

MEDSCHEME HOLDINGS (PTY) LIMITED v BHAMJEE:
THE CONCEPT OF ECONOMIC DURESS

MALEKA FEMIDA CASSIM
Attorney

INTRODUCTION

The concept of economic duress was recently considered for the first time in depth by the Supreme Court of Appeal in *Medscheme Holdings (Pty) Limited & Another v Bhamjee* (as yet unreported) SCA Case 214/04 (judgment of Nugent JA handed down on 27 May 2005). The concept of duress in general was explained by the Supreme Court of Appeal as follows: ‘in general terms, an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable’ (para 6). Since the harm threatened in *Medscheme* was economic harm, the Supreme Court of Appeal had to consider whether a threat of economic harm could ever amount to duress in our law. Economic duress (or business compulsion) may broadly be described as imposition, oppression or taking undue advantage of the business or financial stress or extreme necessity or weakness of another (*Lafayette Dramatic Productions Inc v Ferentz* 9 NW 2d 57 (1943); *Hackley v Headley* 8 NW 511 (1881)). To put it differently, economic duress is constituted by illegitimate commercial pressure exerted on a party to a contract, which induces him to enter into the contract, and which amounts to a coercion of the will which vitiates his consent (see *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd’s Rep 293 at 335; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] AC 704; *Pao On v Lau Yiu Long* [1980] AC 614 at 635–6; *Universe Tankships Inc of Monrovia v International Transport Workers’ Federation* [1982] 2 All ER 67 (HL) at 75–6, 88–9; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944 (Ch) at 960).

Although South African law recognizes duress of the person and (probably) also duress of goods (*Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A); *Union Government (Minister*

of Finance) v *Gowar* 1915 AD 426), the concept of economic duress has hitherto not been authoritatively recognized in South African law. It was previously considered by a single judge (Van den Heever AJ) in the High Court in *Van den Berg & Kie Rekendundige Beampptes v Boomprops* 1028 1999 (1) SA 780 (T), who found that the doctrine was not (yet) part of our law, and was in any event inapplicable on the facts of the case. Although *Malilang v MV Houda Pearl* 1986 (2) SA 714 (A) turned on the question of whether or not there had been economic duress, it was in fact decided on the basis of English admiralty law and cannot therefore be properly regarded as authority for the recognition of economic duress in South African law. (While *NEHAWU v Public Health & Welfare Sectoral Bargaining Council* [2002] 3 BLLR 222 (LC) granted relief on the basis of economic duress as defined in *Malilang*'s case, it appeared to have erroneously overlooked the fact that *Malilang* had been decided on the basis of English law.)

On the issue of the recognition of economic duress in South African law, *Medscheme* proclaimed that 'there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases be recognised as duress' (para 18). But on the facts the court found no indication of economic duress. *Medscheme*'s case indicates that the Supreme Court of Appeal does indeed see scope in our law for the concept of economic duress. This is certainly to be applauded. It gives legal recognition to the modern reality that commercial pressure may in some circumstances be as unconscionable as a threat to the person or a threat to his goods, and encourages a sorely needed modernization of the Roman-Dutch foundations of our law of duress, which impliedly limited the scope of duress to duress of the person (R H Christie *Law of Contract in South Africa* 4ed (2001) 354). It has been long established in the USA, and more recently in England, that an agreement may be voidable on the ground of economic duress, and experience in these jurisdictions has shown that it is, without any doubt, a most useful remedy to have.

Medscheme's case, however, stated further (para 18) that cases of economic duress are likely to be rare, for it is not generally unlawful to cause economic harm or economic ruin to another, nor is it generally unconscionable to do so, particularly in a competitive economy. The court emphasized that a line must be drawn between, on the one hand, hard bargaining, which is perfectly acceptable, and on the other hand, economic duress (see further below), citing with approval the distinction so drawn by Van den Heever AJ in *Van den Berg* (supra) at 795E–796A. Even an imbalance in bargaining power does not on its own render commercial bargaining illegitimate or unconscionable – 'something more' is required (para 18). On the facts, the court ruled that the appellants had engaged merely in hard bargaining and that there was no economic duress, and thereby overruled the finding of economic duress in the court a quo. A critical analysis of *Medscheme*'s reasoning provides some guidance as to what may constitute economic duress in our law.

