THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 831/2015

In the matter between:

DALE LONSDALE HOHNE **APPELLANT**

and

SUPER STONE MINING (PTY) LTD **RESPONDENT**

Neutral citation: *Hohne v Super Stone Mining (Pty) Ltd* (831/15) [2016] ZASCA 186 (30 November 2016)

Coram: Shongwe, Leach, Petse and Willis JJA and Nicholls AJA

Heard: 4 November 2016

Delivered: 30 November 2016

Summary: Delictual claim : theft of diamonds from employer : admissibility of confessions to the acts in question and admission of the quantum : threat of criminal prosecution and adverse publicity : not *contra bonos mores* : the creditor not exacting or extorting something to which it was not otherwise entitled : evidence admitted : claim enforceable : appeal dismissed with costs.

ORDER

On appeal from: The Northern Cape Division of the High Court, Kimberley (Lever AJ sitting as the court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Shongwe JA: (Nicholls AJA concurring)

[1] I have had the benefit of reading the judgments prepared by Willis and Leach JJA. I agree with Leach JA that it is possible to reach a correct conclusion in this matter without reference to the issues raised by Willis JA in paragraphs 19 – 30 of his judgment. Willis JA took a view that the concept of legally recognized duress required greater attention.

[2] The issue identified was primarily that of the admissibility of the video-taped interviews with the appellant and it would have been sufficient to only deal with the matter on this basis. However, having said that, I cannot fault Willis JA in his reasoning and interpretation of the law on duress and enforceability, both locally and in foreign jurisdictions.

[3] They both arrive at the same conclusion, albeit following different routes. I therefore confirm the mutually agreed order that the appeal be dismissed with costs, including the costs of two counsel.

_____

J B Z SHONGWE

Judge of Appeal

Willis JA:

[4] The appellant, Mr Dale Hohne, was the defendant in the trial court. The respondent, Super Stone Mining (Pty) Ltd (Super Stone), succeeded as plaintiff in a delictual action for damages arising from the theft of high-value rough diamonds. The trial court awarded Super Stone R6,015 million plus interest and costs. The appellant appeals to this court with the leave of the trial court.

[5] The case turns on two related issues: (a) the admissibility of evidence that was video-taped and transcribed during an interview between the appellant and representatives of his employer and (b) documentation signed by the appellant, after that interview. In both the recording of the interview and the documentation, it is clear that the appellant admitted having stolen diamonds from his employer as well as the value of what he had stolen. Although the appellant belatedly attempted faintly to argue that the quantum of Super Stone's damages was not proven, Mr Kemp, who appeared on his behalf, accepted that if the evidence in question was admitted, then not only was the appellant's liability established but also the quantum of Super Stone's damages, as awarded by the trial court.

[6] Super Stone reprocesses mine dumps in Kimberley in order to find and then sell rough diamonds. The appellant had been employed by Super Stone as its 'Final Recovery Manager'. In this position he was a senior and trusted employee, solely responsible for the recovery and management of certain large diamonds that Super Stone's processes had yielded. Two of Super Stone's directors, Mr Jahn Hohne and Mr Peter Hohne, are relatives of the appellant.

[7] During early January 2010 a security officer, watching CCTV footage featuring the appellant, became suspicious that he was stealing diamonds. The matter was reported to Mr Jahn Hohne. Further monitoring of CCTV footage confirmed the opinion of the security officer and Messrs Jahn and Peter Hohne that the appellant was indeed stealing diamonds having a high value from Super Stone.

[8] On 15 January 2010 the appellant was requested by Mr Peter Hohne to accompany him to the house of Mr Jahn Hohne and there he was confronted with the allegation that he had been stealing diamonds. Also present at this meeting were Mr Noel Wewege, one of Super Stone's security consultants and Ms Catherine Lloyd, Super Stone's attorney. Later, a police officer, Inspector Van Zyl arrived at the meeting as well. The confrontation was videotaped, with the appellant's permission. This video and the transcript of the meeting formed part of the evidence before the court a quo.

[9] Although at the commencement of the recorded interview the appellant initially denied any involvement in the theft, he later admitted that he had done so over a ten month period and that he had received payments of R5 million in respect thereof. This took place after the so-called 'dirty dozen' exhortation to which I shall later refer. He disclosed that he still had R500 000 of the proceeds kept in a safe at his father-in-law's house, that there were still stolen diamonds hidden in a locked box at the same location and that he had R30 000 of the tainted money at his own house. He signed an acknowledgement of debt for R5 million. Attached to the acknowledgement of debt were annexures.

