

ALEXANDER IMBAYAGO
versus
NATIONAL FOODS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE; 8 & 26 March 2024

Opposed Application

Applicant in person
Ms N Katsande, for the respondent

ZHOU J:

BACKGROUND FACT

This is an application for the setting aside of a deed of settlement that was executed by the applicant and respondent in order to solve their labour dispute. The deed of settlement was duly signed by the two parties on 9 May 2016. The application is opposed by the respondent.

The applicant was employed by respondent as an executive employee in the capacity of a Group Human Resources Manager. During his employment, the applicant became embroiled in a labour dispute with his employer. The applicant avers that he was consistently paid less than his junior colleagues on racial grounds. He commenced litigation and secured an arbitral award in his favour.

The respondent appealed against the arbitral award. Pending the appeal, the award was not implemented. The respondent's appeal was struck off the roll for non-compliance with the rules, and its subsequent efforts to seek condonation and extension of time within which to appeal proved unsuccessful.

The applicant alleges that the respondent taking unfair advantage of him made him sign a written agreement titled, "Settlement of a Labour Dispute," after he had travel from Bulawayo to Harare to claim his backpay. He avers that he was coerced into signing the agreement as a condition for the respondent to process the payments due to him.

The applicant states that he and his erstwhile legal practitioners made efforts to recover what rightfully belonged to the him from the respondent through written communication. The respondent has refused to honour the arbitral award by citing the Settlement of a Labour Dispute document which was signed by the applicant and in terms of which applicant waived several entitlements awarded to him in the arbitral award.

APPLICANT'S CASE

The applicant submitted before the court that he had only one dispute which was a labour dispute, where the respondent had consistently underpaid him compared to his junior colleagues on racial grounds. This dispute between the applicant and the respondent was resolved by an arbitrator where an arbitral award was awarded in favour of the applicant. It is alleged by the applicant that the respondent was obliged in terms of the arbitral award to pay the costs of suit. However, the applicant alleges that the respondent remained delinquent in refusing to comply with the arbitral award. The applicant further submitted that the respondent employed its delaying tactics by noting a futile appeal to frustrate him from getting what he was rightfully awarded in the arbitral award. As alleged by applicant this is what then pushed him to go to the offices of the respondent to demand his back pay as he had been without pay for three years. The alleged duress is said to have eventualized during this visit. The applicant submits that he was ambushed with negotiations and forced to sign the Deed of Settlement in terms which he waived several of his entitlements. It is submitted by the applicant that the respondent threatened to not pay the back pay. As someone who was facing financial constraints the applicant affixed his signature on the document.

OBJECTIONS IN LIMINE

Before, deposing to the merits of the matter, the respondent raised three points *in limine*. To start with was the alleged defective board resolution which the applicant sought to impugn on the basis that it did not address the designation of the directors under their names. The respondent in addressing this point, submitted that there is no provision infringed in the Companies and Other Business Entities Act¹ and none was cited by the applicant. In moving the court to dismiss the preliminary point taken by the applicant, the respondent argued that the

¹{Chapter 24:31}

applicant's demand to restate the designation of the directors under their names is an overbearing demand that the law does not impose on any party.

It further submitted that it is not a mandatory requirement for a deponent to attach a board resolution to an affidavit. Reliance was placed on *Tian Ze Tobacco Company (Private) Limited v Muntuyedwa*² where MATHONSI J (as he then was) had this to say

“The production of a company resolution as proof that the deponent has authority is not necessary in every case as each case must be considered on its merits. All the court is required to do is to satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorized person”.

In the case of *African Banking Corporation of Zimbabwe Ltd t/a Banc ABC v PWC Motors Pvt Ltd & 3 Ors*³ where MATHONSI J (as he then was) outlines the position as follows:

“However, it occurs to me that form of proof is not necessary in every case as each case must be considered on its own merits. All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person”.

Moreover, in its opposing papers before the court, the respondent submitted that all that is required is some evidence of the authority to depone and the nature of the same to be pleaded. Based on the authorities the attached resolution is valid and shows that the respondent authorized the deponent to represent it. Accordingly, the objection is dismissed.

