

TUDOR HOUSE CONSULTANTS (PVT) LTD
versus
GMFS FINANCIAL SOLUTIONS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 11 June 2019 and 26 June 2019

Civil Trial

Ms S. Evans, for the plaintiff
T. Goro, for the defendant

MATHONSI J: The plaintiff is an incorporation registered in Zimbabwe which is run by Dr Cecil Madondo, a business rescue practitioner who specialises in turning around ailing companies. It has sued the defendant, another incorporation registered in Zimbabwe and run by Gift Madhlayo, a structured finance consultant with 22 years experience in the business, for payment of the sum of \$38 000-00 being the balance of money allegedly paid to the defendant in pursuance of an agreement in terms of which the defendant would facilitate the issuance of a 360 – Day Standby Letter of Credit instrument for US\$500 000-00.

The plaintiff averred that when the defendant did not perform its obligations in full and the transaction did not materialise, the defendant signed an acknowledgement of indebtedness in the sum of US\$43 000-00 undertaking to repay that sum by a payment plan. The defendant only paid the sum of \$5000-00 towards settlement leaving a balance of US\$38 000-00 claimed by the plaintiff with all the garnishments of interest at the prescribed rate and costs of suit.

The defendant has contested the claim denying liability on the basis that it performed its obligations in terms of the agreement between the parties and that payment was actually for services rendered. On the acknowledgment of debt, the defendant admitted signing it but averred that it was signed under duress as undue influence was brought to bear on it resulting in the signing of the acknowledgment of debt. The defendant's plea on the merits was filed on 11 October 2016. Much later on 1 February 2018 the defendant obtained leave from this court to amend its plea.

Another plea was then filed on that date in which the defendant pleaded specially that in terms of the agreement between the parties, the law governing the agreement was the law of Israel and that any dispute between them should be determined by the appropriate court of that country. While admitting having paid \$5000-00 to the plaintiff in terms of the acknowledgement of debt, the defendant averred that the money was paid under duress or undue influence. It maintained that there was no cause for debt. To that new plea the plaintiff responded by making the averment that the mandate agreement adverted to by the defendant was not the cause of action, the acknowledgment of debt is. For that reason this court enjoys jurisdiction.

What I am required to determine is whether this court has jurisdiction to hear the matter and whether the defendant signed a valid acknowledgment of debt. Those are the issues as set out in the joint pre-trial conference minute of the parties crafted by them following a conference before a judge on 19 July 2018. Clearly the agreed issues inquire into whether the document is valid. Such an inquiry involves investigating whether duress or undue influence was brought to bear on the defendant's representative which caused him to acknowledge indebtedness. I am however mindful that the defendant did plead that there was no cause for debt which should have been made an issue for trial but was not.

I do not intend to be detained unduly by the issue of the alleged absence of jurisdiction on the part of the court which appears to have been raised half-heartedly by a litigant who said he "only flagged it" but would leave it to the court. I agree with Ms *Evans* for the plaintiff that this court has inherent jurisdiction over all persons and all matters within Zimbabwe in terms of s 13 of the High Court Act [*Chapter 7:06*]. Indeed in terms of s 171 (1) (a) of the Constitution this court has original jurisdiction over all Civil and Criminal matters throughout Zimbabwe.

What is deemed to oust the jurisdiction of this court is contained in the following passage in the mandate agreement signed by the parties on 1 October 2015:

"This Mandate Agreement is governed by the laws of the State of Israel, and the parties agree that any claim or dispute in connection herewith or arising herefrom shall be solely and exclusively heard before the appropriate courts of Tel Aviv, Israel."

It is that mandate agreement which the plaintiff alleges was terminated and superseded by an acknowledgment of debt signed by the defendant and the plaintiff on 14 March 2016. That document grounds the plaintiff's claim and is attached to the plaintiff's declaration as annexure "A". To the extent that the plaintiff has pleaded that the Mandate

Agreement failed and was superseded by the acknowledgment of debt relied upon to sue, a clause in the novated agreement cannot oust the jurisdiction of this court to determine a claim based on a separate agreement. I therefore reject the special plea on jurisdiction. I will exercise jurisdiction.

Each of the parties led evidence from a single witness. Dr Cecil Madondo gave evidence on behalf of the plaintiff confining himself mainly to the acknowledgement of debt signed by the defendant's representative, Gift Madhlayo. He stated that the facilitation agreement which caused the plaintiff to pay money to the defendant, its assigns or nominees collapsed and was never realised. The parties then engaged each other with a view of resolving their dispute. This culminated in the defendant's Managing Director, drafting a letter dated 14 March 2016 acknowledging indebtedness and making a payment plan. The defendant only paid a sum of \$5 000-00 in terms of that undertaking leaving the balance being claimed. When the defendant defaulted the plaintiff sued. The defendant is liable in terms of that acknowledgement signed by both parties.