[10] The appellant volunteered to hand over to Super Stone the stolen diamonds that were at his father-in-law's house. At this stage, a police officer, Inspector Van Zyl was called. The appellant, Mr Peter Hohne and Super Stone's security consultant, Mr Noel Wewege, then went to the house of the appellant's father-in-law. There, the appellant pointed out a large toolbox from which the stolen diamonds were subsequently uncovered at the diamond and gold branch of the South African Police Service, when the box was opened in the presence of one Inspector Gideon Van Zyl. A small plastic container holding 23 uncut diamonds was found in one of the

locked drawers of the toolbox. The appellant was then dropped off at the police station where he was alone with a senior police officer, Lieutenant Colonel Vermeulen. Before this officer, and after his rights had been explained to him, the appellant gave a full and comprehensive statement in Afrikaans in which he admitted in detail to his theft of valuable diamonds from Super Stone, as well as their value. Later that evening, Mr Peter Hohne telephoned the appellant and asked him to deliver the money which the appellant had recouped from the safe of his father-in-law. On that same evening the appellant did so, making over a payment to Mr Peter Hohne of R500 000.00 for which Mr Hohne issued a receipt.

[11] The next day, 16 January 2010 the appellant delivered a further R30 000.00 that he said had been at his own home. He was issued with a receipt signed by Mr Peter Hohne. The receipts issued on 15 and 16 January 2010 were also produced in evidence at the civil trial. After a week-end, on Monday 18 January 2010, Mr Peter Hohne requested the appellant to bring him a copy of his statement made to the police. Not only did the appellant agree to do so but also consented to an additional interview, which was also recorded.

[12] Mr Kemp submitted that the cumulative effect of the following, indicated that the appellant's confession had not been freely made:

(i) He had been asked to hand over his cellular telephone at the commencement of the interview on 15 January 2010;

(ii) He had been transported to the house of Mr Jahn Hohne in the motor vehicle of Mr Peter Hohne on 15 January 2010; and

(iii) During the interview on 15 January 2010, shortly after it had begun, Mr Jahn Hohne said the following to the appellant, after he had initially denied any wrong-doing:

'All right here are the two options. OK, I have no choice but to offer you these two options: the one is you reconsider the question and you tell us everything and the other is I implement the dirty dozen. Here is the list of the dirty dozen and before we walk out of here I am going to make six phone calls and six groups of people are going to meet me there and afterwards I am going to make another six phone calls and I will continue with them and these are the phone calls I am going to make: I am going to phone the South African police the chief of police, I am going to phone the diamond and gold branch in fact other people are

going to phone it for us there are people standing by the director of DPCT the director of priority crime investigation that's the new Hawks, De Beers security our private PI who has been contracted to do this investigation and criminal attorneys from Johannesburg who will come and assist with the total procedure after that we will be calling the following six people: SA Revenue services of tax and VAT investigations, the DFA and *The Star*, the polygraph guy again, the Kimberly club, the Diamond Board Mr Ernie Blom and ETV to assist us in spreading our findings around the world. Dale, if we go to that safe now and I find something in that lid from what I am going to do here you are going to be a very sorry man you probably going to sit in jail tonight – I am going to ask you the question again and I am going to give you two options – one you can go to denial and we use this system and the other is you be honest and you tell me everything. You lied to me once in this conversation already. It was my only question and you lied. Dale, what is in the lid of the solvent canister in the safe?'

This became known, during the course of argument as 'the dirty dozen' portion of the interview. For convenience, I shall adopt this epithet in the judgment.

[13] Immediately after this, the appellant, to use a colloquial expression, 'spilled the beans'. For him, it was 'downhill' all the way thereafter. Mr Kemp eventually conceded that the handing over of the cellular telephone and the appellant having been transported to the home of Mr Jahn Hohne by Mr Paul Hohne were 'makeweights'. The case turns on what one makes of 'the dirty dozen' exhortation in the particular context in which it occurred.

[14] Opinions may vary as to quite how 'relaxed' the interview on 15 January 2010 had been. There is no doubt, as counsel for Super Stone concedes, emotions had run high. The sense of betrayal and disappointment by the other Hohne family members was palpable. It was the 'family connection' that had been the main reason that the appellant had been given the position of trust in Super Stone. The directors admitted to having felt angry and betrayed. When Mr Jahn Hohne was cross-examined as to whether the representatives of Super Stone had been aggressive, he replied: 'I don't like the term aggressive. I'd prefer "firm and professional".' The recording of the interview confirms the accuracy of Mr Jahn Hohne's description. The appellant's sense of guilt, shame and embarrassment was also obvious. As the trial judge emphasised in his judgment, at no stage during that confrontation had the appellant been threatened with physical violence or anything unlawful at common law.

