

DISTRIBUTABLE (63)

Judgment No S.C. 70/03
Civil Appeal No 222/02

Nelson Mujeri Muza V Agricultural Bank Of Zimbabwe Limited

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE SEPTEMBER 11, 2003 & OCTOBER 5, 2004

E. Jori, for the appellant

J. Dondo, for the respondent

CHIDYAUSIKU CJ: The appellant in this case sued the respondent in the High Court for the payment of the sum of \$356 362, 52. The summons claimed that the money was due and payable by the respondent to the appellant in respect of an overpayment of a loan provided to the appellant by the respondent. A default judgment against the respondent was initially granted but was subsequently rescinded and the matter was defended. In its plea to the claim as set out in the summons, the respondent (defendant) denied owing the appellant any money. It further averred that it had loaned the appellant money amounting to \$253 905 and that taking into account interest on that loan it was still owed some money by the appellant. On 21 January 2002 the appellant filed his replication. In the replication the appellant denied the averments in the plea and joined issue. The matter was then set for the next stage of the proceedings, namely, the pre-trial conference. Prior to the pre-trial conference the appellant filed an amendment to his replication. In paragraphs 2 and 3 of the replication the appellant made the following averments for the first time:

“In respect of Loan Account Number 9144980 only the amount of \$133 144,00 was advanced. Defendant is not entitled to rely on any variation of the written loan agreement by virtue of the fact that in terms of Clause 16 thereof, no variation to the terms of the agreement was to be of any force and effect unless contained in writing and signed by the duly authorised representatives of Defendant and Plaintiff.

Plaintiff admits that he alone signed a document in which he appeared to consent to an increase of the loan by \$120 761,00 but states that there was no reality of consent in that the document was obtained from him under duress and misrepresentation. In particular, Defendant's manager informed him that unless he signed the document Defendant would repossess the motor vehicle which had been purchased with the initial loan and which had been delivered to him some eight months previously and misrepresented the position by stating that in law it was entitled to effect the repossession which was not the case."

The matter thereafter proceeded to trial and the appellant's claim against the respondent was dismissed with costs. He now appeals against that whole judgment.

The factual background to this case which was succinctly set out by the learned trial judge in her judgment are as follows:

The appellant, a communal farmer, responded to an advertisement of the respondent and applied for a loan to purchase a CPB12 8-ton Nissan truck, ("the truck") in or about 1991. The respondent had been granted a facility by the World Bank to lend to Zimbabwean farmers to enable them to purchase farm equipment and implements. The application of the appellant was successful. He was advanced the sum of \$133 144,00 as a long term loan. An agreement to this effect was duly signed and numbered 91448980. The sum of \$133 143,00 represented the price of the truck as quoted to the appellant by Dulys, a motor vehicle supplier.

The truck was duly delivered to the appellant. The respondent contends it informed the appellant by a letter dated 27 April 1992 that the truck was available for collection, that the price of the truck was going to be increased, and that collection of the vehicle would be construed as an acceptance of the increased price of the vehicle. The letter reads, in part, as follows:

"The depreciation of the Zimbabwean dollar against the major currencies increased the cost insurance freight of your item. Consequently the cost of your item will escalate resulting in additional costs which you will be advised of upon receipt of the final invoicing by the corporation.

Please note that acceptance of delivery of the item referred to above will imply acceptance of any additional costs to be levied on the item."

The letter expressly alerted the appellant to the proposed increase in the charges and to the fact that his acceptance of delivery would be construed as consent to such an increase.

The appellant denied having received the above letter from the respondent. He contended that it was Dulys that advised him of the availability of the truck. The court disbelieved him, and concluded that the appellant received the respondent's letter of 27 April. That finding by the court cannot be faulted. The appellant has not challenged that finding. It is quite clear that the appellant's denial of the receipt of that letter is motivated by the fact that such an admission would seriously undermine the appellant's contention that he was coerced into signing Exhibit 2 referred to hereunder.