THE FACTS

In *Medscheme's* case the respondent, a medical doctor in general practice, had signed two acknowledgments of debt in favour of the second appellant (hereafter 'the appellant'), which is an administrator of medical aid schemes. Two of the many medical aid schemes administered by the appellant were Sasol's medical aid schemes Oilmed, which (previously) benefited Sasol's black, lower income employees, and Sasolmed, which (previously) benefited Sasol's other employees. Most of the respondent's patients were beneficiaries of Oilmed. Under both acknowledgments of debt, the respondent undertook to repay to the appellant certain sums of money that he had already claimed from, and which had already been paid by, the appellant.

The appellant demanded the first repayment as a result of its 'managed health care' service, which compares the cost profiles of medical practitioners in comparable practices, for the purposes of monitoring the costs incurred by medical aid schemes. This service had shown the respondent's claims profile for the preceding six months to be approximately R350 000 higher than the average claims profile of comparable practices in the area. It is noteworthy that the 'managed health care' service was not directed towards detecting fraud or dishonesty, but rather towards monitoring the cost effectiveness of service providers. The appellant made a threat (either expressly or impliedly) that if the respondent failed to sign an acknowledgment of debt in the amount of R350 000 in favour of the schemes, the schemes would terminate direct payment of claims to the respondent. If direct payment was terminated the respondent's economic survival would be at risk, because it would effectively mean that he would have to recover his charges from his patients who were members of the medical aid schemes and who would in turn look to the schemes for reimbursement, and the result would be that his patients would be discouraged from consulting him (paras 4, 7 and 9). The court noted that the discretion of the scheme to accept claims directly from medical practitioners affords it considerable bargaining power when dealing with service providers, such as the respondent, whose economic survival is dependent upon direct payment of claims by the scheme (para 7). Pursuant to and under the pressure of this threat, the respondent acknowledged himself to be indebted to the appellant in the sum of R350 000 (hereafter 'the First Acknowledgment of Debt'), which he thereafter proceeded to pay in full.

The second acknowledgment of debt, in terms of which the respondent undertook to repay to the appellant an amount of R588 000, was signed over a year and a half later (hereafter 'the Second Acknowledgment of Debt'). It arose from allegations by an informant, which were subsequently retracted, but which prompted the appellant's special investigations unit to undertake an investigation of the respondent's claims over the period from January 1998 to September 1999. Unlike the court *quo*, which had found the respondent's explanations of these allegations to be credible, the Supreme Court of Appeal found that the results of the appellant's investigations and

the underlying probabilities supported the allegation of false claims. Pursuant to a threat by the appellant to terminate direct payment if the respondent failed to sign the Second Acknowledgment of Debt, the respondent signed the agreement. Shortly thereafter, the schemes nevertheless carried out the threat, and terminated direct payments to the respondent. The result proved to be disastrous for the respondent, whose practice soon collapsed. This apparently prompted the respondent to seek to have the acknowledgments of debt declared voidable on the ground of economic duress (paras 4 and 5). It was anticipated in terms of the Second Acknowledgment of Debt that a portion of the second debt would be set off against moneys which the respondent had already claimed from but had not been paid by the schemes, and that the balance of the debt would be paid in instalments. The respondent instituted a claim for the recovery of the moneys to be set off, and the appellant lodged a counterclaim for the balance of the debt.

THE ISSUES

The constituent elements of duress (whether duress of the person or duress of goods), as adopted in some of the leading cases (Christie *op cit* 350) are as follows: (i) there must be actual violence or reasonable fear; (ii) the fear must be caused by the threat of some considerable evil to the person or his family; (iii) it must be the threat of an imminent or inevitable evil; (iv) the threat or intimidation must be *contra bonos mores*; and (v) the moral pressure used must have caused damage. Although the court in *Medscheme* did not expressly endorse these elements in the context of economic duress, the case turned on the element of whether the appellant's threat to terminate direct payment to the respondent was *contra bonos mores*.