[15] The appellant was prosecuted in a criminal trial before Bertelsmann J on 5 and 6 December 2011. The charges included not only the theft of the diamonds but also money-laundering in terms of the Prevention of Organised Crime Act 121 of 1998 and the contravention of certain provisions of the Diamonds Act 56 of 1986. The State had sought to rely on the statement that the appellant had made to Lieutenant Colonel Vermeulen as well as the pointings-out of the diamonds and the cash. The appellant had challenged the admissibility thereof. A trial-within-a-trial concerning the admissibility of the statement and the pointings-out was then held.

[16] In the light of the evidence of Inspector Van Zyl concerning the confrontation that had taken place at the home of Mr Jahn Hohne, Bertelsmann J decided that the statement had not been freely and voluntarily made in terms of the requirements of the Criminal Procedure Act 51 of 1977 (the CPA) and therefore could not be admissible. Relying on the 'fruit of the poisoned tree' doctrine, Bertelsmann J found that the evidence of the pointings-out would also be inadmissible. The State and appellant then closed their respective cases, without leading any further evidence. No evidence as to the CCTV footage was lead. In the result, the appellant was acquitted in the criminal trial on 6 December 2011. The appellant may consider himself to have been fortunate.

[17] The civil trial, with which this appeal is concerned, commenced on 13 August 2013. By agreement between the parties, the civil trial was divided into two parts: the first to deal with the question of admissibility and the second to deal with the merits. As the court a quo noted in its judgment concerning admissibility, this appears to have been the first time in South Africa where the question of the admissibility of evidence rejected as inadmissible in the preceding criminal trial was raised in a subsequent civil trial such that the court hearing the civil matter would have to consider the admissibility of substantially the same evidence.

[18] On 28 February 2014 the court a quo issued a ruling in which it determined that the video recordings of the meeting with the appellant at the house of Mr Jahn Hohne on 15 January 2010, the statement to Lieutenant Colonel Vermeulen, the

pointings-out and the acknowledgement of debt (together with annexures) were admissible.

[19] The trial then proceeded on the merits. On 15 May 2015, the court a quo delivered its judgment that the appellant pay Super Stone the sum of R6,015 million plus interest and costs. The difference between the amount in the acknowledgement of debt (R5 million) and the amount in the order (R6,015 million) arises from the fact that the appellant's statement to the police and the transcript of the meeting on 15 January 2010 support the higher figure.

[20] During the trial, detailed evidence of the CCTV footage, implicating the appellant in the theft of diamonds, was put before the judge. This evidence was supported by the real evidence of the so-called 'click-clack' jars, which the appellant had handled. This evidence was not challenged by the appellant at all. The appellant elected not to testify either during the trial-within-a trial concerning the question of the admissibility of his acknowledgment of liability and the quantum thereof. The same applied in the trial concerning the merits.

[21] In its judgment on the merits, the court a quo recognised that a distinction exists between the admissibility of an acknowledgement of debt and its enforceability.[1] The two are not coextensive. I shall consider the question of admissibility of the acknowledgement of debt and, if admissible, its enforceability, in turn. Nevertheless, in view of the concession made by counsel for the appellant, Mr Kemp that the case turns on the question of admissibility, the significance of enforceability in this case may have been subsumed. This notwithstanding, enforceability raises policy considerations not far removed from those relating to admissibility. Accordingly, it may be useful to examine this issue, in order to ensure fairness to both parties.

[22] In s 2 of the Civil Proceedings Evidence Act 25 of 1965 it is provided as follows:

---

[1] See *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 313A-B and *Gruhn v M. Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 57B, although these two cases are not directly in point.

'No evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible.'

Apart from cases dealing with hearsay evidence, there has been a dearth of authority, both in South Africa and England, dealing with the admissibility of evidence in civil cases. The rationale for excluding hearsay evidence has been its unreliability.[2] The reason for this paucity of authority may lie in the fact that, historically in England, from which so much of our law of evidence derives, relevance was the overriding consideration on any question concerning the admissibility of evidence. In this regard, it is instructive to read a paper by Nigel Cooper QC, 'The Fruit of the Poisoned Tree – The Admissibility of Evidence in Civil Cases'.[3] In that paper he summarises the position in England at present as follows:

'1. Unlawfully obtained evidence is prima facie admissible in civil proceedings.

2. Such evidence may be excluded by the judge exercising the discretion conferred on him by CPR [Civil Procedure Rules] Part 32. However, in practice that discretion is generally exercised in favour of admitting this evidence.

3. In addition, evidence may be excluded by the court exercising its inherent discretion to prevent the court's process being abused or brought into disrepute.

4. Even if neither of those 'discretions can be invoked, there may nevertheless be an alternative remedy available to a party can establish a breach of confidence, he should be entitled to an injunction restraining the use of the unlawfully obtained material.'

