The challenges to the development of the doctrine of economic duress in South African contract law.

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Submitted in partial fulfillment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg.

DECLARATION

I, _Kirsten Chetty_____,
declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The South African doctrine of duress safeguards against traditional forms of coercion, which has meant that more subtle forms of pressure, where one's physical security is not necessarily threatened, are largely neglected. Economic duress is a species of duress, which involves the wrongful use of pressure to compel a party to contract through the exploitation of their financial circumstances. The taxing exercise of balancing various competing policy considerations when contemplating economic duress has meant that South African courts have shied away from exploring a possible test for this type of coercion. A comprehensive test for economic duress is a means through which South African contract law can be developed in line with the egalitarian ethos which the Constitution strives towards, while being an opportunity to advance our legal complement to meet standards of other jurisdictions. In this research report I highlight the many challenges to developing a test for economic duress and how these challenges cannot be overcome by a one size fits all approach but rather by tailoring general guidelines to the facts of each case. I further demonstrate how economic duress infringes upon constitutional values, which further supports the need to develop this doctrine. While drawing upon English law, I highlight the oversights made by our courts in this regard. This is then followed by a deconstruction of economic duress and the two concepts that define this form of coercion, namely wrongfulness and consent, which is used to outline a possible approach to this type of illegitimate pressure.

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1. Introduction:

The current law surrounding the test for duress is underdeveloped and its narrow application has meant that few cases have considered this doctrine.[1] With the nature of modern commercial transactions, generally, having undertones of economic duress rather than duress *per se*, these forms of economic coercion ought to be more aptly catered to by the South African legal system. Our current law on duress regards threats which are made towards one's person, property, or third-party duress as illegitimate and therefore actionable. This classification is confined to pressures that are tangible and are an explicit and overt form of compulsion while failing to acknowledge more subtle pressures such as those made towards economic interests. An expansion of the doctrine will align South African standards with the ideals of other jurisdictions and further develop our Roman-Dutch foundation to provide for the demands of today's society, with the competing interests of those within the marketplace being better accommodated.[2] With a society as unequal as ours[3] there is a need for legal intervention where there has been the wrongful use of economic pressure to induce a party into contracting, which is to be done in line with the constitutional values of freedom, equality and human dignity.[4] Section 39(2) of the Constitution of the Republic of South Africa ("the Constitution")[5] mandates that decision makers purposefully 'develop new methods of approaching and new criteria for resolving common law questions'.[6] This will preserve commercial and legal certainty[7] as well as propel the agenda of transformative constitutionalism.

The *Medscheme Holdings (Pty) Ltd v Bhamjee*[8] ("*Medscheme*") decision signals a movement towards the development of a doctrine of economic duress as well as the concept gaining greater traction with our courts. The court embraced the

[1] See D Hutchison et al 'Improperly obtained consensus' in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* (2012) at 137.
[2] MF Cassim '*Medscheme Holdings (Pty) Limited v Bhamjee*: The Concept of Economic Duress' (2005) 122 *SALJ* 528 at 529.
[3] DM Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' (2011) 22 *Stellenbosch Law Review* 845 at 845.
[4] Section 1(a) of the Constitution of the Republic of South Africa Act 108 of 1996.
[5] The Constitution of the Republic of South Africa Act 108 of 1996.
[6] Which must be done in the spirit, purport and objects of the Bill of Rights. See DM Dennis & K Klare 'Transformative Constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 412; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para 22.
[7] In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 26.
[8] 2005 (5) SA 339 (SCA).

idea of economic duress being actionable in a South African context. However, this was qualified as being possible in rare circumstances, and that in any event to be successful in this defense 'something more' must be demonstrated.[9] Our courts, prior to this, adopted a conservative attitude towards economic duress by deeming it a by-product of a competitive market and ultimately legitimate. Phang asserts that since the inception of the doctrine of economic duress, in English law, its use has been 'few and far between' with emphasis shifting to the doctrine of undue influence due to its more establish roots in law.[10] This attitude creates a barrier to development within any legal system while perpetuating the use of the familiar instead of embracing change. South African contract law, along with its underlying principles, must be able to bend while being all encompassing, or run the risk of oppressing those subject to it. An unreflective and rigid application of duress hinders a necessary evolution of contract law. Therefore, any test created for economic duress ought to be easily applied and simple so as to avoid falling back onto more established doctrines, such as undue influence, due to its familiarity.

This essay will discuss how economic duress can be developed in South African contract law. The first part of this discussion will outline the current state of the doctrine of duress as well as case law considering economic duress. This is followed by a criticism on how the courts in each instance missed an opportunity to develop a doctrine of economic duress and seemed to avoid the topic all together. This will be done by referring to English developments in this regard. By considering the challenges that this jurisdiction has faced in developing a doctrine of economic duress, developing an all-encompassing and comprehensive doctrine for South Africa will be made easier. The second part outlines how economic duress infringes the constitutional values that inform our Constitution and how a test for economic duress serves to further root contract law in an aspirational egalitarian ethos which our Constitution strives to achieve.[11] Cassim defines the concept of economic duress as the use of '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

[9] Ibid para 18.
[10] A Phang 'Economic Duress: Recent difficulties and possible alternatives' (1997) 5 *Restitution Law Review* 53 at 53.
[11] S v Makwanyane 1995 3 SA 391 (CC) at para 262. See D Moseneke 'Transformative Constitutionalism: Its impacts for the law of contract' (2009) 1 Stellenbosch Law Review 3 at 4.

which vitiates his consent'.[12] As evidenced by Cassim's definition, economic duress comprises of two main elements[13], illegitimacy of the pressure (wrongful conduct) and impaired consent. This leads to the third part of this discussion which explores these two concepts. These concepts guide my discussion on the challenges faced when developing a doctrine of economic duress. In addition to this, the causal nexus between wrongfulness and consent, in conjunction with the overlap thereof will be elaborated on. Lastly, the fourth part of this essay will propose what approach South Africa ought to take in tackling the issue of economic duress and how to create an adequate test for this concept.