In or about March 1993 the appellant was summoned to the Marondera branch of the respondent. There, he had a meeting with the accountant who informed him about the increase in the purchase price of the truck. The accountant asked the appellant to agree to take out an additional loan to cover the additional cost of the truck. The appellant, before leaving, signed a final invoice in which he accepted to pay the additional charges to the cost of the truck in the amount of \$120 261. The signed final invoice was produced as Exhibit 2 and provides, in part, as follows:

"RE: FINAL INVOICE: AFC/WORLD BANK: LOAN AGREEMENT NO

I accept the increase and wish to advise the Corporation that I will pay the said \$120 761 by:

- (i) total cash payment to the Corporation on or before the next 14 working days ending N/A 1992.
- (ii) instalment for which I hereby authorise the Corporation to debit the Loan Agreement by the said sum of \$120 761 and advise me of the raised instalment amounts.

Yours faithfully

NELSON MUJERI MUZA (signature)"

The appellant admits that he signed Exhibit 2 but contends he did so under duress. His evidence on this point was that the accountant and some of the respondent's employees threatened to repossess the truck unless he signed Exhibit 2. He alleged he was told that after repossession of the vehicle, the truck would be evaluated and if any damage to the truck was discovered it would be deducted from the \$41 000,00 he had paid as deposit and the balance would be refunded to him. The respondent did not call as witnesses the accountant nor any of the employees present when Exhibit 2 was signed. In the light of this the court felt constrained to and did accept the evidence of the appellant on this point. As a consequence of this finding the court concluded that Exhibit 2 was signed under duress. This is a somewhat generous finding for the appellant for a number of reasons.

Firstly, the letter of 27 April clearly alerted the appellant to the increase in the purchase price. He did not protest at such increase. If anything, he collected the truck despite being advised that such acceptance implied acceptance of the increase in the purchase price of the vehicle. At that point there was no fear of repossession. The appellant's conduct therefore, at that stage, evinces a voluntary acceptance of the new purchase price of the vehicle.

Secondly, in his letter of demand and as indeed, in all the correspondence shortly before the commencement of this action, the appellant maintained the stance that he was entitled to a refund on two grounds - firstly, on the basis of the infringement of the *in duplum* rule and, secondly, on the basis that the Supreme Court had denied the respondent the right to levy additional charges. The issue of coercion was not mentioned in the letter of demand. The issue of coercion was only raised for the first time in the amended replication after pleadings had closed. It would appear to me that the allegation of coercion was an after-thought upon the realization of the correct interpretation of the Supreme Court judgment. Thirdly, the summons setting out the plaintiff's cause of action makes no reference to coercion.

Be that as it may, there is no appeal or counter-appeal in regard to this finding of the court *a quo*, consequently, this Court is not seized with the issue of the correctness or otherwise of that conclusion.

After signing Exhibit 2 the appellant continued with his payments under the loan agreement. A few years later the appellant saw in a newspaper article a Supreme Court ruling concerning a certain farmer to the effect that the respondent was prohibited from levying additional charges for the purchase of trucks. He took the cutting of this newspaper article to the respondent's Marondera office. The respondent, according to the appellant, told him to continue with his payments for the additional charges as the Supreme Court ruling did not apply to him. This he duly did. He made the final payment on the account in July 1997 in the sum of \$60 884,00. The appellant, subsequent to the full payment, demanded a refund of the additional loan. The respondent refused to refund on the basis that the appellant agreed to pay the additional charges and was bound by that agreement.