[23] In *Shell SA (Edms) Bpk & andere v Voorsitter, Dorperaad van die Oranje-Vrystaat en & andere*, it was held that, in a civil case, a court has a discretion to refuse to admit evidence that had been improperly obtained ('op 'n onbehoorlike

[2] See for example *S v Molimi* [2008] ZACC 2; 2008 (3) SA 608 (CC) and DT Zeffert and AP Paizes *The South African Law of Evidence* 2 ed (2009) at p385-388.
[3] 'The Fruit of the Poisoned Tree – The Admissibility of Evidence in Civil Cases' by Nigel Cooper QC www.bgja.org.uk/wp-content/uploads/2014/02/NigelCooper.pdf. (Accessed on 10 November 2016).

wyse').[4] This judgment was approved by the Constitutional Court in *Ferreira v Levin NO & others; Vryenhoek & others v Powell & others*.[5]

[24] The admissibility of evidence in a criminal trial stands on a different footing from a civil dispute and is adjudicated according to somewhat different criteria for reasons that are not hard to understand. In the first place, the Criminal Procedure Act 51 of 1977 (CPA) contains express provisions relating to the free and voluntary nature of written admissions and confessions before these may be admitted in evidence.[6] There is no equivalent provision in our law of civil procedure. The Constitutional Court has recognised that, in certain important respects, civil and criminal proceedings have a different character.[7] This relates, in particular, to the manner in which evidence is given and obtained.[8] Most importantly, by way of background, a criminal matter is a contest in which the might of the State is pitted against an individual. In a contest of this kind, a bad result for an accused person may lead to a loss of freedom. Such a consequence is incomparably different from any outcome in a civil dispute.

[25] Moreover, s 35(5) of the Constitution expressly addresses the question of evidence obtained in violation of the Bill of Rights and provides that evidence 'must be excluded' from a criminal trial if it would render the trial unfair or would otherwise be detrimental to the administration of justice. Contrastingly, s 34, which extends to civil matters as well, contains no equivalent guarantees, providing merely that everyone has the right to have civil disputes decided 'in a fair public hearing before a court'. There is no provision regarding the exclusion of evidence. In civil litigation 'fairness' is seldom, if ever, located in a 'one-way street'.

---

[4] *Shell SA (Edms) Bpk & andere v Voorsitter, Dorperaad van die Oranje-Vrystaat en & andere* 1992 (1) SA 906 (O) at 916H-917G.

[5] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) para 148. See also the judgment of Brand J in *Fedics Group (Pty) Ltd & another v Matus & others; Fedics Group (Pty) Ltd & another v Murphy & others* 1998 (2) SA 617 (C) para 75.

[6] Section 217 of the CPA provides that a confession relating to an offence may be admissible in criminal proceedings if it is 'proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.' Section 219A provides for the admissibility of extra-judicial admissions in relation to the commission of an offence that are proved to have been made 'voluntarily'.

[7] See *Bernstein v Bester* NO & others 1996 (2) SA 751 (CC) paras 107-123. See also *Fedics Group (Pty) Ltd & another v Matus & others; Fedics Group (Pty) Ltd & another v Murphy & others* 1998 (2) SA 617 (C) para 90.

[8] Ibid.

[26] In the United States of America, in *United States v Janis*,[9] the Supreme Court had to consider whether to extend this exclusionary rule to civil proceedings in circumstances where a state criminal law enforcement officer had obtained evidence in good faith but nevertheless unconstitutionally. The majority held that the 'prime purpose' of the rule was to deter 'unlawful police conduct' and that any 'additional marginal deterrence provided by its extension in cases like this one does not outweigh the societal costs of excluding concededly relevant evidence.'[10] That case dealt with a tax dispute and not one between two private litigants. As far as I have been able to ascertain, the reasons relied upon by the appellant to exclude evidence of the kind in question, which relates to liability and the proof of quantum in a civil case, have succeeded nowhere in the world.

[27] In *Janit v Motor Industry Fund Administrators (Pty) Ltd*[11] this court carefully left open the question of whether a civil court had a discretion to exclude otherwise relevant evidence, which was unlawfully obtained. For reasons that follow, the evidence in this case was not unlawfully obtained and it is therefore not necessary for this court to decide the point left open in *Janit*.