2. The current approach to duress:

The doctrine of duress aims to safeguard people from threats that are of a physical nature, which are used to secure a benefit.[14] It was, therefore, designed to deal with more archaic forms of coercion and although at times it effectively addresses unconscionable uses of pressure it does not comprehensively accommodate modern forms of coercion, which commonly center around money.[15] In a competitive economy driven by profits, contracts are more susceptible to being induced through the use of improper economic threats as opposed to having ones physical security threatened.[16] As put by Beatson 'in a modern society there is no justification for the assumption that physical coercion is more potent than economic coercion'.[17]

Autonomy remains the cornerstone of contract law[18], it is the 'essence of freedom and a vital part of dignity'.[19] Therefore, a violation of someone's choice is an infringement upon one's human dignity, and can only be condoned if it is found to be reasonable and justifiable as per section 36 of the Constitution.[20] Duress, which is the

[12] Cassim op cit note 2 at 528.
[13] See *Barton v Armstrong* [1976] A.C. 104.
[14] J Beatson 'Duress As A Vitiating Factor In Contract' (1974) 33 *The Cambridge Law Journal* 97 at 99.
[15] Ibid.
[16] G Glover 'Developing a test for economic duress in the South African law of contract: A comparative perspective' (2006)123 *SALJ* 285 at 286.
[17] Beatson op cit note 14 at 106.
[18] D Bhana 'The development of a basic approach for the constitutionalisation of our common law of contract' (2015) 26 *Stell LR* 3 at 4.
[19] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para 50. See R Steinmann 'The Core Meaning of Human Dignity' (2016) 19 *PER/PELJ* 2 at 10, 16, 19.
[20] Constitutional right can be limited, in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of the Constitution. See section 36(1) of the Constitution.

wrongful use of pressure, is regarded as a form of intimidation[21] and coercion of will, and therefore impairs any consent given under these circumstances and strips the coerced party of their dignity. The doctrine of duress is the countervailing force to this form of *vis compulsiva*.[22] Economic duress is a species of duress, which also involves a form of unconscionable pressure exerted to coerce a party to contract. [23] The difficulty of balancing several competing policy considerations when evaluating economic duress has meant that courts have shied away from exploring a possible test for this form of coercion. This could explain the Supreme Court of Appeal's ("SCA") nondescript claim that for economic duress to be proven 'something more' would be required.[24] The SCA merely suggested that open-ended factors such as an abuse of unequal bargaining power and illegitimate hard bargaining could potentially be indicative of economic duress but retreated from giving any further concrete explanation on the matter.

As pointed out by Glover, South African courts have previously decided claims of economic duress, however these cases were not recognised as matters of economic coercion but were regarded as cases of threats to property, known as duress of goods.[25] Rafferty points out that the first form of economic duress acknowledged by the courts was duress of goods, further demonstrating that there is room for the development of economic duress within our legal framework.[26] An example of South African courts incorrectly classifying economic duress as duress of goods is the *Hendricks v Barnett*[27] ("*Hendricks*") case. The court in this instance held that the contracts entered into were valid due to the fact that the defendant failed to prove that he unequivocally protested before entering into the agreement, to nullify his consent. The defendant suggested that the threat made by the plaintiff was made to his wider economic interests, as failing to submit to this demand would destroy his whole business. This argument is based on the notion of economic duress. The plaintiff was invaluable to the defendant given his extensive and exclusive knowledge of the horses

[21] Hutchison op cit note 1 at 136.
[22] G Glover 'Duress in the Roman-Dutch law of obligations' (2005) 11 Fundamina 26 at 29. In Broodryk v Smuts NO 1942 TPD 47 the current test for duress was set out.
[23] See CJ Pretorius & R Ismail 'Compromise, Undue Influence and Economic Duress' (2012) 33 *Obiter* 681 at 689.
[24] *Medscheme* supra note 8 para 18.
[25] Glover op cit note 16 at 286. See also *Kapp v TC Valuta* 1975 (3) SA 283 (T).
[26] N Rafferty 'The Element of Wrongful Pressure in a Finding of Duress' (1980) XVIII *Alberta Law Review* 431 at 433.
[27] 1975 (1) SA 765 (W).

on the defendant's farm, without which the auctioned sale thereof could not proceed. With the pending auction the defendant had no reasonable alternative but to submit to the demands of the plaintiff or suffer economic ruin. There is a causal nexus between the defendant entering into the contracts and the threat made by the plaintiff, which speaks to his consent having been impaired. Thus, had the threat not been made, the defendant would not have submitted to the plaintiff's demands. Accordingly, this case should have been characterised as economic duress and not duress of goods. Respectfully, the outcome of this matter is debatable. The court holds that by the defendant not expressly protesting to the plaintiff's demands, his consent was not defective. Protestation serves to more vehemently support arguments that a victim's consent was impaired due to the pressure. Undoubtedly, agreements entered into under protest are more indicative of the presence of coercion. However, where the true nature of the undertaking is voluntary any protesting will not detract from the voluntariness of the consent given.[28] Therefore, the weight attributed to protesting at the time of entering into the contract cannot be a sole determinate of the state of mind of the party at the time of the transaction, and essentially whether the consent they gave was sufficiently voluntary. English law brings some clarity on this issue. In the case of *Occidental Worldwide Investment Corporation v Skibs (The Sibeon & The Sibotre)*[29] Kerr J recognised the doctrine of economic duress, however the court cautioned that commercial pressure alone is insufficient to render a contract voidable. The court emphasised that 'the true question is ultimately whether or not the agreement in question is to be regarded as having been concluded voluntarily'.[30] The following four factors are to be considered when dealing with the question of economic duress: whether the person claiming to be coerced protest at the time of entering into the contract; whether that person had any other available course of action; whether they were independently advised; and after entering into the contract, did they take steps to avoid it?[31] These factors illustrate that protesting alone cannot determine whether the consent given is sufficiently autonomous. *Universe Tankships Inc. of Monrovia v International Transport Workers Federation and Others*[32] held that in

[28] FHI Cassim 'Economic duress in the law of unjust enrichment in USA, England and South Africa' (1991) 24 *Comparative and International Law Journal of Southern Africa* 37at 50- 51.
[29] [1976] 1 Lloyds Rep 293.
[30] Ibid 335.
[31] See *Pao on v Lau yiu Long* [1979] 3 All ER 65.
[32] [1983] 1 AC 366.

respect of typical duress matters, what is considered important is not the **'**lack of will to submit' but rather the 'submission arising from the realisation that there is no other practical choice' available to the victim.[33] In the *Port Elizabeth Municipality v Uitenhage Municipality*[34] decision, regarding duress of goods, the court was perceptive and did not place as much emphasis on protesting as the court in *Hendricks* did.[35] Therefore, it seems absurd that the court in *Hendricks* placed such great emphasis on protesting given that in *Port Elizabeth Municipality* the court was able to accept that protesting, especially in instances where time is of the essence, serves no purpose other than to verbalise the unwillingness of the threatened party. The court in *Hendricks* ought to have placed greater emphasis on the wrongfulness of the plaintiff's conduct, given the fact that he was capitalising on the defendant's vulnerability and acted in bad faith. Instead of appreciating the fact that the consent given was impaired because the defendant had no reasonable alternative at the time, the court overemphasized the lack of protestation.