With regard to the other elements of duress, the Supreme Court of Appeal held that the respondent had clearly signed the agreements in the belief or fear that his failure to do so placed the future of his lucrative practice at risk (para 15). It was found that the harm threatened by the appellant was indeed imminent (para 16). There were factual disputes between the parties on the question whether the threat had been made directly or only by implication, but the court ruled that this was of no consequence (para 15) — either would suffice. This affirms the decision in *BOE Bank Bpk v Van Zyl* 1999 (3) SA 813 (C) at 828G–829G that duress may be constituted by a threat which is made either expressly or by implication. While the court *a quo* had found that the threat to cause economic ruin in this case was unconscionable and accordingly amounted to economic duress, the Supreme Court of Appeal overturned this finding and held that the threat was neither unconscionable nor unlawful in the circumstances and, accordingly, that there had been no economic duress. The respondent's claim therefore failed. The reasoning of the Supreme Court of Appeal on the legitimacy of threats to cause economic harm will be critically analysed.

THE JUDGMENT ON THE LEGITIMACY OF THE THREATS IN
MEDSCHEME

The court noted that both English and American law recognize that economic pressure may in certain circumstances constitute duress. It was stated that while the principle has yet to be authoritatively accepted in our law, there would seem to be no cogent reason why the threat of economic ruin should not, in appropriate cases, be recognized as duress in South African law. But the court stated further (para 18) that:

‘such cases are likely to be rare . . . 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 Beampies* 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.’

The imbalance in bargaining power in this case, as stated above, was occasioned by the discretion of the medical aid schemes to accept claims directly from medical practitioners, which affords substantial bargaining power to the schemes, particularly when dealing with medical practitioners, such as the respondent, whose economic survival depends upon direct payment of their claims by the schemes (para 7). But the Supreme Court of Appeal ruled that the bargain in this case was not a particularly hard one, because the schemes were entitled to encourage their members to consult medical practitioners whose costs were standard, and to refrain from consulting those medical practitioners whose costs varied from the norm (para 19). The court found that the effect of the bargain resulting in the First Acknowledgment of Debt was that, as a trade-off for the appellant continuing to make direct payment to the respondent, the respondent’s future charges would be consistent with those of comparable practices, and in respect of his higher-than-average charges for which the schemes had already reimbursed him, he would pay back R350 000 (para 19).

The Supreme Court of Appeal disagreed with the two grounds of unconscionability that the court a quo had found with respect to the First Acknowledgment of Debt: in dismissing the ground of unconscionability that the respondent had not ‘really gained anything by conceding to [the appellant’s] threats’, the Supreme Court of Appeal stated that the respondent had in fact gained the ability to continue his lucrative practice; and in dismissing the ground of unconscionability that the respondent was simply ‘obtaining what was his in any event’, the Supreme Court of Appeal pointed out that medical practitioners do not have an automatic right to direct payment from the appellant and that direct payment lies instead within the discretion of the medical aid schemes (para 17). The Supreme Court of Appeal concluded that the respondent had no doubt made the trade-off ‘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’ (para 19).

Turning to the Second Acknowledgment of Debt, the Supreme Court of Appeal found that the results of the appellant's investigation supported its allegations of false claims. The Supreme Court of Appeal stated that it was quite apparent that the appellant sought the repayment from the respondent due to a genuine belief that the respondent had been cheating, and that the appellant was not attempting to extract moneys from the respondent that it knew were not due (para 29). 'What resulted was no more than a settlement of the parties' respective contentions, prompted by legitimate commercial considerations that fell far short of duress' (para 29). The Supreme Court of Appeal thus held that the threat which had induced the Second Acknowledgment of Debt was not unconscionable and did not amount to duress. The court refused to allow the respondent's claim for the moneys which were to be set off against the debt stating that, since the appellant had a discretion and not an obligation to make direct payment to the respondent, the moneys in question were debts of the respondent's patients and not debts of the appellant. The appellant's counterclaim also failed, on the basis that it was a suspensive condition of the Second Acknowledgment of Debt that it would be approved by the schemes, and since the schemes had not in fact approved it, it had never become enforceable and could not be relied on by the appellant for its counterclaim.

