

ETTAH NCUBE

And

CAIN MOYO

Versus

JOEL NCUBE

And

JULIUS SIBANDA

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 OCTOBER 2008 AND 22 July 2010

H Shenje, for the 1st plaintiff
T Sibanda, for 1st and 2nd defendant

Civil Trial

NDOU J: The single issue which falls for decision is whether, on the facts, the cession of the stand known as number 30161, Entumbane, Bulawayo by the 1st plaintiff into the names of the 1st defendant was done of the 1st plaintiff's free will and volition. The parties agreed at the pre-trial conference that the onus to prove lack of volition rested on the 1st plaintiff. During the course of the pleadings the 1st plaintiff has, procedurally, remained the sole plaintiff after Cain Moyo, who was the 2nd plaintiff withdrew his claim and opted to abide by the court's order. Henceforth any reference to plaintiff will be reference to the original 1st plaintiff.

There is a chequered history to this matter. Plaintiff's son, one Reggy Mkandla sold the disputed property to the 2nd defendant in 1984 for the sum of \$2 500,00. Reggy represented to 2nd defendant that the property was in fact his but registered in the name of the plaintiff to avoid Bulawayo City Council's by-laws since he already owned another property under the area of the Bulawayo City Council. The parties could not immediately transfer the property into 2nd

defendant's names because at the time there was no agreement of sale between the plaintiff and the Bulawayo City Council because the latter had not commenced selling the stands in that area to occupants. Reggy later reduced into writing his acknowledgement that he had sold/ceded the stand to the 2nd defendant.

In 1998, at the 2nd defendant's instance his agent Forget Nkomo and Reggy went to Harare where the plaintiff was resident to collect her to come and effect the transfer into 2nd defendant's names. They brought plaintiff to Bulawayo but the cession was not effected on account of the above-mentioned problem of agreement of sale. During the middle of 1999, the 2nd defendant went to Harare personally to collect plaintiff. When they got to Bulawayo City Council and they were told the issue of the agreements of sale was not yet out. The 2nd defendant then sold his right to this property to the 1st defendant and this was done before the cession from plaintiff to 2nd defendant. In 2000 2nd defendant again went to Harare to collect the plaintiff. It was then that plaintiff revealed to him that she had sold the rights to the property to Cain Moyo. This dispute commenced as a result. A meeting was held involving plaintiff, her two children Reggy and Precious and 2nd defendant. It was resolved that Cain Moyo should be refunded his money by plaintiff. Another meeting was arranged at Cheda & Partners legal practitioners. The 2nd defendant's rights to the property were asserted and to avoid complications at the Bulawayo City Council it was agreed that plaintiff should sign the agreement of sale to effect transfer into 1st defendant's name. Subsequently, in November 2001 the plaintiff went with the 1st defendant to the Bulawayo City Council where she signed a consent form to enable the cession of property into the 1st defendant's name. When the lease agreement from Bulawayo City Council finally became available, the plaintiff collected it and handed it over to the 2nd defendant. The transfer had been effected into the 1st defendant's name. The plaintiff testified that she is 78 years old. She said that at the time of the acquisition of the property she was staying at a widows' hostel in Harare's Lochinvar suburb. Her son Reggy Mkandla, realizing the miserable life that she was leading, approached her and advised of his intention to buy her a property in Bulawayo. Reggy then bought her the property in dispute and had her name registered against the property. She said she regarded the property as hers. She said at some stage a woman known as Violah came to see her in Harare claiming to have bought the same property from the 2nd defendant. She came to Bulawayo to see 2nd defendant whereupon she discovered that there other people who had already taken occupation of the said property with the blessing of the 2nd defendant. These people, she said, were in occupation at the instance of Cain Moyo. Cain Moyo, too, claimed to have bought the same property from the 2nd defendant. When Cain Moyo realized that she was indeed the registered owner of the rights in the property he then opened negotiations with her about the sale of the said property. She said that was the beginning of her troubles with 2nd defendant. She later