In the *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK*[36]*,* decision, the court acknowledged that duress of goods in English law was inclusive of economic duress[37], and that this form of duress referred to the use of illegitimate commercial pressure which rendered the victim with no alternative other than to enter into the contract against his will.[38] Although it appears that the conduct in question amounts to economic duress, on the facts of this case, the court was not of the same opinion. The court sternly stated that economic duress did not form part of our law and that South Africa could not recognise it as our law is not developed enough. The case concerned an estate agency which needed exclusive information that was in an accountants' possession. A lucrative sale hinged on this information. One is inclined to feel less sympathetic towards the victim in this matter since they stood to earn an exorbitant amount of commission from the sale. It is also clear that the accountant capitalised on his position, and knew how valuable this information was to the estate agency. Although this was an instance of commercial pressure, it was held not to be

[33] Ibid 635.
[34] 1971 1 SA 724 (A).
[35] Ibid 742A. See *Lilienfield & Co v Bourke* 1921 TPD 365 at 370; Attorney-General v Horner (No 2) 1913 2 Ch 140.
[36] 1999 (1) SA 780 (T).
[37] Ibid 786C- E.
[38] Ibid 786-7.

unlawful or *contra bonos mores*.[39] By the accountant exploiting the vulnerability of the estate agency this arguably point towards this conduct being unconscionable. The South African doctrine of unconscionability is narrowly applied to instances where a contracting party is 'reduced to the status of a virtual slave'.[40] The question remains, when does hard bargaining become an improper use of pressure and encroach into the territory of economic duress?

The *Medscheme* case revealed that South African courts, the SCA in particular, are not opposed to the idea of economic duress being introduced into our legal system. The court maintains that it is not *per se* wrongful to cause another party financial harm which has the effect of economically ruining them.[41] Commercial pressure alone, hard bargaining, is insufficient to declare any contract voidable, moreover for hard bargaining to be considered wrongful something more is required other than the mere presence of unequal bargaining powers between the parties. This proviso set by the SCA serves to confine the use of such a doctrine to unconscionable situations and avoid hindering economic development through frivolous use of the doctrine. However, the court neglected to explain what would be considered as 'something more' which does not provide any guidance in the task of delineating the concept of economic duress within a South African context. The facts of the case are as follow: Bhamjee was a general practitioner who agreed to two acknowledgements of debt (the agreements), which were in favour of Medscheme (a medical aid practitioner), concerning the repayment of amounts paid to Bhamjee by Medscheme on behalf of patients who were its members. There was no contract between the parties, which meant Bhamjee was permitted to claim consultation fees directly from Medscheme. Medscheme noticed that the claims lodged by Bhamjee were exorbitant, which prompted them to inform Bhamjee that they were contemplating ceasing with the direct payments to him, because of these irregularities.[42] This induced Bhamjee to sign the first agreement to avoid the effect of this threat. However, Bhamjee's aberrational claims persisted, affirming Medscheme's suspicions that the claims were fraudulent. A second agreement was then presented, where Medscheme threaten to cancel future

[39] Ibid 795H- I.
[40] D Bhana, M Nortje & E Bonthuys 'Legality' in *Student's Guide to the Law of Contract* 4thed (2015) 159 at 203. See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).
[41] *Medscheme* supra note 8 para 18.
[42] Ibid paras 11- 12, 19, 27, 29.

direct payments, which induced Bhamjee into consenting to the agreement. The second agreement had a caveat that its enforcement was subject to approval by medical aid schemes involved, which was consequently not given, and as such Medscheme ceased with its direct payments. [43] In any event, because no contract existed between the parties, Bhamjee was not entitled to any direct payment. Bhamjee's practice subsequently went under, he then instituted action against Medscheme to set aside the two agreements on the grounds of economic duress. The court accepted that the threats made by Medscheme induced Bhamjee into agreeing to the agreements so that he would continue to receive direct payments by them and sustain his practice.[44] The court *a quo* regarded these threats as unconscionable and found that Bhamjee was entitled to the direct payments.[45] However this finding was overturned by the SCA who held that Medscheme was under no responsibility to pay any doctor directly.[46] The court regarded the use of the threat by Medscheme as justified in this instance, as it was in the interest of the members of the medical aid scheme.[47] With Medscheme's suspicions that some of Bhamjee's claims were fraudulent having been supposedly confirmed, the threat made by Medscheme was deemed to be justified. Therefore, the threat was not regarded as unlawful.

It is arguable that a threat need not be unlawful for it to be coercive enough to impair the consent of the threatened party. Lawful threats are nonetheless threats and have the effect of bending the will of the threatened party. Conduct or threats that are wrongful 'in a moral or equitable sense may amount to economic duress' even where they are not 'unlawful, criminal, delictual or in violation of a contractual duty', therefore, lawful acts may be wrongful.[48] In the case of *CTN Cash and Carry Ltd v Gallaher Ltd* ("*CTN*")[49]*,*we see the English court retreating away from the doctrine of economic duress and employing a similar line of reasoning as the court in *Medscheme* to justify the use of a threat to induce a contract. The case considered whether lawful conduct can constitute economic duress. CTN, a cash and carry business, denied liability and payment for cigarettes that were delivered to the wrong warehouse and subsequently

[43] Ibid para 30.
[44] Ibid para 15.
[45] Ibid para 16- 17.
[46] Ibid para 17.
[47] Ibid para 19.
[48] FHI Cassim op cit note 28 at 43- 44. See *Fowler v Mumford* 102A 2d 535 (1954).
[49] [1994] 4 AII ER 715.

stolen before they were collected by Gallaher to take them to another warehouse. Gallaher alleged that CTN was liable and threatened to cease with any future dealings with CTN unless they paid for the stolen merchandise. CTN submitted to this threat and accepted liability. It was later established that the risk of the stolen cigarettes was not on CTN, following which they sued Gallaher for repayment. The court found that the Gallaher was well within their right to cease with future dealings with CTN as they were under no obligation to contract with them in the future. Furthermore, Gallaher had acted upon legal advice which, according to the court, meant that their conduct was not improper. The court remarked that extending the doctrine of economic duress to the facts at hand would be 'radical' due to the fact that the conduct in question, which compelled CTN to pay for the cigarettes, was not objectionable.[50] Further holding that 'it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the contract is lawful but whether it is morally or socially unacceptable'.[51] The court also observed that the relationship between CTN and Gallaher was not a 'protected relationship', but was rather one arising out of 'arm's length commercial dealings'.[52] This decision is similar to *Medscheme* given the fact that it was held that Medscheme had no obligation to make direct payments to Bhamjee, and as such the threat made by Medscheme to cease with direct future payments should he fail to sign the agreement was within their commercial and legal prerogative. Although Gallaher and Medscheme were not obliged to contract with the respective victims in future this does not mean that the use of the threat to cease with future dealings was not *contra bonos mores* and therefore illegitimate. Christie regards the notion of public policy and *contra bonos mores* are interchangeable ideas and further advocates that where a term or contract is clearly improper or excessively harsh and unfair it may be declared contrary to public policy.[53] He further asserts that public policy embodies an overall sense of justice of a society which finds expression in public opinion.[54] Therefore, I submit that the threat made by Medscheme was morally offensive, *contra bonos mores,* and for that reason wrongful and consequently amounts to economic duress due to the effect this had on Bhamjee's consent. The

[50] Ibid 719.
[51] Ibid.
[52] Ibid 717.
[53] See L Hawthorne 'Public Policy: The origin of a general clause in the South African law of contract' (2013) 19 *Fundamina: A Journal of Legal History* 300 at 306.
[54] Ibid.