Madondo drew attention to the contents of that document addressed to the plaintiff's legal practitioners but hand-delivered by Madhlayo to the plaintiff's offices on 14 March 2016. It was prepared by Madhlayo at his own offices before he brought it to the plaintiff where it was counter-signed by the witness. It reads:

"RE: SBLC USD 500 000.00 ISSUED IN FAVOUR OF TUDOR HOUSE CONSULTANTS PRIVATE LIMITED

I acknowledge receipt of your letter dated and received on Friday 11 March 2016 regarding the above. Indeed I met with Dr Madondo on Wednesday last week 09 March 2016, we deliberated on the above and agreed on the following fee collection and payment plan to Tudor House Consultants Private Limited to their bank account at Stanbic. GMFS will collect the revenues from pipeline deals underway between GMFS and Polo Trade Finance Limited, Tel Aviv. In line with banking procedure and executed agreements, Polo Trade Finance and CNF Merchant Bank are not in a position to refund fees collected for work correctly completed. However Polo Trade Finance has granted GMFS to apportion franchise fees collected from current assignments and apply towards THC as GMFS has strongly made a submission to the effect that THC be assisted to regain its fees because it is the beneficiary of the instrument who failed to perform. THC had done everything required, including registering the facility with ELCC, RBZ. Dr Madondo of Tudor House Consultants Private Limited agreed to collect US\$7 000-00 from Mr Raja of Phinlink being co-arrangement fees by THC to Mr Raja directly and through GMFS. GMFS collection and payment plan is as follows:

Item	Amount	Due Date
Mandate fees paid to GMFS	US\$5 000-00	31 March 2016
Success fee paid to GMB (<i>sic</i>)	US\$8 000-00	30 April 2016
Bank charges paid to Polo Trade Finance and CNP	US\$30 000-00	31 May 2016

Merchant Bank Italy		
Total	US\$43 000-00	

GMPS and THC agree that any funds available could be paid to THC notwithstanding the above in an effort to retire the above even earlier than the projected dates. The reason why GMFS and THC are agreed that the above transaction be rescinded is that the beneficiary of the above instrument attached has failed to provide THC with the loan earlier promised. GMFS and THC are seized with the fact that the irrevocable SBLC instrument is still valid until its expiry date on 15 October 2016. GMFS and THC are working on ways to transfer it to a safe haven to avert the possible contingent liability to CMF Merchant Bank of Italy by THC in the event that the beneficiary somehow collects value out of the instrument. Please indicate your agreement to collection and payment terms hereof by signing below where indicated.

Yours faithfully

MR GIFT MADHLAYO
Chief Executive Officer
GM Finance Solutions Private Limited

The above payment plan was discussed and agreed with Dr C. Madondo of Tudor House Consultants Private Limited on 09 March 2016.

.....Date 14 March 2016
Dr C. Madondo – Chief Executive Officer
Tudor House Consultants Private Limited.”

The contents of the above document show that it was an elaborate negotiated settlement of a dispute in which the defendant had secured the co-operation of other players in the equation and then undertook to refund money paid by the plaintiff by reason that the earlier transaction had been rescinded because the beneficiary of the Standby Letter of Credit had “failed to provide THC with the loan earlier promised”. The reasons are a far cry from what the defendant’s witness claimed in evidence.

Madondo strongly refuted the defendant’s claims for duress and undue influence. He maintained that the acknowledgement was authored by Madhlayo in the comfort of his office in the absence of the plaintiff’s representative or its lawyers. He then brought it to the plaintiff of his own free will and when the payment plan was agreed it was endorsed by the plaintiff. There is no semblance of any duress in the entire set of facts. As to why the plaintiff was claiming sums which had been paid to other firms Madondo insisted that it is the defendant which had directed money to be paid that way and it made the undertaking to refund. It is not the plaintiff’s business to explain all that.

Clearly the evidence presented on behalf of the plaintiff established liability on the part of the defendant based on what it admitted as owing and undertook to pay. The question,

which the defendant then set about to answer in its evidence, is whether liability was admitted freely and voluntarily. Conversely, the defendant having alleged duress or undue influence, it set about to prove it.

Gift Madhlayo is a very educated businessman of note. He set out a very impressive resume at the commencement of his testimony. He is a structured finance consultant with over 22 years' experience in International Trade having worked for the Pan African Export & Import Bank and the PTA Bank in the capacity of regional manager for Sadc and East African States. Prior to that he was the director of structured finance with local banks including FBC Bank, ZABG and Babican Bank. He is certainly an accomplished and well to do business executive who holds an MBA and is currently doing a PHD.