SOME COMMENTS ON THE JUDGMENT

The basic nature of economic duress

With respect, it is submitted that the concluding statement of the court in its judgment on the First Acknowledgment of Debt (namely that the respondent had no doubt made the trade-off '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' (para 19)) suggests a fundamental misunderstanding by the Supreme Court of Appeal in *Med-scheme* of the essential nature of economic duress. If one enters into an unfavourable agreement because one considers it on balance to be economically worthwhile, it does not necessarily follow that one does not act under economic duress — in fact, it may indicate quite the contrary. The fundamental statement that duress induces a person to act involuntarily or deprives one of true volition, does not mean that duress overbears the will, depriving a person of all choice; instead, duress merely deflects the will, leaving one with a choice between two evils (see e.g. *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A) 397–8). A person acting under duress fully intends to do what he does, but does it unwillingly, his intentional submission stemming from a realization that there is no other practical choice open to him (*Universe Tankships Inc of Monrovia* (supra) at 88). Accordingly, consent to an agreement resulting from duress is probably more real than normal contractual consent (see John Dalzell 'Duress by Economic Pressure' (1942) 20 *North Carolina LR* 237). Therefore, the fact that one makes a trade-off 'precisely because [one] considered it to be economically

worthwhile, even though [one] would no doubt have preferred not to have been required to make it' as stated in *Medscheme*, certainly does not by any means exclude duress; the fact that a choice is made according to interest is in fact a characteristic of duress properly so called, as so aptly put by Justice Holmes in *Union Pacific RR v Public Service Commission* 248 US 67 (1918) at 70. Like the confusion previously experienced by the English courts, it appears that the Supreme Court of Appeal in *Medscheme* misconstrued the fundamental nature of duress (for a discussion in English law on this type of confusion in the nature of duress see *Lynch v DPP of Northern Ireland* [1975] AC 653; *Chitty on Contracts* 28ed Vol 1 (1999) para 7-002; A Hadjiani 'Duress and undue influence in English and German contract law: A comparative study on vitiating factors in common and civil law' (2002) *Oxford University Comparative Law Forum* 1 at 3 (available at ouclf.iuscomp.org)).

The interface between hard bargaining and economic duress

Nevertheless, it is submitted that the reasoning of the court in *Medscheme* on what will amount to an improper threat for the purposes of economic duress, as well as its reasoning on the interface between economic duress and legitimate hard bargaining, is basically sound. The statement of the court that there is no reason in principle why economic duress should not be recognised in our law, brings our law closer in line with both US law and English law, although the South African law on duress is based, not on English law, but on essentially Roman-Dutch foundations with some adoption of English authorities (*Van den Berg* (supra) 792; Christie op cit 349). In the USA the concept of economic duress has long been recognized, and in recent years English law has also come to accept it (the concept was first recognized by the following four English and Privy Council cases: *Occidental Worldwide Investment Corporation* (supra), *North Ocean Shipping Co* (supra), *Pao On* (supra) and *Universe Tankships Inc of Monrovia* (supra), and is now firmly established).

The dicta in *Medscheme* that economic or commercial bargaining would amount to duress only where the commercial pressure is unlawful or unconscionable, and that an imbalance in bargaining power without 'something more' would not suffice to render hard bargaining illegitimate, represent cogent reasoning. Commercial or economic pressure, on its own, cannot be said to be wrongful, since in commercial life most contracts are made under economic pressure or some form of hard bargaining. As put by Chitty op cit para 7-006, 'every offeror threatens that unless the offeree accepts the terms offered, he will not get the benefit of the offer', and by Lord Diplock in *Universe Tankships Inc of Monrovia* (supra) at 76: '[c]ommercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party'. Whether commercial pressure actually amounts to duress must always depend on whether the pressure exerted is regarded as improper or illegitimate in our law. This should not be found too lightly. (See also Lord

Scarman in *Universe Tankships of Monrovia* (supra) at 89, who stated that ‘in life, including life in commerce and finance, many acts are done “under pressure, sometimes overwhelming pressure”’; but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate’.)

Unlawful act duress versus lawful act duress

The court in *Medscheme* appeared to accept that for a threat of economic harm to amount to economic duress, it must be either ‘unlawful’ or ‘unconscionable’ (or ‘illegitimate or unconscionable’) (para 18). This implies that in South African law, even where a threat of economic harm is *lawful*, it may nevertheless amount to economic duress if the threat is regarded as *unconscionable*. This is referred to as ‘lawful act duress’. However, it is regrettable that the court in *Medscheme* did not find it necessary to provide any guidance as to what the ‘something more’ (para 18) might be, which would render economic bargaining or hard bargaining *unconscionable* and therefore amount to economic duress.