court in *Medscheme* regarded the threat made as justified because it was made to protect the interest of several members of the medical aid scheme. This is not reason enough to condone the use of a threat. There may be sound justifications for condoning 'economic inequalities that flow from unequal rights', but these reasons 'must be more specific than a broad policy… [or] freedom of contract'.[55] Hale in the abovementioned quote is referring to property rights in South Africa, and I submit that the same line of reasoning can be employed to the context of economic duress. By condoning the abuse of greater bargaining power and rationalising this as a natural consequence of commercial undertakings, the courts perpetuate a system of segregation between the common law of contract and constitutional values. Any justification of the inequalities that flow from commercial undertakings must be more rigorously justified. Although Medscheme was acting on behalf of their members this does not immunise their conduct from scrutiny. Therefore, by taking undue advantage of a change in circumstances to pressure Bhamjee into agreeing to a contract he would not have agreed to but for the threat, this is *contra bonos mores*. Although the court ultimately found that on the facts there was no evidence of economic duress, this does not diminish the significance of this decision, namely, that to establish economic duress something other than a mere inequality of bargaining power and unlawful threat must be demonstrated. Perhaps the 'something more' that the court requires for economic duress to be satisfied could be the presence of unconscionable hard bargaining which is contrary to market standards, an abuse of greater bargaining power, or protestation by the victim before submitting to the contract.

Following the *Medscheme* decision was *Gerolomou Construction (Pty) Ltd v Van Wyk*[56] ("*Gerolomou*") which was decided on the basis of undue influence, although the facts convincingly reflect a situation of economic duress. The relevant facts of the case are as follows: the plaintiff had performed subcontracting work for the defendant and sought to obtain payment of retention money withheld by the defendant. The plaintiff could not pay his workers without this, and his workers began to pressure him for their pay. The defendant orchestrated several delay tactics to put off the payment of the money, however eventually a meeting between the parties took place. At this meeting the plaintiff was presented with a document stating that the defendant was only

[55] Davis op cit note 3 at 849.
[56] 2011 (4) SA 500 (GNP).

prepared to pay a retention rate of R19 291,70, significantly less than the amount due, which was presented on a take it or leave it basis. The plaintiff protested to the changes but ultimately signed the document, this was however only done so that he would have enough money to pay his workers. Following this the plaintiff sued the defendant for the balance of the retention money owed to him. The plaintiff alleged that he signed the document because of undue influence on the part of the defendant. The question before the court was whether the conduct of the defendant amounted to undue influence.[57] It is clear that the defendant gained influence over the plaintiff, the defendant was aware of the fact that the plaintiff was in dire need of the money due to the pressure he was under by his unpaid workers, who waited outside during the meeting, and that the plaintiff was not in a position to walk away from the final settlement amount, and this inequality in economic standing of the parties is a factor that the defendant used to his advantage.[58] Thus, undoubtedly the defendant preyed on the plaintiff's situation to coax him to agree to a transaction which was to his disadvantage.[59] For undue influence to succeed as a defense it must be proven that the conduct in question was unconscionable.[60] For this to be satisfied there must be a considerable degree of 'unscrupulousness, an intention to oppress, or a departure from the values' of a reasonable person in the specific context, ultimately the party must have taken unfair advantage of his superior position.[61] This was regarded as having been satisfied and the contract was deemed voidable.[62] Tuchten J held that 'when a genuine settlement of a disputed indebtedness is involved' it is permissible for a party to exploit another, however where an economically powerful party withholds money that is owed to a weaker party for his advantage this is another thing.[63] Arguably Tuchten J was alluding to a situation of economic duress here but did not explicitly regard it as such. Which leads one to suspect that Tuchten J believed this case was in fact economic duress but at the risk of not succeeding on such a defense and the plaintiff suffering at the hands of the defendant, he accepted this as undue influence. Glover maintains that adjudication on cases concerning a threat of breach

[57] See *Patel v Grobbelaar* 1974 (1) SA 532 (A) at 533-4.
[58] *Gerelomou* supra note 56 para 20.
[59] Ibid para 21.
[60] Ibid.
[61] Ibid para 22-23.
[62] Ibid para 24.
[63] Ibid.

of contract is a cumbersome task because it demands that several competing policy considerations be scrutinized.[64] This may also be one of the reasons for Tuchten's avoidance of what appears to be clearly economic duress. Sharrock highlights that cases of undue influence typically transpire because of a pre-existing relationship of trust or exclusivity of knowledge , therefore the abuse of a party's bargaining strength, as was the case here, does not satisfy this purpose because the superior party does not have 'control over the weaker party's mind of judgment' as would be the case with undue influence.[65] It is evident that the plaintiff in this case was by no means 'overborne' due to his protestation at the contractual changes made by the defendant.[66] Therefore, arguably the characterisation of this case as undue influence was incorrect as the threat of breach of contract amounted to economic duress.[67]

The case of *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* ("*Atlas*")*.*[68] clearly demonstrates how economic duress occurs in commercial transactions. This case illustrates one of the most crucial factors of economic duress, that the victim of the duress must have had no alternatives but to submit to the pressure of the coercer. In this case the defendant was pressured to renegotiate the terms of a contract to his disadvantage, with no reasonable alternative but to submit to the demands of the plaintiff. Atlas was a courier company who contracted with Kafco to deliver their baskets to Woolworths branches. Atlas discovered a miscalculation regarding the respective cartons and consequently that they were undercharging Kafco. Atlas proceeded to inform Kafco that the agreed price would have to be renegotiated and that if the new terms were not accepted they would cancel the contract. Kafco would not be able to withstand the financial impact that would be felt by this, and at the time, was unable to find an alternative carrier. As such Kafco signed the agreement and agreed to the new rate. Kafco later refused to pay the higher rate, and argued that they were subject to economic duress. It was found that the pressure applied by Atlas amounted to economic duress which vitiated the consent given in respect of the new rate. It is clear that Atlas exploited the change in circumstances to extort a greater

[64] Glover op cit note 16 at 291. See R Bigwood 'Coercion in contract: The theoretical constructs of duress' (1996) 46 *University of Toronto LJ* 201 at 242.
[65] R Sharrock 'The general principles of the law of contract' (2011) *Annual Survey of South African Law* 534 at 582.
[66] Ibid 583.
[67] Ibid.
[68] [1989] 1 All ER 641.

benefit. Ogilvie has succinctly illustrated the position of several academics and judges[69] in the United States who advocate that 'when the victim of the duress submits to [the threat] …, he is giving his real consent to a lesser evil', which is plainly spelt out in the *Atlas* matter.[70] A similar line of reasoning can be employed to the *Gerelomou* decision where it is clear that there were no feasible alternatives at the plaintiff's disposal at the time of the threat.

