

PUDURAI MAZENGWA
versus
GODFREY NJANIKE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 24 May 2022 & 15 November 2023

Opposed Matter- Summons for Civil Imprisonment

Mr *P Phatisani*, for the applicant
Mr *T Mudhara*, for the respondent

CHINAMORA J:

Factual background

The plaintiff in this matter instituted summons for provisional sentence against the defendant for the sum of USD \$537 556.00, together with interest at the rate of 5% per cent per annum from March 31 2022. The background of this case will help put the law into perspective. The plaintiff and defendant entered into an oral agreement whilst in the United Kingdom. The agreement was for construction of a farmhouse, church building and hospital. A total amount of US\$995 380.65 was advanced to effect the construction. In addition, the parties signed and Memorandum of Agreement hereinafter referred to as the Memorandum. It is imperative to note that during the signing of the Memorandum the defendant was represented by a legal practitioner even though no supporting affidavit from the legal practitioner has been tendered.

In the Memorandum attached as part of the record the Defendant acknowledged to be indebted to the Plaintiff in the sum of US\$597 346.00 , that the High Court of Zimbabwe would have Jurisdiction by consent of the parties and that the Memorandum of Agreement would be the whole agreement and any variation to it would be in writing. The defendant managed to repay \$59 790.00 of the total amount claimed. The plaintiff's claim was based on the liquid document signed by the defendant, which is Annexure "A" of the plaintiff's papers. It was because of the acknowledgement that the defendant made the first payment of \$59

790.00. The plaintiff lists various breaches in the acknowledgement of debt, and the allegations are as follows:

- a) The defendant is in breach of clause b (i) of the acknowledgement of debt in that he failed to pay the first instalment of USD 24 900.00 on or before 31 March 2022 as acknowledged and agreed. This was only paid on 7 April 2022.
- b) Another instalment of USD 24 900.00 was also not paid by 31 April 2022 in terms of clause b (i). This was paid on the 11 May 2022.
- c) The defendant is in breach of clause b (i) for failure to pay USD 24 900.00 on or before 31 June 2022 as acknowledged. This was only paid on 12 July 2022. The defendant also paid USD10 000.00 and not the agreed sum of USD\$24 900.00 per month.
- d) The defendant has since stopped paying the agreed instalments of \$24 900.00 per month after the 31 July 2022 as acknowledged and agreed.
- e) The defendant is therefore in breach of the terms and conditions of the acknowledgement of debt in that he did not pay any instalment from 12 July 2023.
- f) The defendant's total indebtedness according to plaintiff is the sum of USD\$537 556.00

Owing to the alleged breaches, the plaintiff instituted summons for civil imprisonment against the defendant. In response, the defendant filed a notice of opposition. When the matter came before me during motion proceedings on the unopposed roll, I deferred it for argument in open court. In his defence, the defendant raised a special plea that the court lacked jurisdiction to entertain the matter. His argument was that the contract was entered into and concluded in the United Kingdom, although construction was to take place in Zimbabwe. The contention was that due to differences between the parties the contract was not executed prompting the plaintiff to institute legal proceedings in the United Arab Emirates, as well as in Zimbabwe. The defendant therefore contends that because proceedings in the United Arab Emirates had not yet been concluded this ousts the jurisdiction of the High Court. The defendant raises another defence against the claim based on the acknowledgement of debt. He states that he did not sign the document freely and voluntarily but was induced by the fear of the police report made against him. The defendant also argues that there are various material disputes of facts that cannot be resolved on paper and prays that the matters be referred to trial. While on the unopposed roll, I directed parties

to file all requisite pleadings so I could hear the matter on the opposed roll. When the pleadings were filed, I advised the parties that I would decide the matter on the papers and reserved judgment. Both parties had filed detailed heads of argument. I now hand down my judgment.

The applicable law and analysis of the case

The first issue I will deal with is whether this court has jurisdiction to hear this dispute. The question is: should I deal with the matter on the merits or uphold the special plea and decline jurisdiction? It is trite that the High Court is a court of original jurisdiction, with inherent power to deal with any civil or criminal matter throughout Zimbabwe. Let me consider the factual conspectus of this case. From the agreement of the parties, even though it was unsigned, it appears that the intention of the parties was for the High Court to have jurisdiction. I say so because that the issue had already been agreed between the parties. The defendant does not dispute having received payment towards the performance of the contract; and does not deny that the agreement was for construction purposes. The only question at issue is the jurisdiction of the High Court. The defendant, in my view, cannot be seen to blow hot and cold as and when it suits him it is trite that when parties reduced the agreement to writing they had every intention to make it binding. This is evidenced by the fact that parties exchanged the agreed amounts for construction to commence and defendant accepted same with an intention to perform the construction. I believe parties reduced the contract to writing for record keeping purposes only. There is no doubt that parties had a clear intention to have the contract to be legally binding, since both parties had a clear and mutual understanding of the essential terms and subject matter of the agreement. The parties' intentions are further substantiated by the terms of the Memorandum wherein the parties clearly agreed to the jurisdiction of the High Court and signed the same. The validity of the Memorandum however is a bone of contention among the parties, but I will deal with this as my judgment proceeds. I however am convinced that the alleged set of facts do point to the jurisdiction of the High Court of Zimbabwe.

Having settled the issue of jurisdiction, I will now proceed to deal with the question of duress and whether the defendant willingly signed the acknowledgement of debt.