Like *Medscheme*, both English and USA law (eg *Kohen v HS Crocker Co* 260F 2d 790 (1958); *Fowler v Mumford* 102A 2d 535 (1954)) distinguish between unlawful act duress and ‘lawful act duress’. In USA law there have been many cases in which courts have found economic duress where a threatener threatened to do what he had a legal right to do (eg *Hochman v Zigler’s Inc* 50 A. 2d 97 (1946); *Mitchell v CC Sanitation Co Inc.* 430 S.W. 2d 993 (1968), where a threat to lawfully dismiss an injured employee unless he accepted a manifestly low settlement for his injuries was held to be lawful act duress). English law, which has a less developed notion of economic duress (R Halston ‘Opportunism, economic duress and contractual modifications’ (1991) 107 *LQR* 649 at 657), requires commercial pressure to be ‘illegitimate’ before it would amount to duress — the use of the term ‘illegitimate’ encompasses scope for the English doctrine of economic duress to apply to both lawful threats as well as unlawful threats (R Bigwood ‘Economic duress by (threatened) breach of contract’ (2001) 117 *LQR* 376 at 379).

In the area of ‘lawful act duress’, both US and English law (like *Medscheme*) have carefully drawn lines between legitimate hard bargaining and economic duress (see eg *Alec Lobb Ltd v Total Oil GB Ltd* [1983] 1 *WLR* 87; *Tisdale v Bryant* 177 Pac 510 (1918) 79 *ALR* 659). Neither jurisdiction regards a mere inequality of bargaining power on its own as sufficient to establish lawful act duress (F H I Cassim ‘Economic duress in the law of unjust enrichment in USA, England and South Africa’ (1991) 24 *CILSA* 37, 43; Goff & Jones *The Law of Restitution* 5ed (1998) 342). In the USA, lawful act duress requires that a threat, which is wrongful in a moral or equitable sense, must be so oppressive under the circumstances so as to constrain one to do what one’s free will would refuse (*Rubenstein v Rubenstein* 120A 2d 11 (1956)) or that there must be some ulterior or improper purpose (*Fox v Piercy* 227 P 2d 763

(1951)). In English law, the position is less clear. While it was once said that it can never be unlawful in English law to threaten to exercise one's legal rights, no matter what the motive, such a principle is much too widely stated (Chitty op cit para 7-030; Halston op cit 661). According to Chitty, a threat to commit a lawful act would amount to economic duress if coupled with a demand that goes substantially beyond what is normal or legitimate in commercial arrangements (Chitty op cit para 7-030). Examples of lawful act duress in English law are where one demands money from another as the price for abstaining from disclosure of discreditable incidents in the victim's life (Lord Scarman in *Universe Tankships Inc of Monrovia* (supra)), or where an agreement is obtained by a justifiable threat to prosecute for a criminal offence, on the basis that although it may be a lawful act it is coupled with an unreasonable demand (*Kaufman v Gerson* [1904] 1 KB 591; Hadjiani op cit 5). What the position is in South African law with regard to unconscionable (or lawful) threats of economic harm is sadly unsettled and remains to be seen. As stated above, the Supreme Court of Appeal in *Medscheme* did not give any clear guidance on this question. But the court did take into account a number of factual considerations in arriving at its conclusion that the appellant's threat of economic harm was not unconscionable. These factors are discussed below.

Factors relevant to unconscionability in Medscheme

An inadequate exchange of values

In considering the unconscionability of the First Acknowledgment of Debt, the Supreme Court of Appeal made reference to whether the respondent had 'gained anything by conceding to [the appellant's] threats' (para 17) and to a 'trade-off' in terms of which the respondent paid the moneys demanded by the appellant 'as a condition' for the continued support of the schemes (para 19). This suggests that a South African court may be inclined to look at whether there has been an inadequate exchange of values, in distinguishing between acceptable hard bargaining and lawful act (or unconscionable act) economic duress. In US law, a disproportionate exchange of values is regarded as a significant indication of coercion; where there is adequate consideration there is generally no duress (*Williston on Contracts* 3ed Vol 13 (1970) § 1617, referred to in Cassim op cit 44). Indeed the overwhelming majority of economic duress cases in US law involve factual scenarios where a party in a superior bargaining position has coerced another into an unequal exchange of values (J P Dawson 'Economic duress — An essay in perspective' (1947) 45 *Michigan LR* 253 referred to in Cassim op cit 44). In English law this factual scenario tends to be considered under the head of the doctrine of consideration. However there are academic suggestions that English law may undergo developments to take into account the gross inadequacy of consideration as a factor suggestive of economic duress (although the gross inadequacy of consideration appears to be relevant more to the element of causation in economic duress, rather than the element of illegitimacy) (see Chitty op cit para 7-014).

