.

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List of abbreviations

SALJ	South African Law Journal
THRHR	Journal of Contemporary Roman-Dutch Law

JORDAN V FARBER 1352/09 [2009] ZANCHC 81 (15/12/2009)

J Barnard*

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Summary

This case note deals with several aspects of the law of contract, such as public policy and validity, error, cancellation, repudiation, undue influence and damages. It concerns the case of an elderly couple who had to stop their farming operations because of ill health. The attorney whom they approached for assistance offered to lease the farm, equipment and animals from them in his personal capacity, although in his professional capacity he also drafted the contracts of lease. It later transpired that the attorney used his position to mislead the couple as regards the contracts in question and that he was guilty of unethical and unprofessional conduct. The couple applied to court to have the leases declared void, alternatively cancelled, and to have the attorney evicted from the farm. The order was granted; however, the discussion seeks to demonstrate that the couple were afforded only minimal justice in that they did not claim, nor were they granted, any damages. The various possibilities open to them in the circumstances are examined and the conclusion is that ventilating the matter by way of application was probably not the best manner in which to have sought assistance.

Keywords

Attorney; breach of contract; cancellation of contract; conflict of interests; damages; enrichment; fraudulent misrepresentation; letting and hiring; matrimonial property; public policy; undue influence.

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