In his evidence he spent a lot of time discussing the mandate agreement entered into with the plaintiff and how he set about trying to perform the defendant's part of the bargain. He stated that the defendant had fulfilled its obligations of facilitating the issuance of a standby letter of credit by CNF Merchant Bank of Italy to such an extent that the plaintiff then paid to the defendant the success fee of \$12 500 representing 2.5% of the facility amount, on 8 October 2015. The rest of the money paid by the plaintiff was for air travel to Israel to present the letter of credit as well as payments made directly to the banks involved.

The essence of Madhlayo's testimony is that there was no cause of debt which would have motivated the defendant, represented by himself, to sign an acknowledgment of debt as it did. For that reason, even though he acknowledged authoring the acknowledgement on his own and in the comfort of his office before transporting it to the plaintiff's offices on 14 March 2016, according to him the document does not give rise to legal liability because it was prepared and signed under duress.

Madhlayo stated that the duress or undue influence was in the form of harassment by Madondo who was telephoning him almost everyday demanding payment from the defendant. Madondo would also make frequent demands via the whatsapp social media platform. The witness did not produce any proof of the telephone calls or the whatsapp message. When challenged under cross examination to do so he could only nonchalantly say that the evidence could be obtained from Econet, the service provider.

Madhlayo also stated that the duress and undue influence brought to bear upon him also came in the form of endless letters of demand sent to him by the plaintiff and its legal practitioners. Again the evidence of such letters could not be found. Quite to the contrary, although the witness claimed that immediately after he had been paid the success fee on 8

October 2015, Madondo started harassing him with letters of demand, it soon became apparent that the first letter of demand sent to the defendant was written on 11 March 2016 and received by his maid Shorai Santana the same day. This was more than 5 months after the success fee was paid. Madhlayo was not being truthful. In fact when asked how many letters were received by him before the summons was issued he said they were 3 or 4, a figure quite inconsistent from his gratuitous statement that letters and emails “were coming everyday.”

He also stated that duress and undue influence were in the form of unspecified action which he said Madondo threatened to take against his person, as well as meetings that Madondo convened with him after normal working hours including one meeting which took place in Borrowdale. For that meeting he was called on a Sunday and had to leave a church service to attend the meeting. Interestingly he stated that prior to writing the letter of 14 March 2016 he is the one who had personally requested a meeting with Madondo and his lawyers during which he rendered an unacceptable explanation to them resulting in him being asked to write an acknowledgment of debt in exchange for his liberty.

If one examines the letter that he wrote on 14 March 2016, it becomes even clearer that it was not written under any form of harassment as alleged. He was alone in his office when he wrote it and certainly had no one bearing down on him. He said in it that he had met Madondo on 9 March 2016 during which they deliberated and agreed on the offer he was making. 2 days after that meeting he had received a letter dated 11 March 2016 from the plaintiff’s legal practitioners which we now know as the first letter of demand. The letter which Madhlayo was writing was being written exactly 5 days after his last meeting with Madondo which he alluded to and he did not refer to any other meeting or harassment in between. Clearly what he stated in court was inconsistent with what happened on the ground and does not point to a person who was harassed, traumatised and trembling because of undue influence.

More importantly, although the witness was claiming harassment and threats of unspecified action against his person, he admitted he did absolutely nothing about it right up to now. With tongue in cheek he claimed to have reported the matter to the police only after he had been served with summons commencing action. That statement is demonstrably untrue and cannot even begin to explain the conduct of writing the acknowledgement of debt written on 14 March 2016. This is because it was not until 25 August 2016, more than 5 months after the letter under scrutiny, that the summons was issued. It was only served on the defendant on 5 September 2016, 6 months after the acknowledgment. It means that although

unspecified action was allegedly threatened against him in March 2016 causing him to acknowledge indebtedness on 14 March 2016, he did not report to the police until after 5 September 2016. For what it is worth, he says the police counselled him that the issue was a civil matter and that he should respond to the summons. He did so by entering appearance to defend through his lawyers on 7 September 2016.

I have no doubt in my mind that the claim of duress or undue influence is an after thought and a most recent fabrication existing only in the fertile imagination of the witness. He failed dismally to demonstrate that he was unduly interfered with before making the commitment to pay contained in the letter of 14 March 2016. I am fortified in that view by the fact that Madhlayo went on to pay \$5 000 to the plaintiff according to the payment plan on 31 March 2016, a further 2 weeks later. There was therefore a cooling period during which he could have disowned the payment plan if it had been elicited through duress. This is a man, as I have said, whose level of education and sophistication are extremely high, a renowned business executive who could not yield to rudimentary intimidation tactics which he alleges. He was expected to know better and to do something to protect his rights and those of his business if there had been threats made against them.