[28] As this court said in *Medscheme Holdings & another v Bhamjee*,[12] 'in general terms, an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable'.[13] The evidence of the quantum of the theft may not have been freely and voluntarily obtained within the meaning of the CPA in order to prove his guilt but, insofar as proving the amount of his liability is concerned, it was not extracted unlawfully or 'by the threat of some considerable harm.' Other than donations, civil liability is rarely 'volunteered'. Moreover, an employer is not only entitled to confront an employee about an allegation of wrongdoing, but is also

[9] *United States v Janis*, 428 U.S. 433 (1976).
[10] At 443.
[11] *Janit & another v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at 306H-307C.
[12] *Medscheme Holdings (Pty) & another v Bhamjee* 2005 (5) SA 339 (SCA).
[13] Para 6.

obliged to do so, even before a formal disciplinary hearing is convened.[14] It is part of the time-honoured 'audi' principle.[15]

[29] It is a well-established principle of our law that if a party wishes to avoid liability on the basis that he assented to an agreement by reason of duress, the onus is upon him who makes that allegation.[16] The same applies where a litigant claims that evidence was obtained in breach of his constitutional rights.[17] The appellant alleged that he had signed the acknowledgement and the statement before the police under duress but did not testify. Although care must be taken not to confuse the relevant principles in claims founded in delict and those based on contract, it is not always impermissible to borrow principles from the one type of causa and apply them to another.[18] We are dealing here with a written acknowledgment of both liability and the amount in question. The closeness of the facts in this case to those ordinarily featuring in contractual claims, in my opinion justifies a general examination of when legally recognised duress may be found to exist in situations other than delict. I turn now to consider the question of enforceability in our law.

[30] In *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd; Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd*[19] Nestadt J gave a comprehensive review of the law relating to threats of prosecution, including the well-known case of *Arend & another v Astra Furnishers (Pty) Ltd*,[20] in which Corbett J delivered the judgment of the full court. Nestadt J dealt with whether the duress in question was induced by actual violence or reasonable fear of the threat of an imminent or imminent considerable evil and then concluded that two vital questions need to be asked: (i) was the threat *contra bonos mores* and (ii) did the creditor

---

[14] See for example *Old Mutual Assurance Co Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA) paras 5-10.
[15] 'Audi' is lawyers' shorthand for *audi alteram partem*, which means 'hear the other side'. See for example *Old Mutual Assurance Co Ltd v Gumbi* (*supra*) paras 5-10 and *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 ILJ 2209 (SCA) paras 6-7.
[16] *Rothman v Curr Vivier Incorporated & another* 1997 (4) SA 540 (C) at 551G-J; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 439E-G; *Savvides v Savvides & others* 1986 (2) SA 325 (T) at 330A-C and *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd; Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W) at 275H.
[17] See for example *Protea Technology Ltd v Wainer & others* 1997 (9) BCLR 1225 (W) at 1227.
[18] See for example *Fourway Haulage SAA (Pty) Ltd v South African National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) in which Brand JA, delivering the unanimous judgment of this court, applied contractual principles relating to pure economic loss in a delictual claim.
[19] *Machanick Steel & Fencing* ibid at 271B-273H.
[20] *Arend & another v Astra Furnishers* (Pty) Ltd 1974 (1) SA 298 (C).

thereby exact or extort something to which he was not otherwise entitled?[21] *Machanick Steel* dealt with an acknowledgment of debt that was used in evidence in support of an application for the winding-up of a company. The acknowledgement had been obtained by threatening a prosecution of the directors. Nestadt J held that the onus was on the respondents to make out a case of operative duress. He found that they had failed to do so and a provisional order of liquidation in each instance was justified.[22]

[31] *Arend v Astra Furnishers* dealt with a contractual claim. Having come to the conclusion that 'generally speaking a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress', Corbett J went on to say, in that case:

'It is not necessary to express a positive view on whether this rule obtains where the party threatened in fact owes a liquidated amount to the party making the threat and the agreement involves merely the payment of this amount.'[23]

It is fundamentally important to bear in mind that in *Arend v Astra Furnishers* what the court was dealing with and set its face against was extortion or what is commonly known as 'blackmail'.[24] One cannot threaten to lay a criminal charge against someone for an act irrelevant to that for which payment has been attempted to be secured.[25] The same applies in respect of embarrassing but not criminal acts that have no bearing on the claim in question.[26] As Corbett J noted, without actually using the colloquialism, is that under the influence of English law, 'blackmail' has long been recognised as a crime in our law and, accordingly, it has correspondingly been our law since the nineteenth century that an agreement concluded as a result of such blackmail is void for its illegality.[27] In deciding matters of the kind in question it seems that, ultimately, it is policy considerations that are determinative. A consideration of whether or not a threat was *contra bonos mores* is precisely one of policy.[28]

---

[21] At 271B-D and 272C-D.
[22] At 275C-277E.
[23] At 311G-H.
[24] See especially at 307B-308F.
[25] See for example at 308E-F.
[26] At 307F-308A. It was in *Green v Fitzgerald & others* 1914 AD 88 at 102 and 119-120 that this court decided that adultery, as a crime, was obsolete in our law.
[27] At 308F-G.
[28] See for example *Gbenga-Olowatoye v Reckitt Benckiser South Africa (Pty) Ltd & another* [2016] ZACC 33 (15 September 2016) para 9.