Bona Fides

The court in *Medscheme* also took into account the appellant's bona fides in arriving at its ruling that the appellant had engaged in commercial bargaining (or a settlement of its commercial contentions) and not economic duress, in the context of the Second Acknowledgment of Debt. In this regard, the Supreme Court of Appeal stated that the appellant had a genuine belief that the respondent had cheated the schemes and for that reason sought the repayment; and that the appellant was not overreaching the respondent by trying to extract moneys from him that it knew were not due (para 29). This suggests that the bona fides of the threatener may be a factor that South African law may take into consideration in distinguishing economic duress from commercial bargaining, where the threat in question is a threat to commit an otherwise lawful threat. The good faith of the threatener was regarded as a key factor in the English case of *CTN Cash and Carry v Gallaher* [1994] 4 All ER 715 where, in the context of lawful act duress, the Court of Appeal stated that it was an 'important' fact that the defendant had a bona fide belief that the plaintiff owed it a certain sum of money (which the plaintiff did, in fact, not owe at all).

One wonders, however, to what extent the good faith of the appellant in *Medscheme* ought to have been regarded as negated by the fact that the appellant could in fact have received an acknowledgment for a greater sum than was actually due to it, for the appellant was unable to specify the precise sum of money which the respondent allegedly owed to it, and had instead calculated the amount of the debt simply by way of an educated guess, based on two alternative approaches, using averages and estimates (see para 27 of the judgment).

In any event, it is submitted that while good faith may be a valid consideration in determining the unconscionability of a threat to commit a *lawful* act of economic harm, in cases of *unlawful* act duress the good faith of the threatener should not be permitted to detract from the unlawfulness of the threat. Instead, greater recognition and emphasis should be given to the reality that the pressure on the complainant (which vitiates his consent) remains the same, regardless of the threatener's good or bad faith — since the threatener threatens to commit an act which the law does not entitle him to commit, his good faith should not be an excuse for the economic duress which he exerts.

The appellant's counterclaim in *Medscheme's* case (in terms of which the appellant claimed the balance due under the Second Acknowledgment of Debt) was arguably rather daring, and perhaps even in bad faith. In effect, the Second Acknowledgment of Debt 'was no more than a settlement of the parties' respective contentions, prompted by legitimate commercial considerations' (para 29), in terms of which the respondent agreed to pay the appellant the alleged amount of R588 000, prompted by his desire for the continuation of the appellant's direct payment of claims. Yet shortly after the appellant had induced the respondent to sign the agreement, the schemes

proceeded nevertheless to carry out the threat and terminated direct payment of claims. In the light of this occurrence, it seems quite strange that the appellant, while effectively failing to hold up its end of the bargain to continue direct payments, simultaneously requested the court to hold the respondent to its respective end of the bargain by counterclaiming for the balance due under the Second Acknowledgment of Debt. But, surprisingly, the court did not regard this as relevant. Nonetheless, as mentioned above, the court rejected the appellant's counterclaim on another ground (namely failure of fulfilment of the suspensive condition to the Second Acknowledgment of Debt).

A threat to exercise a legal privilege to the detriment of another or a threat not to contract with another in the future