Parallels can be drawn between all four of the abovementioned South African decisions as they all invariably concern threatened parties that had no reasonable alternatives at the time of the threat other than to submit to the lesser of two evils. Moreover, it is evident that there was an abuse of bargaining power in each instance, because not only were the threatening parties presenting their demands at the last possible moment and monopolising on the vulnerable position of the other party, but their conduct was also *contra bonos mores*.[71]

3. Constitutional values:

The averseness demonstrated by our courts towards interrogating 'the distributive consequences of private law rules in the routines of economic life' has meant that constitutional rights afforded in South Africa are not adequately realised through contract law as well as that they are then compromised in an effort to avoid grappling with the difficult question of economic duress and the consequences that flow thereof.[72] The horizontal application of the Constitution demands that the common law be developed so as to 'transform power relations, including social and economic power relations, between individuals in the private law realm'.[73] Freedom, equality and dignity are the three constitutional values at the forefront of constitutional transformation. These values dictate and inform the standard of the South African legal system. Equality[74] is an invaluable constitutional value, which stands to promote and 'protect the ability of each human being to develop' their capabilities and shape 'mutually

[69] *Union Pacific Ry Co. v. Public Service Commission* 248 U.S. 67 (1918) at 70.
[70] MH Ogilvie 'Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract' (1981) 26 *McGill Law Journal* 289 at 315.
[71] Agreements are regarded as *contra bonos mores* where they offend our conscience, values, or modesty.
[72] Dennis & Klare op cit note 6 at 403.
[73] D Bhana 'Contractual autonomy unpacked: The internal and external dimensions of contractual autonomy operating in the post-apartheid constitutional context' (2015) 31 *SAJHR* 526 at 526.
[74] Section 9 of the Constitution.

supported human relationships', as well as being instrumental in achieving social transformation.[75] Like equality, the Constitutional value of dignity is paramount as it is 'irrevocably linked to the protection of freedom and autonomy'.[76] O'Regan J stresses that, 'recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings' and that we are deserving of respect.[77] Therefore, where the economic ruin of a person is as a result of a coerced contractual undertaking, to simply accept this as being the norm in a competitive economy is to undermine the achievement of the Constitution's vision. The *Gerolomou* case highlighted that the threat of breach of contract is 'subversive of freedom and human dignity' because such conduct infringes upon a person's constitutional rights.[78] Thus, this infringement on one's constitutional rights have severe implications. Furthermore 'contractual autonomy is part of freedom' and to ignore the coercive nature of abused bargaining power is to restrain one's freedom.[79] Justice Yacoob in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*[80] ("*Everfresh"*) held that the 'law of contract must lend itself to such values as it cannot be confined to common-law legal tradition alone'.[81] The court went on to state that it is necessary to 'infuse the law of contract with constitutional values, including values of ubuntu.'[82]

The narrow approach employed by the courts when considering cases of duress has meant that this test has been criticised by academics on several grounds. Glover[83] makes several arguments as to why the current test for duress is deficient. One of his arguments speaks to the leg of the test that requires the threat or evil in question be directed towards either the person party to the contract or his family. He argues that to regard a threat as 'only having a coercive effect if it is directed against oneself or a member of one's family' rules out the real possibility that should the threat be 'directed at one's friend, or even a total stranger' this may still pressure a person into contracting.[84] It would be preposterous to deny a person relief in such an instance

[75] D Bhana & M Pieterse 'Towards A Reconciliation of Contract Law and the Constitutional Values: Brisley & Afrox revisited' (2005) 122 *SALJ* 865 at 880.
[76] S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 at 5.
[77] *Makwanyane* supra note 11 at para 328.
[78] *Gerolomou* supra note at 56 at para 24.
[79] *Brisley* supra note 6 at 35E.
[80] 2012 (1) SA 256 (CC).
[81] Ibid para 23- 24.
[82] Ibid para 71.
[83] G Glover 'The Test for Duress in the South African Law of Contract' (2006) 123 *SALJ* 98.
[84] Ibid 103.

given that a threat to one's livelihood is arguably as coercive as a threat to one's person, family or a stranger.[85] In today's competitive economy and market, it is not farfetched to believe that a person could be economically threatened and put in a position where they are faced with the dilemma to either contract or accept economic ruin, a price which is too high for any person to pay. The current approach to duress neglects to recognise the ubuntu spirit and interdependence that informs our Constitution.[86] Ubuntu is an interpretation of the goals of the constitutional value system, which is a South Africa united in its diversity. This implies that there must be a limitation on the pursuance of self-interest for the interests of others. Neglecting economic duress as a means of protecting the financial interest of people suggests that only certain aspects of life are worth judicial intervention.

Barnard-Naude in considering the *Brisley v Drotsky*[87] decision remarked that the judgment 'uncritically assumes that the strict enforcement of contracts…is in service of the constitutional values of dignity, equality and freedom'.[88] This is an assumption that does not always serve the interests of both parties. This is especially the case with contracts induced through economic coercion which have, to date, been consistently enforced by South African courts because of our courts endorsement of economic duress as being unactionable and nearly impossible to prove. Thus, recognition of the link between freedom of contract and dignity does not necessarily mean that this calls for or even favours a strict enforcement of contracts.[89] Davis and Klare highlight that should the reach of the Constitution be limited to exercises of power that are 'aberrational', this excludes 'normal' uses of power from being considered.[90] This would be contrary to the purpose of a transformative constitution, like ours, which 'celebrates equality, human dignity, and human self-realisation'.[91] The Constitution must therefore be able to 'challenge our ideas of the social and economic "normal"'.[92] Therefore, the reasoning by the court in *Medscheme*, that 'hard bargaining

[85] Ibid 104.
[86] Dennis & Klare op cit note 6 at 403. See *Makwanyane* supra note 11 para 237.
[87] *Brisley* supra note 6.
[88] AJ Barnard-Naude ''Oh, what a tangled web we weave…'Hegemony, freedom of contract, good faith and transformation' (2008) 1 *Constitutional Court Review* 155 at 197.
[89] S Wagener 'A proposal for the reform of the law of contract brought about by the judicial development of novel *naturalia*' (2005) *Responsa Meridiana* 19 at 39-40.
[90] Dennis & Klare op cit note 6 at 481.
[91] Ibid.
[92] Ibid.

is not the equivalent of duress'[93], has the effect of preventing the interrogation of the status quo of hard bargaining in a competitive market. This undermines the rights of parties with limited bargaining power. It is for this reason that context is intrinsic to any inquiry into economic duress and ought to unequivocally form part of this inquiry. Therefore, that which is considered to be 'normal' in the context of an economic duress cases ought to also be questioned and not merely taken at face value. Davis and Klare further highlighted that the disregard for context is evident when analysing bargaining power as seen in cases dealing with freedom of contract.[94] These cases have condensed the notion of bargaining power into what appears to be 'self-defining', nondescript distinctions that consist of two extremes: 'normal' and 'excessive' degrees of bargaining pressure, and between 'freely chosen' and 'coerced' bargains'.[95] The extensive span between what constitutes 'normal' and 'excessive' bargaining power is 'infinite', and serves to merely restate several 'questions' that need to be answered. These nondescript distinctions 'marginalise' matters 'calling for judicial intervention' by regarding them 'as rare and uncommon'.[96] This effect is clearly demonstrated in the *Medscheme* decision where the court remarked that any finding of economic duress would be rare if anything. It is for this reason that more overt guidelines need to outline how to delineate hard bargaining and coerced consent in the context of economic duress.