It is settled in our law that for duress to vitiate a contract, it must be shown that the threat must be of an imminent or inevitable evil which cannot be averted otherwise than by agreeing to the contract, although the party agreeing to the contract in the agony of the moment should not be judged by the standards of an armchair critic. See RH Christie, *Business Law in Zimbabwe* 2 ed, Juta & Co Ltd at p 83; *Spellbound Investments (Pvt) Ltd v Tawonameso* HH 183-13 (unreported).

In other words, duress or undue influence, will vitiate a contract if at the time of expressing consent to the contract the contracting party was acting under the physical or moral constraint of the other party or a third party to such an extent that the consent to the contract given is not a genuine one. The requirements for setting aside a contract on the ground of duress or undue influence were set out by the learned author J.W.Wessels, *The Law of Contract in South Africa*, vol 1, 2 ed, Butterworks 7 Co Ltd at para 1167:

“In order to set aside a contract on the ground of violence or fear, our law requires the following elements:

- 1) Actual violence or reasonable fear---
- 2) The fear must be caused by the threat of some considerable evil to the party or his family---
- 3) It must be the threat of an imminent or inevitable evil---
- 4) The threat or intimidation must be *contra bonos mores*---

5) The moral pressure used must have caused damage---.”

See also *Mabhena v Sibanda* HB 202-16 (unreported); *Muza v Agribank* SC-138-04.

In making the submission that Madhalyo was under threats from Madodno, the managing director of the plaintiff, Mr Goro for the defendant relied on the case of *Spellbound Investments (Pvt) Ltd v Tawonameso, supra*, in which I found the existence of duress vitiating a contract in a case where the contracting woman who was married to a Nigerian national had been consistently harassed over the telephone by a dealer who had used a Central Intelligence Organisation operative in order to instill fear. Her husband had been targeted for deportation and a stalker had followed her when she took her children to school and threatened to harm them. In the end, trembling with fear, the woman had be constrained to sign a contract prepared for her signature by her tormentor.

In my view that case is distinguishable from the present where the alleged victim is a business stalwart of repute who has seen it all in the business world and has mastered the disciplines of the craft. Apart from that, there is no shred of intimidation or duress that has been shown. A man of Madhlayo’s standing and intelligence cannot be shaken by nothing or by being inconvenienced by another business executive through telephone calls or whatsapp texts, even if that had happened, and 3 letters of demand, so as to commit to paying a large sum of money which is not due.

In fact it is apparent from the contents of Madhlayo’s letter of 14 March 2016 that it belies a compromise arrangement arrived at by equals following protracted negotiations. He made it clear that he had succeeded in persuading other players in the transaction to reverse a business deal that had “failed” to come to fruition. I agree with Ms *Evans* for the plaintiff that the position of our law is that where a compromise is agreed between the parties it is generally not permissible to go behind the compromise transaction in order to test the validity of the original transaction unless a reservation of right under the original agreement exists. This is because a compromise, by its very nature, settles disputed obligations. See *Georgias & Anor v Standard Chartered Finance Zimbabwe* 1998 (2) ZLR 488 (S).

Indeed, it occurs to me that this is a classic case of a party who made a poor business decision trying to use the court to side foot the consequences of an agreement reached as a result by raising all manner of excuses. This court will not excuse a party from its commitments in those circumstances because it is salutary that the court upholds the freedom of the parties to contract as they please and will uphold the principle of sanctity of contract.

That is the view expressed by PATEL JA in *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D:

“It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with the express terms.”

Apart from that, the concept of the *caveat subscriptor* rule that where a person has put his or her signature to a document out of his or her free will, he or she cannot fail to realise what he or she is called upon to signify by doing so, namely assent to whatever words appear above the signature applies to this matter. This is more so in a case such as the present where the signatory is the author of the words appearing above his signature. See *George v Farmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471 A. Having said that the matter is resolved and I conclude that the defendant signed a valid acknowledgement of debt binding on it.

In the result, it is ordered that:

1. Judgment be and is hereby entered in favour of the plaintiff as against the defendant in the sum of US\$38 000.00.
2. Interest on that sum at the prescribed rate of 5% *per annum* from 14 March 2016 to date of payment in full.
3. Cost of suit.

Mabuye, Zvarevashe-Evans, plaintiff’s legal practitioners
Mbidzo, Muchadehama & Makoni, defendant’s legal practitioners