Parallels may be drawn between the *Medscheme* case and the English case of *CTN Cash and Carry* (supra), which Goff & Jones categorize as a situation where D threatens not to contract with P in the future or threatens to exercise some legal privilege to P's detriment (see further Goff and Jones op cit 332 for a useful categorization of the types of economic duress in English law). In *CTN Cash and Carry* the defendant distributor threatened to withdraw the plaintiff retailer's credit facilities for cigarettes, unless the plaintiff paid the defendant the cost of a certain consignment of cigarettes, which had been stolen. The defendant mistakenly, but in good faith, believed that the plaintiff bore the risk of the goods. Each sale was effected under a separate contract. The defendant enjoyed a monopolistic position and had the right to withdraw the credit facilities at any time, but this would seriously jeopardize the plaintiff's business. In order to retain the credit facilities, the plaintiff paid the defendant — it was the lesser of two evils. The Court of Appeal held that there had been no economic duress, based on a combination of two factors: first, the defendant's bona fides; and secondly, a party is entitled to refuse to enter into any future contract with another, and a threat to that effect does not amount to duress (or more specifically, to lawful act duress). It accordingly appears that, as a general principle, a threat by a party in a superior bargaining position to exercise a legal privilege to the detriment of another (such as, it is submitted, a threat by a medical scheme to exercise its discretion against accepting future claims directly from a medical practitioner, as occurred in *Medscheme*), is not necessarily an illegitimate threat and does not amount to duress in English law (see also *Eric Gnapp Ltd v Petroleum Board* 1949 (1) All ER 980; Goff & Jones op cit 342).

While it is as yet unclear in English law whether there may be exceptions to this general principle where such a threat could in certain circumstances amount to improper pressure (for instance, where the threatener's terms are extortionate (eg in salvage cases), or where the threatener is in a strong monopoly position (Chitty op cit para 7–032)), certainly in the USA, which has a longer-established and much better developed body of case law on the concept of economic duress, a threat not to enter into a contract would

exceptionally amount to duress (for example if X induces Y to assume that a contract will be concluded on certain terms and then, when Y has no other alternatives, X refuses to contract except on revised terms) (The American Law Institute *Restatement of the Law of Contracts 2d* (1981) §176, illustration 13 referred to in Goff & Jones op cit 345). By contrast, in some Commonwealth jurisdictions there have been cases which have ruled that a person who has no duty to enter into a contract with another may dictate his own terms, even though such terms may appear to be extortionate and the other party has no alternative but to comply (Chitty op cit para 7–032). For instance, in the Australian case of *Smith v William Charlick Ltd* (1924) 34 CLR 38, the court permitted the appellant Australian Wheat Harvest Board to demand from the respondent a further sum of money, which it called a surcharge, in respect of wheat which had already been sold and delivered to, and paid for by, the respondent (although the Wheat Board allegedly had a moral entitlement to the surcharge (unlike the appellant in *Medscheme*, which did not have a moral entitlement to the First Acknowledgment of Debt) since the wheat had been sold on the basis of weekly requirements only, and the respondent had overstated its weekly requirements).

These, then, are the factors which are relevant to the unconscionability of the threats in *Medscheme*. It is submitted with respect that it would certainly have been useful, and more helpful to the development of the concept of economic duress in our law, had the Supreme Court of Appeal given closer consideration to the issues raised above. On balance, and on a proper analysis of the legal principles, it is nevertheless submitted that there are sufficient grounds to support the decision of the court in *Medscheme*.

The policy issues

Despite this submission, on the broader policy issues, the question of where to draw the line between legitimate hard bargaining and economic duress has proven in practice to be difficult (see further below). The position in English law as stated by Steyn LJ (as he then was) in *CTN Cash and Carry* (supra) 719 is that ‘it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable’. Steyn LJ continued to say that an over-expansion of the scope of lawful act duress would introduce much uncertainty into the commercial bargaining process. (See also D Tan ‘Constructing a doctrine of economic duress’ (2002) 18 *Const LJ* 87 who goes further and argues that lawful act duress should be excluded altogether and economic duress should be limited to unlawful acts only.) Similarly, in German law, the main dispute in the area of duress relates to economic duress, where the courts appear reluctant to treat certain conduct as illegitimate on the basis of immorality, particularly if the conduct serves lawful economic interests (Hadjiani op cit 11). It remains to be seen where exactly the line is drawn in South African law.

The difficult task of drawing the line between hard bargaining and economic duress is of growing importance due to the multitude of pressures

which are exerted in a competitive society, and particularly in South Africa where there is a growing number of unsophisticated persons entering the business world, who certainly would require the protection of a broader scope of lawful act duress, with the corollary of a narrower scope of acceptable hard bargaining or commercial pressure. It is respectfully submitted that the different social circumstances in South Africa, as contrasted with England and Germany, and as viewed against the backdrop of our constitutional principles, necessitate that our contract law should go beyond the narrow English approach to lawful act duress. Economic duress, it is submitted, has a policy basis and the element of *contra bonos mores* involves social and normative considerations, which require that the line between hard bargaining and duress should not be drawn in a manner that is too clinical or too narrow. Although this may make the task of formulating the permissible limits of commercial bargaining a more complex and difficult one, our courts should not for this reason shy away from it. However, care ought always to be taken that the healthy competitiveness of the commercial bargaining process is retained, along with reasonable certainty about the enforceability of contractual obligations and compromises.