In this jurisdiction, the law on duress is settled. In order to vitiate a contract, the person alleging duress, must be show that the threat was imminent or inevitable, and that it could not be averted otherwise than by agreeing to the contract. Case law cautions that the

party agreeing to the contract in the agony of the moment should not be judged by the standards of an armchair critic. In this respect, we must see RH Christie, *Business Law in Zimbabwe* 2nd ed, Juta & Co Ltd at p 83; *Spellbound Investments (Pvt) Ltd v Tawonameso* HH 183-13. Nevertheless, it must be realized that there are facts which have to be alleged and proved to sustain the defence. In this context, I place reliance on the decision in *International Export Trading Company Zimbabwe (Pvt) Ltd v Mazambani* HH 195-17, where DUBE J (as she then was) stated:

“...a litigant wishing to rely on duress and undue influence as a ground for resisting enforcement of an AOD must do more than just allege that he was forced to sign the AOD. He must convince the court that the pressure applied upon him to coerce him to sign was so extreme or severe so as to negative voluntariness and induced him to sign the document without his free will. The influence averted to must be shown to be unscrupulous and that it weakened his power to resist. Further, that he would ordinarily not agree to the signing. He must show that he protested and took steps to avoid the forced action or contract. The threats alleged must be proved to be the motivation for the signing and the threat must be of some imminent or an inevitable evil. The defendant’s fear must be reasonable.”

See also *Dos Santos v Sikhunda* HB 146-18

Turning to the facts, the defendant’s averment is that he signed the document under duress yet he still made no effort to report to the police. No further details are given. It appears to me that the alleged duress has not been explained in great detail. A person who makes a positive allegation of fact must prove it. In this regard, in *Astra Industries Limited v Chamburuka* SC 258/11 OMERJEE AJA stated that:

“The position is now settled in our law that in civil proceedings a party who make a positive allegation bears the burden to prove such allegation’. The applicant did not prove the grounds or advance any evidence to prove its case. In my view there is nothing before this court that warrants an award of damages”.

Therefore, it follows that the defendant having alleged duress ought to have given full particulars of the apprehended harm. In fact, he ought to have gone beyond to demonstrate that he was acting under physical or moral constraint to an extent which vitiated voluntary consent. My view is that duress has not been substantiated. Consequently, in the absence of proof, I am not satisfied that reliance on such a defence has merit. Raising the defence of duress looks like an afterthought reaction intended to fend off the plaintiff’s claim. In this regard I agree with the sentiments raised by the plaintiff through the case of *Caltex (Africa) Ltd v Trade Fair Motors and another* 1963 (1) SA 36 SR that where there is a valid

acknowledgment of debt that is sufficiently clear and certain and no evidence to the contrary has been given by the defendant, provisional sentence summons will be granted, and that it the end of the enquiry (my own emphasis). In the case of *Sibanda v Mushapaidze* 2010 (1) ZLR 216 (H) this court confirmed that where there is a clear, unequivocal and unambiguous written promise to pay a debt, this will constitute a liquid document for the purposes of a provisional sentence. It therefore follows that even the contract that the defendant alleges was signed in the United Kingdom this aspect will become immaterial as the liquid document now constituted a new valid agreement between the parties.

I find no merit in the plea of duress and move on to deal with the defendant's next point in *limine*.

The defendant contends that there are material disputes of fact which cannot be resolved on the papers. His argument continues that the applicant should have commenced the litigation by way of action, instead of application. It must be stated that it is not every dispute where a material dispute of fact exists, especially one that cannot be resolved on the papers. See *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92-09. As stated by the Supreme Court in the case of *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339C-D, in motion matters, the court should always endeavour to take a robust and common sense approach. Usually, such a preliminary point is taken after the court has heard the merits, because only then can the court make an informed decision whether or not there are material disputes of fact. The disadvantage of having such a point taken before the merits are heard is that the court is not afforded an opportunity to take a robust and common sense approach to the dispute. Before I decide whether there is a material dispute of facts *in casu*, let me consider that in *Grain Marketing Board v Mandizha* HH 16-14, CHIGUMBA J illuminated the issue as follows:

“... it is my view that, the phrase material dispute of facts, in the application procedure, refers to the untenable position where averments are made in an affidavit, which averments have a direct bearing on the outcome of the matter, yet the papers which will be before the court, from the founding affidavit, the opposing affidavit, the answering affidavit, the annexures attached, the heads of argument, the parties oral address at the hearing of the matter, leave the court riddled with doubt and uncertainty as to the veracity of the averments, to the extent that it ought to have been clear to the applicant, at the outset, that the court would be unable to come to a conclusive decision, on the merits of the application.”

Based on the authorities I have referred to above, I am unconvinced that a material dispute of fact that is so grave as to inhibit resolution of this matter on the papers, has been demonstrated. There is no basis for upholding the points *in limine* since they lack of merit. In

conclusion, it is clear that the acknowledgement of debt was not signed under duress as alleged by the defendant. Nothing, therefore, stops me from granting the relief sought by the plaintiff.

Disposition

In the result, I make the following order:

1. The points *in limine* be and are hereby dismissed.
2. On the merits, it is ordered that: provisional sentence against the defendant for the sum of USD \$537 556.00, or the equivalence at interbank rate, together with interest at the rate of 5% per cent per annum from March 31 2022.
3. The defendant shall pay the plaintiff's costs on the ordinary scale.

Antonio & Dzvettero, the plaintiff's legal practitioners
Mundia & Mudhara, the defendant's legal practitioners