On the second preliminary point raised by the applicant that the opposing affidavit was not appropriately addressed, paragraph by paragraph, the respondent, submitted that there is no rule or provision in the High Court Rules nor the High Court Act which provides for such a requirement. The only requirement as averred by the respondent is for the applicant's assertions to be countered with clear evidence.

The last preliminary point raised by the applicant is that the respondent's papers were accompanied by a document that was headed, “urgent court application” instead of it being a notice of opposition. The respondent stated that this was a clerical error it had made. It argued and also cited cases such *Ahmend v Docking Stattung Safaris (Pvt) Ltd*,⁴ to the effect that the clerical error made does not invalidate the opposing affidavit whose contents are clear. The

² HH 626-15

³ HH 123-13

⁴ SC 70/18

court's conclusion is that the clerical error does not render the opposing papers fatally defective. Accordingly, the objection in this regard must be dismissed.

THE MERITS

On the merits, the respondent submitted that for the defence of duress to vitiate a contract, the person alleging duress must show that the threat was imminent or inevitable and that it could not be averted otherwise than by agreeing to the contract. The respondent first point of call in addressing the issue of duress as it submitted, was whether the applicant was a victim of a threat. It was submitted that the applicant is an intelligent man who had gained a senior post in the employment of the respondent and could not be said to have been a victim of any threat. Secondly, the respondent submitted that the applicant was armed with an arbitral award, although not registered, from which stemmed greater rights than those of the respondent. Therefore, the respondent prayed for the dismissal of this application on the ground that the applicant failed to prove duress or coercion of any form.

The respondent further submitted that had the applicant felt, at the material time, that he was unduly pressured to affix his signature to the alleged unfair document, the applicant had viable options, for instance, to approach this court and complain of the same, register the arbitral award and enforce it by executing it and attaching the respondent's property. Moreover, it submitted that as an educated man of his calibre who had mastered the disciplines of negotiation, the applicant could have abandoned the negotiations and continued in litigating its matter before the courts of law. Even after the applicant had endorsed its signature in the Deed of Settlement, the respondent argues that the applicant still had an option to approach the court to complain of the same. However, the applicant waited for five years to institute the claim before the court. The respondent further submits that from the evidence adduced in court, the alleged threat was not of imminent danger or evil, neither was it *contra bono mores* nor unreasonable. The respondent therefore prays for the dismissal of the application before the court on the basis that it is not merited.

ANALYSIS

In our jurisdiction, the law of duress is settled. Duress or undue influence have a potential of vitiating a contract if it can be proved on balance of probabilities that at the time of expressing consent, the contracting party was acting under the physical or moral constraints of

another party or a third party to such an extent that the consent given was not a genuine one. Authorities have, cautioned 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 reference is made to *R H Christie, Business Law in Zimbabwe 2nd ed Juta & Co Ltd at p83* and the classic case of *Spell bound Investment (Pvt) Ltd v Tawonameso HH 183-13 (unreported)*

Nevertheless, it must be realized that there are facts which have to be alleged and proved to sustain this case alleged. In *International Export Trading Company Zimbabwe (Pvt) Ltd v Mazambani*,⁵ 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 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 a motivation for the signing and the threat must be of some imminent or an inevitable evil. The defendant’s fear must be reasonable.”

Turning to the facts, the applicant’s averments that he was unduly pressured to sign the document has no substance as at the material time the applicant was armed with an arbitral award which upon its registration, he could properly demand his dues by executing the award or attaching the property of the respondent. As an educated man who it is alleged that as an employee of the Respondent could handle negotiations, advisory and litigation matters, there is no possible explanation tendered before the court as to how such a person could have been a victim of a threat and could have been threatened by the Human Resource Department as is alleged, a department he once had control over, a department in which he knew all its ropes and disciplines of craft.