4. Challenges to incorporating economic duress into South African law: Wrongfulness and Consent:

Glover proposes an alternative test for duress which acknowledges some of the traditional elements of the test for duress. The test is divided into two broad enquiries, the proposal enquiry and the choice enquiry, which are broken down even further. Glover believes that the focus of a duress enquiry should not be on what the threat is against, which is the approach currently used, but should rather be on whether the threat was used in a wrongful, illegitimate manner. The proposal test differs significantly from South Africa's common-law which requires specific types of threats to be considered, and allows for more subtle forms of coercion to be acknowledged

[93] *Medscheme* supra note 8 para 18.
[94] Dennis & Klare op cit note 6 at 480.
[95] Ibid.
[96] Ibid 481.

as duress. The proposal enquiry considers the following two things: firstly, whether there was a threat, which essentially is an unwelcomed consequence that would arise; and secondly, that the threat in this instance must have been used in a *contra bonos mores* way or be regarded as illegitimate.[97] The choice enquiry considers the following two things: that the threat must have induced the contract, and that there should have been no reasonable alternative available to the threatened party other than to agree to contract.[98] Therefore, although there may be options at the threatened party's disposal these alternatives must have been unreasonable. This aspect of Glover's enquiry reflects the leg of the common-law duress test that requires that there must be a reasonable fear that the threat would eventually arise, as well as that the threat must be imminent and inevitable. There must be a causal nexus between the threat made and the threatened party consenting to the contract.[99] Furthermore, considering whether the threatened party had any reasonable alternatives at his disposal will require the courts to consider the viability of the alternatives. This calls for the consideration of the circumstances of the threatened party at the time of the threat. The proposal leg of the test speaks to the wrongfulness of the act or threat while the choice leg considers whether the consent given is sufficiently autonomous.

5. Wrongfulness: Proposal enquiry

An enquiry into duress considers whether it is 'rightful' to employ a certain type of persuasion to produce a disproportionate outcome.[100] It is assumed that the use of a threat to act illegally is illegitimate, known as unlawful act duress.[101] However, it may also be illegitimate to threaten to act legally, as alluded to above, this type of threat is known as lawful act duress. Therefore, to assume that 'it is never duress to threaten to do what one has a legal right to do' ignores the reality that a threat, of even a lawful act, may be as coercive and as wrongful in a commercial setting as a threat to act

[97] Glover op cit note 16 at 287.
[98] Ibid 287- 288.
[99] A Stewart 'Economic Duress- Legal Regulation of Commercial Pressure' (1984) 14 *Melbourne University Law Review* 410 at 433.
[100] JP Dawson 'Economic Duress- An Essay in Perspective' (1947) 45 *Michigan Law Review* 253 at 288.
[101] R Bigwood 'Throwing the baby out with the bathwater? For questions on the demise of lawful-act duress in New South Wales' (2008) 27 *The University of Queensland Law Journal* 41 at 41. See T A Leng 'Lawful Act Duress' (1995) 7 *Singapore Academy of Law Journal* 208 at 208.

unlawfully.[102] Cassim highlighted that both English and American law differentiate between 'unlawful act duress' and 'lawful act duress'.[103] It is irrelevant whether the coercer had a right to do that which he is threatening to do, what is relevant is whether the use of that threat is wrongful. In respect of lawful act duress[104], this requires that the threat, 'which is wrongful in a moral or equitable sense', be brutal enough to induce a person to act contrary to their free will or be made for an 'ulterior or improper purpose'.[105] Thus, considering whether the threat was morally wrongful may aid in distinguishing between hard bargaining and economic duress. That is that the threat or act must have been made to obtain an advantage over the party which the threatening party was not already entitled to. Rafferty seems to share the same sentiment as Cassim, by proposing that where the 'purpose behind the coercers demand', especially where the act threatened is lawful, is imperative to establish its illegitimacy.[106] This calls for a consideration of the reasonableness of the act or threat in question. Glover's test considers the duress from the perspective of the threatened party, which is useful in ascertaining whether it was the threat that caused the party to consent to the contract. However, the perspective of the coercer needs to be considered when establishing what the purpose underlying the threat. Stewart indicates, the issue in this regard is that there is little information that can be used to formulate a set of 'well-defined guidelines' as to what exactly is 'commercially moral'.[107] This makes it difficult to ascertain what a reasonable person in that market would have done. This presents a further dilemma, which is, should certain conduct be regarded as illegitimate and immoral, where the conduct serves a 'lawful economic interest', this could have severe economic and commercial ramifications.[108] Therefore, each situation will have to be considered on its own merits.

The extent and nature of the harm suffered by the person who was threatened is indicative of whether the pressure is illegitimate. The illegitimacy of the pressure is a factor, coupled with the purpose of the pressure, which assists in meaningfully differentiating between hard bargaining and economic duress in respect of what is

[102] Stewart op cit note 99 at 427.
[103] Cassim op cit note 2 at 535.
[104] See *Rubenstein v Rubenstein* 120A 2d 11 (1956).
[105] Cassim op cit note 2 at 535. See *Fox v Piercey* 227 P 2d 763 (1951).
[106] Stewart op cit note 99 at 431.
[107] Ibid.
[108] Cassim op cit note 2 at 539.

considered as commercially moral in the context of the case. An inquiry into what is generally accepted in the market is essential when considering whether the use of pressure is unconscionable. Cassim identifies three factors that could assist in establishing whether the pressure exerted was unconscionable. The factors are as follows: considering whether there has been an inadequate exchange of values, whether the threatening party acted in a *bona fide* manner, and whether there was a threat to utilise a legal privilege to another's disadvantage or a threat to cease with future contractual undertakings.[109] An inadequate exchange in value is generally indicative of the exploitation of circumstance or bargaining power by either party. A threat to exercise a legal privilege or a threat to suspend future contracting may amount to improper pressure.[110] The notion of good faith has been aligned with standards of reasonableness and fairness and as such is pertinent in establishing whether the pressure exerted is illegitimate.[111] Public policy is 'rooted in the Constitution and the fundamental values it enshrines'.[112] To establish if a contract is contrary to public policy a balancing of several competing considerations is needed. In terms of the two-pronged test of reasonableness,[113] a contract undermining constitutional rights will only be enforceable where it is both objectively and subjectively reasonable. The objective leg of the test considers factors in favour of *pacta sunt servanda*, values that underlie the protection of the relevant fundamental rights, the significance of the right in question, whether the clause serves a legitimate purpose, which is compared to the extent that the right is infringed.[114] The subjective leg on the other hand considers the personal attributes of the parties, their socio-economic standing in society, an evaluation as to whether there is an inequality in bargaining power between the parties, whether the party whose rights were infringed was aware of the clause, and 'circumstances surrounding invocation of the clause'.[115] Naturally when considering the fairness of a contract, the 'principle of freedom of contract, as grounded in the foundational constitutional values of freedom, dignity and

[109] Ibid 536- 539.
[110] See *CTN Cash and Carry* supra note 49.
[111] *Barkhuizen v Napier*2007 (5) SA 323 (CC) at para 80.
[112] *Price Waterhouse Coopers v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at para 24. See Davis op cit note 3 at 847.
[113] See *Barkhuizen* supra note 111.
[114] D Bhana, M Nortje & E Bonthuys op cit note 40 at 196. See *Barkhuizen* supra note 111 para 59.
[115] Ibid. See *Barkhuizen* supra note 111 para 58.

equality necessarily comes into play'.[116] Therefore, where the contract was not freely entered into, this violates the constitutional values of freedom, equality and dignity which speaks to the unfairness of the contract. The courts seem to regard 'the extent of the financial harm' as immaterial in this exercise, which I believe is a missed opportunity.[117] The extent of financial harm, in light of the specific facts of the case, ought to be a consideration when the fairness of the contract is questioned. This will assist in deciphering whether the conduct in question is unconscionable.