[32] Here, we are dealing with a delict. In *Machanick Steel* the underlying causa for the acknowledgment was a misappropriation of money - in other words, what was also a delict. The facts and the issues in this case are so similar to those that were relevant in *Machanick Steel* that I conclude that the experience of the appellant and, more particularly, what was said to him immediately before he began to confess to his theft, was not *contra bonos mores*. Furthermore, it did not result in Super Stone exacting or extorting something to which it was not otherwise entitled. The contrary is true. Moreover, the conduct of Super Stone was not otherwise unlawful, never mind illegal.

[33] The appellant has also sought to rely on the following passage from *Ilanga Wholesalers v Ebrahim & others*[29] in which Milne J said as follows:

'Where, however, the creditor does not know and probably cannot establish (and *a fortiori* where he knows 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. No doubt even where the plaintiff does not know the exact amount stolen he is fully within his legal rights in threatening to prosecute the debtor but to use the threat of such proceedings to extort an undertaking to pay an amount which he knows he cannot prove to be due in a Court of law constitutes, in my view, an abuse of his legal rights.'[30]

Ilanga Wholesalers seems to operate against the appellant, rather than in his favour. Super Stone did not use any threats in order to extort an undertaking to pay an amount which it knew it could not prove. Even in our law of criminal procedure an exhortation to tell the truth will not exclude a confession.[31] Not even a threat of the probability of arrest constitutes undue influence.[32] After all, the test is whether there is 'any fair risk of a false confession.'[33]

[34] Moreover, the uncontested evidence of the CCTV footage alone is sufficient circumstantial evidence to justify the conclusion that the appellant did, in fact, steal

---

[29] *Ilanga Wholesalers v Ebrahim & others* 1974 (2) SA 292 (D)
[30] At 297G-298B.
[31] See for example *R v Afrika* 1949 (3) SA 627 (O) at 634-636, approved in *S v Kearney* 1964 (2) SA 495 (A) at 498H.
[32] See for example *R v Magoetie* 1959 (2) SA 317 (A) at 325B.
[33] See for example *Kearney* (*supra*) at 498H.

the diamonds. The statement to the police, which contained the evidence of damages upon which the court a quo relied, was not 'extorted' by Super Stone. It was made by the appellant when he was alone with Lieutenant Colonel Vermeulen.

[35] The appellant failed to discharge the onus that rested upon him. The appellant did not give or show any evidence as to operative, or legally recognised, duress which could prevent the acknowledgement of debt from being enforced against him. The evidence is admissible because it is relevant and the uncontested evidence of Super Stone does not suggest a reason why it should be otherwise be excluded. Furthermore, there is no compelling policy consideration either why the evidence in question should be excluded or the admission of liability and quantum unenforced. On the contrary, in the absence of any legally recognised duress, policy considerations favour the admission of the evidence and the enforceability of the claim where a person has stolen millions of rands from another.

[36] In summary, the appeal cannot succeed for the following reasons: both the theft and the evidence of the quantum of Super Stone's damages had been established in documents in which the appellant had acknowledged his wrongful acts, his liability and the amount in question. This evidence was both admissible and enforceable against the appellant because it had been obtained without there being any duress, recognised in law.

[37] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

_____

N P WILLIS

Judge of Appeal

Leach JA: **(Petse JA concurring)**

[38] I agree with Willis JA that the appeal be dismissed. My reasons for doing so differ somewhat from his, and he deals with issues that I find unnecessary to comment upon. Hence this judgment.

[39] The respondent is a diamond mining company which had employed the appellant in a senior position described as the 'final recovery manager'. The appellant, however, stole diamonds from the respondent. Of that there can be no doubt. Closed circuit television coverage proves that to be the case, albeit in regard to diamonds which were not the subject of the claim that lies at the heart of this appeal which related solely to diamonds allegedly stolen from mid-February 2009 until December that year. After a hearing in the Northern Cape Division of the High Court, Kimberley, the respondent obtained judgment in its favour against the appellant in the sum of R6,015 million being the value of diamonds the court found the appellant had stolen from the respondent during that period, as well as interest and costs. It is against that judgment that the appellant appeals to this court with leave of the court a quo.