sold the property to Cain Moyo and received the full purchase price of \$144 000. The 2nd defendant would, therefore, incessantly visit her in Harare to fight over the property. She said eventually she was worn out of the troubles and decided to relocate to Bulawayo but the 2nd defendant would not relent. He visited her at her Pelandaba house now and again demanding that she cedes the property into his name. She said at some stage he threatened to take her to his legal practitioners to which she agreed, knowing that she had nothing to fear. She said the dispute eventually spilled into the offices of Messrs Cheda and Partners where legal practitioners Mr B. Ndove and G Nyoni were representing 2nd defendant and Cain Moyo respectively. She said meetings were arranged where attempts were made to resolve the impasse about who between Cain Moyo and 2nd defendant would legally be entitled to claim cession of the property. In one of these meetings, she alleged her son Reggy also attended to clear the question of ownership of the property. She said pursuant to a series of events she was later called to the offices of Cheda and Partners where she was made to sign a document. She said she would later learn of the documents as being an agreement of sale dated 7 January 2000 between her and the 1st defendant. She said she got to know of this development after a secretary with the said legal practitioners asked her whether she was the seller in the papers drawn up for signing. She said upon realizing that she had been made to sign, unknowingly, an agreement of sale she then took the legal practitioners concerned to task about the feasibility of a double sale since she had already sold the same property to Cain Moyo and had no reason to cancel the earlier sale. She said she was told that once signed by her, the deal was done and that was the end of the matter.

Thereupon she said she proceeded to the offices of Mr G Nyoni who was representing Cain Moyo to relate her ordeal of having been made to sign an agreement of sale in favour of the 1st defendant without being aware of that fact. She said on the last date of her agony at the hands of the 2nd defendant certain words were uttered which compelled her to accompany 2nd defendant to the Bulawayo City Council offices with a subdued mind. She narrated that the threatening utterance were to the effect that the 2nd defendant would “take a woman and be intimate with her in front of the plaintiff.” This, he is alleged to have said whilst drawing a sign of a cross on his forehead. She said this scared her to such an extent that she signed the cession of the disputed property in favour of the 1st defendant. She said at Bulawayo City Council Housing Office she was virtually a passenger in the unfolding process. It was the 2nd defendant who in fact answered questions put to, and meant for her, in the affirmative. She said she was at that stage weary of 2nd defendant’s threats. She said she wanted it to pass. Under cross-examination she said she did not report 2nd defendant’s threats to the police or bring them to the attention of Bulawayo City Council Housing Officers because she had referred the matter to her legal practitioners. Apart from the above alleged duress, it can be discerned

from her testimony that she implies that she signed the agreement of sale at the offices of Cheda and partners mistakenly. She said in her mind the meeting was about the improvements that the 1st defendant had made on the disputed property. She said she would not have signed had she known the true contents of the documents. She said she was coerced by the 2nd defendant and misled by his legal practitioners to sign the documents ceding the disputed property into the names of the 1st defendant. I find the allegations by the plaintiff not credible. First, the alleged duress took place over a long period of time thus giving her an opportunity to bring it to the attention of the law enforcement agents. She would have made a report to the police or her own legal practitioner at the time of the alleged threats and not after she had squandered the purchase price from Cain Moyo. Second, her two adult sons Reggy and Precious were involved at some of these meetings and were well aware of the 2nd defendant's position throughout. When she was first collected from Harare to come to sign the cession in Bulawayo, she was collected by her own son, Peggy and 2nd defendant's agent Forget Nkomo. This is not consistent with someone being coerced unless if she claims her own son was also coercing her. The involvement of Reggy is consistent with him having sold the property to the 2nd defendant. Further, she would have refused to come to Bulawayo a year later when Forget Nkomo went to collect her for the same purpose. Further, she signed the agreement of sale ceding the disputed property into the names of the 1st defendant with her own son Precious signing as a witness. This was done at Cheda and Partners legal practitioners yet she did not dispute its contents.

Further, on a separate date she accompanied the defendants to the housing Office to sign consent papers to cede the disputed property into the names of the 1st defendants. Before they went to the Housing Office they first went to see her son Reggy at his plot in Lockview. This is not the conduct of people who were coercing her. Further, Reggy acknowledged in writing that he sold the property to 2nd defendant. It is worthy to note that the plaintiff herself does not dispute that the house was bought by her son, Reggy. She admits to this, but quickly points out that the property was donated to her by her son. Why would Reggy sell the property? The only credible explanation is the one given by the 2nd defendant that plaintiff names were only to conceal from the relevant housing officers that the true purchaser was in fact Reggy who already had another property in the Bulawayo City Council's area, a thing not permissible under the latter's regulations.