6. Consent: Choice enquiry

Collins makes an economic argument that supports the presence of certain pressures and influences regarding the choices exercised by individuals within the market. He argues that almost all choices are constrained,[118] which is a position that the SCA in *Medscheme* seems to be in agreement with.[119] The court regards all commercial transactions as being subject to pressure, which is a by-product of a competitive market. These constraints present themselves in several different forms, namely due to the 'shortage of resources', 'limits on choice in the market itself', and lastly when 'one person feels compelled to subordinate his wishes to another's'.[120] As such it is necessary that certain factors are ignored for the market to function optimally. Thus, one ought to distinguish between choices that are sufficiently voluntary and those which are not considered sufficiently voluntary in deciding whether the choice is aberrational to normal market conditions. He suggests that, for instance, 'the law cannot accept… that poverty constrains choice sufficiently' to warrant judicial intervention, as this would cast doubt about the enforceability of numerous contracts. Collins further holds that the law ought to deem parties to a contract as 'disembodied, unsituated persons', ultimately as 'abstracts' so as support the market.[121] I respectfully disagree with this statement. To disregard the personal background and

[116] Bhana op cit note 73 at 534.
[117] Nortje M 'Pre-contractual duties of disclosure in the South African common law (part 1)' (2015) 2015 *TSAR* 347 at 360. See *Medscheme* supra note 8.
[118] H Collins 'Coercion and competitive markets' in *The Law of Contract 4* ed (2003) 136 at 137.
[119] *Medscheme* supra note 8 para 18.
[120] Ibid.
[121] Ibid.

circumstances of a person will lead to a situation where substantive equality[122] cannot thrive and aid in the realisation of a transformed society. It is therefore necessary that the background of the threatened party be considered because this is an important consideration in establishing whether there was an unconscionable abuse of unequal bargaining power. There currently exists legislative measures[123] which regulate certain commercial relationships by considering specific socio-economic displacements. This form of state intervention has not stifled economic growth within South Africa, and as such a more subjective and inclusive notion of consent will better address the question of whether the consent given was sufficiently autonomous. Furthermore, how can we expect to sustain and propel economic development and commercial certainty if there is not a consistent and continued emphasis of 'voluntary choices (liberty) of participants in the market'.[124] Where it is evident that economic duress has permeated a contractual undertaking, so as to safeguard the 'institutions of the market against coercive taking', it is pertinent that this issue be addressed and not merely ignored due to the fact that such pressure may create a stagnant market.[125] As such the social standing and personal attributes of a person cannot simply be ignored.

The individualist approach the courts seems to favour, endorses a specific conception of autonomy.[126] Individualism is characterised by self-interest and determination at whatever cost. This is argued to be a mechanism through which one's autonomy is magnified. This autonomy is empowered by limited state interference. This 'narrow' conception of autonomy becomes problematic where such an exercise of autonomy infringes upon the ability of another to determine their life, which ultimately leads to 'socio-economic domination', a stance that is unlikely to have been taken by the Constitution.[127] That being said, the free market system which is intrinsically based on 'economic individualism' accepts the presence of and 'submission to commercial pressure', which is a sentiment the SCA seems to agree

[122] Substantive equality supports the idea that people who are different ought to be treated differently so that they are able to be regarded as equals. Thus, like are treated alike and different are treated differently so as to be equal.
[123] For example, the Consumer Protection Act 68 of 2008.
[124] Davis op cit note 3 at 848. See D Bhana 'The Role of Judicial Methodology in the Relinquishing of Constitutional Rights Through Contract' (2008) 24 *SAJHR* 300 at 303.
[125] Collins op cit note 118 at 137.
[126] Davis op cit note 3 at 848.
[127] Dennis & Klare op cit note 6 at 480.

with given their stance in the *Medscheme* judgment.[128] I accept that in commercial negotiating ones free will is hampered to an extent, and this is largely due to expectations of 'gain or the fear of loss' as well as social pressures, however where one's free will is bent to the point where the decision made is out of necessity and the lack of viable alternatives, legal recourse is necessary.[129] Therefore 'this system of institutionalised coercion' demands a level of 'protective intervention' which can be done through contract law and the incorporation of economic duress into our legal framework.[130] This will demand that not only consideration be had to whether there was interference with the party's consent but also requires an evaluation of whether the party had the opportunity to consider a range of meaningful options.[131] This idea of autonomy is more compatible with economic duress in the sense that for there to be economic duress, the threatened party must have had no other reasonable alternative other than to contract.

7. Unequal bargaining power:

The purpose of the duress is to intercept 'unjust enrichment resulting from unequal bargaining positions' and ultimately curb the abuse of these positions, while maintaining considerable equality in bargaining relations.[132] Unequal bargaining power is inherent to all contractual relationships however, the mere inequality of bargaining powers does not automatically lead to the avoidance of a contract. Dawson holds that generally where a contract 'is equally advantageous to both parties' it is unlikely that there would be reason for an abuse of bargaining power to coerce the other party into submitting to the demands of the other, rather contracts that involve an 'unequal exchange of values' are more likely to be tainted with duress on the part of the party with a 'superior bargaining position'.[133] It is therefore inappropriate to simply assume that wherever one party to a commercial transaction is in a stronger bargaining position than the other party, that this amounts to actionable commercial pressure that warrants a right to redress. Therefore, it is the abuse of a superior

[128] Stewart op cit note 99 at 422.
[129] *Medscheme* supra note 8 para 18.
[130] Stewart op cit note 99.
[131] See SA Smith 'Future Freedom and Freedom of Contract' (1996) 59 *The Modern Law Review* 167.
[132] FHI Cassim op cit note 48 at 37.
[133] Dawson op cit note 100 at 285.

bargaining position that is concerning and not the mere existence of an inequality in bargaining positions. Inequality of bargaining power is where one contractual party is in a superior position imposes contractual terms on the other party, which are to their advantage, whilst the other party, who is a weaker position, has hardly any choice in the matter but to submit to these demands due to a lack of viable alternatives.[134] Ultimately there are no meaningful contractual negotiations that take place as the superior party presents his position on a take-it-or-leave basis. This hinders one's ability to self-govern which is synonymous with the exercise of free will. Therefore, an abuse of unequal bargaining power infringes upon the dignity of weaker parties. Moreover, the equality of the threatened party is offended since the party is not given equal consideration in a contract that binds them. The overarching effect of an abuse of unequal bargaining power is that the self-worth of the threatened party is disregarded while one-sided contractual terms are imposed on them. Thus, it goes without saying that an abuse of bargaining power speaks to both wrongfulness and consent.