[40] As set out by my colleague Willis JA in paragraph 2 of his judgment, the appeal turns on the admissibility of certain evidence: first, the video-recording of interviews conducted with the appellant, and second, certain documents signed by the appellant – in particular a confession made to a police officer and a written acknowledgement of debt the appellant had signed in Kimberley on 15 January 2010 in which he admitted being liable for and held himself bound to the respondent in an amount of R5 million in order to secure loss it suffered as a result of his having stolen diamonds. Both the interview and these documents show clearly that the appellant admitted having stolen diamonds from his employer. Indeed counsel for the appellant, quite correctly, admitted in this court that the appeal had to fail, both in regard to the merits of the claim and the quantum of the respondent's damages, if his contention that this evidence was the product of duress was not accepted. Accordingly his argument was directed solely at that issue.

[41] In paras 20-27 of his judgment, Willis JA deals, inter alia, with the discretion of a court to admit improperly or unlawfully obtained evidence, and in doing so deals with authorities both in this country and in foreign jurisdictions. However, as the respondent had limited the issue to duress and counsel for the respondent therefore essentially confined himself to that issue, interesting as my colleague's discourse in those paragraphs may be, it is in my view irrelevant to the issues at hand and needs not be dealt with by this court.

[42] In arguing that the appellant's utterances were the result of duress, reliance was placed firstly upon the common law rules, including in particular those set out in *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305H-306C and 309B-F (relating to the distinction between a lawful threat of prosecution and the unlawful use of such a threat to extract a benefit from a suspected thief) and, secondly, on the contention that to allow evidence obtained by duress offended the right to a fair public hearing as envisaged by s 34 of the Constitution. But in doing so counsel conceded that the only factor upon which he could rely in support of any allegation of duress was the so called 'dirty dozen' threat contained in the passage quoted by Willis JA in para 9 above.

[43] It is of importance for that passage to be viewed in its context. At the outset, an attorney who was present, representing the interests of the respondent, asked the appellant whether he would consent to the taking of a video of the meeting and of 'your statements made here', to which he agreed. A representative of the respondent then told the appellant that the respondent had entered into a substantial security investigation arising out of certain information received, and that they had learned from this both that the appellant had become 'quite a high-rolling gambler' and that some drunk individuals had boasted as to how they had obtained 'goods' (presumably diamonds) from the appellant. This had led to the respondent installing substantial new technology on the mine relating to security. The interviewer then concluded this introduction thus:

'I have a question for you but before I ask you the question I need to remind you that we are of the same blood we are of the Hohne family and there has been an immense amount of trust laid on you by us and we expect today at this meeting that that trust continues that every question you will answer 100% honestly ─ you need to know that I know a lot and if at

any point in time I believe you are lying to me you are going to be given two options which I will relate to you just now ─ but here's the question answer it honestly for once and please do not test my patience ─ if you and me had to go to you safe in the glove box now what will I find in the lid of the solvent canister?'

[44] In response, the appellant stated that nothing would be found in the solvent canister. On being given the opportunity to think about the matter, he again replied that there was nothing there. This then led to the 'dirty dozen' portion of the interview which concluded once more with the question 'what is in the lid of the solvent canister in the safe?' It was after this that the appellant confessed there would be diamonds and that he had taken them out and put them back in the glove-box earlier that day. When asked why he had had diamonds in the lid of the canister, his reply was 'I don't know'. This ridiculous answer led to the following exchange:

'Dale honestly I'm telling you don't let me go to plan B ─ the ball is in your court now for plan A ─ plan A the following is also with plan A if you give us 100% honest questions on everything that I ask and we ask you today we will not prosecute you if you lie any further you will go thought the full prosecution ─ I know a lot more than you do Dale I know when you lie and trust met I need to be 99.999% sure that every answer you give me is true. You need to give me the whole bang shoot speel and we will give you an assurance of none prosecution. But I want everything otherwise I am sorry my boy it is the dirty dozen immediately and I will push it hard from every corner and you know how I deal with projects hey ─ so you did put diamonds into the lid?

DH (nodding his head)

JBL When did you take them out?

DH Today

JBL Where are those diamonds you put into the lid today?

DH They in the glove-box

JBL The glove-box or the safe?

DH No in the glove-box ─ that canister on the coarse side

JBL Be more specific please where are those diamonds exactly in the glove-box?

DH The number 4 glove-box the concentrate pipe that bucket its in there

JBL How many diamonds are in there?

DH 4

JBL How big are they approximately?

DH Probably about 3 ─ 3 carats each

JBL Just keep answering honestly hey don't let me down I don't want to do this but if I have to I have to I have a complete obligation for the company to resolve this thing 100% what were you going to do with those diamonds?

DH We were going to try and sell them?

JBL Try and sell them or have you got a buyer lined up?

DH Try and sell them

JBL Dale how many times have you done this before ─ careful of the answer here Dale be very careful of the answer you have to be honest with me how many times have you done this before?'