The 1st defendant testified that he bought the property from the 2nd defendant sometime in 1999 for the sum of \$450 000,00. He paid a deposit of \$50 000,00 and the balance was settled after the completion of the cession process. He said that he was indeed informed that the property was registered in the names of the plaintiff but in actual fact belonged to Reggy Mkandla, who is plaintiff's son. He said he was informed that Reggy Mkandla had sold

the property to 2nd defendant and had not been able to effect cession to his name because the requisite documents to enable such cession to occur were not available. He said that the earlier meetings between the other parties were personally unknown to him except the one at the offices of Cheda and Partners. In that meeting he got an assurance that he will get the property and an agreement of sale was signed and backdated to the time of payment of the first installment of \$50 000,00. This agreement was signed by the plaintiff and witnessed by her son Precious Mkandla. He said he never had direct dealing with the plaintiff, and that is why on 20 May 2002, the day of cession, he was collected by the 2nd defendant who was in the company of the plaintiff and another person to go to the Housing Office. He said at the Housing Office the plaintiff was asked as to whether she was the owner of the property to which she agreed and also to the fact that she sold it. This testimony was uncontroverted. He said he was not aware of any duress on the plaintiff. I am satisfied that he gave his evidence well. He gave a consistent and credible account of how the property was eventually ceded to his names.

The 2nd defendant testified. He said he bought the property from Reggy and sold it to the 1st defendant. In his evidence he points out the following pertinent points. He sent and financed Reggy and Forget Nkomo to travel to Harare to collect plaintiff to come and sign cession papers. He also attended the meeting at Cheda and Partners where the agreement of sale was signed. He also collected the plaintiff from her home and took her to Reggy's plot and then to the Housing Office to effect the cession. He vehemently denied any implications of duress. Under cross-examination he said that at all times before contacting or dealing with plaintiff, he would contact her son Reggy. He said at all times the plaintiff never indicated that she was an unwilling party to the process. He denied ever threatening to bed a woman in front of the plaintiff and indicated that he treated the plaintiff as his own grandmother. I find that the 2nd defendant is a credible witness. His conduct throughout is not consistent with someone placing another under duress.

As alluded to above, the *merx*, stand number 30161 Entumbane, Bulawayo is currently registered under the names of the 1st defendant. The plaintiff has to prove that the cession was done with duress. If she fails, the cession is confirmed, if she succeeds, the cession would be reversed. To discharge the onus, the plaintiff has to show that:

- (a) The threats were directed towards her and/or her family;
- (b) The threats must be directed towards the formation of the contract, that is the conclusion of the contract must be induced by fear or threat of harm;
- (c) The threats must be ongoing, that is performance should be done whilst still under pressure, not when the pressure has ceased;
- (d) The threats must pose imminent danger to the threatened; and
- (e) The threats must be exercised unlawfully or *contra-bonos mores*.

AJ Kerr -*The General Principles of the Law of Contract* (4th Ed) (1989) at pages 238-245.

The law is that a contract which is induced by duress, *metus*, is not void *ab initio* but is voidable at the option of the coerced party – R H Christies – *The Law of Contract in South Africa* (2nd Ed) at 367, *Smith v Smith* 1948 (4) SA 61 (N) at 67-8 and *Broodryk v Smuts* 1942 TPD 47 at 53. The onus, as alluded to above, is on the plaintiff to prove that the improper pressure is of a kind and severity recognised by law in this context – *Savvides v Savvides & Ors* 1986 (2) SA 325 (T); *Dr Fergusson & Partners v Zimbabwe Federation of Trade Unions & Ors* HB-57-04.

From my above findings, the plaintiff has dismally failed to discharge the onus. She failed to prove that the cession was induced by duress or mistake.

Accordingly, the plaintiff's claim is dismissed with costs.

Shenje & Company, plaintiff's legal practitioners

James, Moyo-Majwabu & Nyoni, 1st and 2nd defendant's legal practitioners