The other threats in Medscheme

As a final point, according to the judgment in *Medscheme*, the respondent alleged that, besides the threat to withdraw direct payments of claims, the appellant had also made certain other threats; but the court found that there was no suggestion that the other threats (the nature of which were unspecified in the judgment) had *induced* (or caused) the respondent's conduct (para 28). Regrettably, the court in *Medscheme* did not delve further into the issue of causation and the degree of causation that would suffice for the purposes of economic duress. The Privy Council in *Barton v Armstrong* [1975] 2 All ER 465 (PC) ruled that, in the context of duress of the person, it is sufficient if a threat is *a* reason (not *the* reason or the main reason) for the complainant entering into the agreement, while in the context of economic duress, the position appears to be that a threat need only be a 'significant cause' (not even the predominant cause) inducing the complainant to enter into the agreement (Chitty op cit para 7–018; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152 at 165; Hadjiani op cit 8; Goff & Jones op cit 331). Kerr is of the view that a South African court would come to the same conclusion, at least in the context of duress to the person (see A J Kerr *The Principles of the Law of Contract* 6ed (2002) 326).

Nevertheless, had the court found sufficient evidence that the appellant had made a threat (even impliedly) that it would institute criminal proceedings for fraud or dishonesty if the respondent failed to sign the Second Acknowledgment of Debt, the decision in the case may well have been different. (It is noteworthy, in this regard, that a threat of criminal proceedings may be regarded as a threat to the person (*Mutual Finance Co Ltd*

v John Wetton & Sons Ltd [1937] 2 KB 389 at 395; Chitty op cit para 7–033), and proof of a significantly lower degree of causation may therefore suffice, as discussed above.) The underlying principle of the courts' approach to the wrongfulness of a threat of prosecution which induces an agreement is that it is not duress to induce a promise of no more than one's due by agreeing to withhold a justified prosecution; but if the threat of prosecution is used by the threatener to exact a performance which is more advantageous than that to which he is reasonably entitled, it is wrongful for the purposes of duress (Christie op cit 357). Since the appellant in *Medscheme* was unable to establish the precise amount of the respondent's indebtedness for the purposes of the Second Acknowledgment of Debt, and had instead merely estimated the amount of the indebtedness (as pointed out above), a threat by the appellant to institute criminal proceedings against the respondent may well have been wrongful and may well have amounted to duress. In this regard *Ilanga Wholesalers v Ebrahim* 1974 (2) SA 292 (D) stated that 'where, however, the creditor does not know and probably cannot establish (and *a fortiori* where he knows that he cannot establish) the amount of the debtor's indebtedness it seems to me an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due'. The court in *Ilanga Wholesalers* (supra) 296 accordingly found that, although the complainant was probably not innocent of the crime of pilfering, the manner in which the debt had been calculated was by way of an estimate or approximation, and consequently the threat of criminal prosecution amounted to duress.

CONCLUSION

Although it is submitted that the decision in *Medscheme* was, on balance, correct in its application of the legal principles, had the court given closer consideration to the issues raised in this note, the judgment, with respect, could have been more progressive. Nonetheless, *Medscheme's* case brings South African law a step closer to recognizing the concept of economic duress, which would be of indisputable benefit to our legal system. But it also cautions that the distinction between economic duress and commercial bargaining must always be borne in mind. This is sound reasoning, for the purpose of economic duress is not to condemn all commercial threats but merely to define the limits. Where South African law draws the balance between, on the one hand, the competing values of protecting those who have been influenced by improper pressure, and, on the other hand, the enforceability of contracts and compromises, remains to be seen. The court in *Medscheme*, sadly, gave no clues as to how wide the net of lawful economic duress might be cast in South African law. It is submitted, however, on the basis of the policy reasons outlined above, that our law certainly ought to cast the net more widely than English law.