(The initials DH in this transcript refer to the appellant.)

It was after this that the appellant proceeded to make a clean breast of things and described in detail how he had stolen diamonds and what he had done with them.

[45] Those present then agreed that they would all go to the home of Mr Dougie McLeod, described in the record both as being the appellant's brother-in-law and his father-in-law (quite what the relationship is between them is immaterial). This they did where, in a storeroom, the appellant pointed out a red toolbox. It was locked and its keys could not be found so it was loaded onto the back of a bakkie and taken to the South African Police Diamond and Gold branch offices where it was forced open. Inside was found a container in which there were 23 large rough diamonds. After these diamonds were photographed, the appellant was taken away whereafter he voluntarily gave a statement to a police officer.

[46] At about 20.30 that evening the police telephoned the marketing director of the respondent, Mr Peter Hohne to say they were finished with the appellant. Mr Hohne went and fetched the appellant and took him to the mine where his motor vehicle was. An hour or so later he called the appellant on his cellphone and asked him to bring the sum of R500 000 that he had said was at the home of Mr Dougie McLeod. This the appellant promptly did, the money being delivered to him in a cardboard box. At this, Mr Hohne gave him a receipt for the money which contained the words 'proceeds of illegal diamond sales' and which the appellant voluntarily signed. The following morning, after Mr Hohne had spoken to him on his cellphone, the appellant brought and handed over a further R30 000 in cash which he had been keeping in a safe at his home. He was again issued with a similar receipt.

[47] It is in the light of these background facts that the question of duress has to be considered. In doing so it is important to bear in mind, as Kriegler J pointed out in *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) paras 93-97, that hard choices often have to be faced by people facing allegations of criminal conduct. And the mere fact that a suspected criminal is faced with an election whether or not to make any statement relating to allegations of criminality levelled against him or her does not render any statement he or she decides to make offensive to the right to a fair trial if it is thereafter introduced into evidence. As appears from what I have said, the respondent's representatives gave the appellant the option of co-operating with them by making a clean breast of things. He was told that in that event, although they could not grant him immunity from prosecution, they would request it. But their attitude in that regard was dependent upon his being truthful and answering their questions. If he failed, the full might of the law would be set in train.

[48] I do not see this as having been either unlawful or *contra bonos mores*[34] (or as it has been put an 'unconscionable threat of some considerable harm'[35]), being elements which would have to be established to avoid a contract on the grounds of duress. Nor in my view would evidence of anything he said or did as a result render his subsequent trial unfair. The appellant had a choice to make. He took what was in fact the soft option. He decided to confess and co-operate in the hope that he would obtain the benefit of possible immunity. By no stretch of the imagination can this be regarded as being the product of duress of an unlawful nature.

[49] Moreover, there is no evidence that the appellant in fact acted under duress. Objectively viewed, in the light of what I have said above, there was no threat of any unlawful evil being done to him if he did not cooperate with the respondent. His counsel had stated in cross-examination of the respondent's witnesses that the appellant would deny that he had made the admissions freely and voluntarily, and would testify that during breaks in the recording he had been further threatened and told that his and his family's lives, including those of his parents who were employed by the respondent, would be destroyed, and that if he did not admit to provide the

---

[34] Compare *Arend v Astra Furnishers* at 306A-C.
[35] *Medscheme Holdings & another v Bhamjee* 2005 (5) SA 339 (SCA) para 6.

information required he would be imprisoned for life. However, notwithstanding this and despite the unusual protection afforded by the trial-within-a-trial procedure that was adopted, the appellant failed to give evidence. That, too, was a decision he was entitled to take. But actions have consequences, and one of the consequences that flows from the respondent's failure to testify is the inference that his evidence was likely to damage his case.[36]

[50] The appellant bore the onus of establishing the necessary duress or coercion which either rendered the incriminating evidence against him inadmissible or breached his constitutional right to a fair trial if it was admitted. In my view, in the light of what I have said, including the appellant's failure to testify, he clearly failed in that task. On this limited basis alone the appeal must fail.

[51] For these reasons I agree that the appeal be dismissed with costs, such costs to include those consequent upon the employment of two counsel.

_____

L E LEACH

Judge of Appeal

[36] The authorities in this regard are well-known and do not require repetition.

APPEARANCES:

For Appellant:	KJ Kemp SC (with him B Pretorius)
	Instructed by:
	Roelofse Meyer Inc, Port Elizabeth
	Kramer Wehmann & Joubert, Bloemfontein
For Respondent:	D Unterhalter SC (with him S Budlender)
	Instructed by:
	Haarhoffs Inc, Kimberley
	Honey Attorneys, Bloemfontein