This concept has not been defined by our courts which makes ascertaining what exactly constitutes an abuse of greater bargaining strength difficult. Moreover, there is no 'broad doctrine forbidding' one from 'taking advantage of the adversity of another to drive a hard bargain'.[135] The concept was first considered in *Afrox Healthcare Bpk v Strydom*[136] where the court highlighted that inequality of bargaining powers alone is insufficient to justify the conclusion that a contractual term is against public policy. The court in *Medscheme* inferred that the inequality of bargaining powers can only be wrongful where something more is proven.[137] In *Napier v Barkhuizen*[138] the SCA held that 'inequality of bargaining power could be a factor in striking down a contract on public policy and constitutional grounds'.[139] The Constitutional Court[140] went on to formulate a two-pronged test of reasonableness to determine whether a

[134] D Bhana, M Nortje & E Bonthuys op cit note 40 at 187.
[135] FHI Cassim op cit note 48 at 43. However, the American courts have not been consistent in their determination of when the monopolisation of unequal bargaining power is wrongful, this is evident from the differing decisions reached in *Hackley v Headley* 8 NW 511 (1881) and *Fitzgerald v Fitzgerald and Mallory Construction Co* 62 NW 899 (1895).
[136] 2002(6) SA 21 (SCA). See D Bhana, M Nortje & E Bonthuys op cit note 40 at 187.
[137] *Medscheme* supra note 8 para 18.
[138] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).
[139] Ibid para 9.
[140] *Barkhuizen* supra note 11.

term is unfair, the first leg considers whether the objective terms of the contract are inconsistent with public policy, while the second leg determines whether 'the terms are contrary to public policy' in light of the bargaining position of the parties.[141] Sharrock is of the opinion that a term in a contract will not be illegal or against public policy on the basis that such term has been imposed by a party in a stronger position.[142] Even if a term is rendered unfair, this does not automatically mean that the term is unenforceable.[143] Sharrock disagrees with the courts determination that a term will be unlawful if it infringes a constitutional value or public policy because it will merely 'produce a result which is unreasonable or unfair', as this approach is contrary to constitutional standards which encourage the enforcement of autonomous contracts.[144] Although the Constitution demands the respect of one's free will this is not to be done blindly and requires that the free will of both parties to the agreement be upheld. Therefore, contractual values and principles cannot prevail at the expense of fairness between the contracting parties.

Ogilvie recognises that the doctrine of inequality of bargaining power cannot be the sole 'determinant of economic duress'[145] for the following reasons: 'the mere existence of a superior bargaining position does not guarantee the use or abuse' thereof; the concept is 'vague' and demands excessive amounts of research for both counsel and the court in establishing 'its existence', use and the 'state of the market involved'; the ambiguity of the concept is likely to lead to 'uncertainty in its application' which is undesirable for the continued existence of 'commercial life'; if the courts apply the doctrine too generously they stand to 'offend the… view that men are born unequal' and as such those who are 'talented ought to be allowed to exploit their talents fully'; and lastly, considering the risk of the political consequences that may arise from acting without any 'guidelines for intervene'[146], the courts may either go too far or err on the side of caution 'for fear of appearing revolutionary'[147] both of which may have significant socio-economic impacts. Thus, to avoid these pitfalls Ogilvie argues that in

[141] Ibid para 58- 59.
[142] R Sharrock 'Relative bargaining strength and illegality: *Uniting Reformed Church, De Doorns v President of the RSA* 2013 (5) SA 205 (WCC)' (2014) 35 *Obiter* 136 at 142.
[143] Ibid.
[144] Ibid 143.
[145] Ogilvie op cit note 70 at 312.
[146] Ibid.
[147] Stewart op cit note 99 at 430.

considering whether a party in a superior bargaining position has in fact abused their power requires that abuse be defined in terms of placing the weaker party 'in the position of having no commercially viable alternatives to submission'. [148] It is for this reason that in conjunction with ascertaining whether there has been an abuse of bargaining power, the wrongfulness of the conduct along with the impact that this has on the consent given by the threatened party must be considered to ascertain whether there was in fact economic duress.

8. Conclusion:

The bold stance taken by the SCA in *Medscheme*, that 'it is not unlawful, in general, to cause economic harm… to another, nor can it generally be unconscionable to do so in a competitive economy', reaffirms the idea that the courts embrace an individualist ideological perspective of contract law.[149] This attitude creates a barrier to transformation within South Africa.[150] The courts seem to be more concerned with the enforcement of contracts rather than the devastating effect of economic strong-arming.[151] With a majority of the South African society being disempowered in a commercial sense, contractual undertakings become increasingly susceptible to abuse.[152] As such, there ought to be a 'shift in emphasis' by our courts, with greater focus being placed on 'excessive and unjustified gains that are directly traceable to disparity in bargaining power' and the abuse thereof.[153] This will not only allow for greater recognition and acceptance of economic duress as doctrine in our legal system but serves as an avenue through which the constitutional vision can be realised. Although the enquiry into economic duress may be a taxing exercise, it is a necessary means of 'intervention to restrain freedom to act in [one's] commercial self-interest' to the detriment of others, while ensuring that 'the freedom to compete is meaningful'.[154] Developing a more inclusive formula for duress in general, as is proposed by Glover, will prove to be invaluable to the law of contract. As illustrated above Glover's test

[148] Ibid 430-431.
[149] *Medscheme* supra note 8 at 346A- C.
[150] Dennis & Klare op cit note 6.
[151] Ibid 479.
[152] Barnard-Naude op cit note 88 at 196.
[153] Dawson op cit note 100 at 289- 290.
[154] Stewart op cit note 99 at 423.

speaks to the two concepts that define economic duress, wrongfulness and impaired consent. Wrongfulness can be proven by considering an array of factors which include the extent of the harm suffered and the purpose of the threatening party's conduct. Thus, whether there was an equal exchange of values and ultimately whether he acted in good faith, as well as whether this was *contra bonos mores* or contrary to moral standards within the specific market. On the other hand, consent can be proven by considering whether the party had a meaningful range of options to choose from at the time of the threat and whether these options were viable, which can be established by looking at the threatened party more subjectively as well as whether there was an abuse of bargaining power. One cannot disregard the threatened party's circumstances because it was the exploitation of these circumstances that put them in a position where they could not walk away from the proposed contract. Therefore, economic duress cannot be considered in isolation without considering the facts of the case. When the opportunity presents itself, one can only hope that our courts directly address concerns of economic duress and embrace a test, whether this is a more inclusive duress test or a separate test all together, to fill this gap within our contract law.

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