Neither was there any proof or evidence tendered before the court that the respondent through written communication or by email had coerced the applicant to travel from Bulawayo to Harare, a 6-hour journey only to threaten him or ambush him to affix his signature to the document. In the papers tendered before the court and during oral submissions, it is not disputed, and it cannot be missed that the applicant willingly took the initiative to travel from Bulawayo to

⁵ HH 195-17

Harare to demand his backpay at the premises of the respondent. He was armed with an unregistered arbitral award, from which stemmed greater rights than those of the respondent.

The respondent's premises which the applicant was fully aware of at the material time, as it was legally represented was neither a province nor an avenue for the applicant to assert what it was rightfully awarded by the courts of law.

The respondent as it was eager to settle the matter, just like any other business entity, *made hay while the sun still shined* by grabbing the opportunity and inviting the applicant for negotiations which resulted in the parties signing a Deed of Settlement which therefore compromised the arbitral award and waived several entitlements awarded to the applicant by the arbitral award.

Although, the applicant suggests that while he was happy with the rest of the agreement, what did not sit well with him was the general waiver clause where he waived the costs which were awarded to him in courts. As a highly educated person at the time, nothing stopped the applicant to abandon the negotiation proceedings and continue with litigation. Even after the applicant had endorsed the document with his signature, nothing barred him from approaching this court to complain about the alleged injustice.

The conduct alleged does not in any way satisfy the threshold definition of threat. To indicate in negotiations an intention not to honour the arbitral award and pay the applicant his backpay that he had accrued in accordance with the court order cannot be said to have evoked a sense of fear in the applicant which had the potential of influencing him to affix his signature on the document. The applicant was armed with an arbitral award, which he had obtained lawfully. He is a sophisticated man who is well experienced in negotiating matters. To allege that he was shaken by this conduct of the respondent does not make sense. With the applicant's history of approaching the courts and obtaining an arbitral award in his favour, nothing barred him, even fear on its own to approach the courts of law to enforce what the court had previously endorsed.

From the very onset the applicant knew that his recourse does not lie with the respondent but the court. It was therefore not necessary for him to go to the offices of the respondent to claim his backpay, something that he had already claimed and had been granted by the courts of law, whilst the court doors were widely opened for him to access justice, register the arbitral award, execute it and attach the respondent's property.

Nothing similar to the case of *Spellbound Investments (Pvt) Ltd v Tawonameso supra* can be said to have been procured from evidence presented in court by the applicant to prove that the threat was of considerable evil and imminent danger. The economic duress alleged by the applicant in this matter, was not proved, as the applicant is alleging that he had been without pay for three years. If he was not properly dismissed from the employment of the Respondent, he could have claimed this arrear payment of these salaries before the courts of law.

Had the threat been of considerable evil and eminent danger to the applicant or his family, the applicant could have approached this court on an urgent basis to invalidate what he was unduly pressured to sign. The applicant only approached this court after five years post the signing of the agreement. Given this passage of time, it is quite clear that there was no pressure that had been put to bear upon him to sign the agreement.

Moreover, the applicant on his own free will received the funds which were paid pursuant to the deed of settlement, enjoyed the same funds, only to approach this court after he had exhausted the funds. There is no evidence of intimidation or duress that was tendered before the court. Allegations of duress raised in the applicant's claim are without merits.

There was nothing wrong with the respondent inviting the applicant for negotiations so that they could solve their dispute amicably.

It occurs to court that the same remarks expressed by MATHONSI J in *Tudor House Consultant (Pvt) Ltd v GMFS Financial Solutions Pvt Ltd supra*, apply to this matter, that the applicant appears to have made the decision to sign, but now tries to wriggle out of the contract which he signed freely and voluntarily. The Court as was held in *International Export Trading Company Zimbabwe (Pvt) Ltd supra*, will not sanction the change of mind unless a person who penned down his signature to a Deed of Settlement can convince it that he was unduly pressured or threatened to sign the document.

Applicant has not proved such undue pressure or duress *in casu*.

In the result, IT IS ORDERED THAT:

1. The application be and is dismissed with costs.

Maguchu & Muchada, respondent's legal practitioners