The court *a quo* concluded that the agreement, Exhibit 2, in terms of which the appellant agreed to pay the additional charges was voidable at the instance of the appellant. The court *a quo* further concluded that after becoming aware of the Supreme Court ruling in the Johnsen case, the appellant should have repudiated the agreement within reasonable time. His failure to do so amounted to ratification of an otherwise voidable agreement. In arriving at this conclusion the learned judge in the court *a quo* reasoned thus:

"The plaintiff was coerced into consenting to the additional costs by threats of the repossession of the truck. He made repayments of the additional costs under the continuing duress. He then became aware of the Supreme Court judgment that, in his opinion, did not authorise the AFC to repossess the items bought under the World Bank facility. In my view, this is when became aware of the deception by the defendant and therefore the time at which the law obliged him to make an election either to rescind the contract or continue to be bound by it. It is not in dispute that after becoming aware of the deception on him, the plaintiff continued to make repayments under the voidable contract. His continued repayments were in my view, an election to be bound by the agreement and an abandonment of the right to claim rescission and restitution. The plaintiff may have nursed an intention to later on sue on the voidable contract but the doctrine of quasi-mutual assent will work against him. Indeed, the plaintiff testified that he did not take any legal action then because he could not afford legal representation. Not only is this belied by the fact that he paid a sum of \$60 884,68 as a lump sum on 30 July 1999 when his monthly instalment was a mere \$6 500,00 but, it made his election to seek rescission belated. His election to rescind the consent was therefore not taken within a reasonable time and this is fatal to his claim.

The *onus* was on the plaintiff to prove that he is not bound by his written consent to the additional costs raised by the defendant for the purchase of the truck. In my view and on the basis of the foregoing, the plaintiff has not discharged this *onus*. He remains bound by the written consent that he signed.

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

As I have already stated the appellant was dissatisfied with the outcome and now appeals against the judgment on two grounds. The two grounds of appeal set out in the notice of appeal are:

- "1. The Learned Judge should have held that the duress exercised by the respondent, which was of a continuing nature, vitiated any

reality of consent and that in the circumstances the document extracted by Respondent from Appellant wherein he consented to the loan being debited with the additional amount was a nullity.

2. That the Learned Judge erred in finding that Appellant was put to an election when he became aware of the Supreme Court judgment in *Johnson v AFC* 1995 (1) ZLR 65 since Respondent misrepresented the position to him and advised him that the judgment had no bearing on his case. In any event, the principle of election would not apply in the case of duress where the duress is of a continuing nature."

No submissions were made in support of the first ground of appeal. There was no formal withdrawal of that ground of appeal either. I am not surprised that Mr *Paul* did not make any submissions in support of this ground. The evidence in this case simply does not support the allegation that Exhibit 2 was void *ab initio* and therefore a nullity by reason of duress. Contracts that are void *ab initio* by reason of duress are very rare as the duress required to render an agreement void *ab initio* has to be extremely severe. It has to be so severe as to negative any element of voluntariness such as where a stronger person physically overcomes a weaker person and puts a pen in his hand and physically forces his hand to write his signature on a written contract.¹ The evidence adduced by the appellant fell far short of this requirement. That ground of appeal cannot, therefore, succeed.

The second ground of appeal is that the learned judge misdirected herself by holding that the appellant failed to make an election to repudiate the agreement within reasonable time and consequently ratified an agreement that was otherwise voidable. It was argued for the appellant that even after the appellant became aware of the case of *Johnsen v AFC*² the threat of repossession still persisted.

¹ The Law of Contract in South Africa, 3rd Edition. R.H. Christie p. 337; *Grocious* 3.48. *Van Leenwan* C.F. 1.4.41; *Voet* 4.2.2. *Smith v Smith* 1948 (4) SA 61 (N) 67-8

I am not persuaded by this argument. In *Johnsen's case, supra*³ the Supreme Court concluded that the respondent could not unilaterally increase the purchase price of an item purchased in circumstances similar to this case. The court also held that the remedy of summary attachment could not be used in such circumstances. Upon becoming aware of the Supreme Court ruling in the *Johnsen case, supra*, one would have expected the appellant to have approached the respondent, as he in fact did, and advised it that it was prohibited from levying extra charges and from repossessing his truck. The appellant should have stopped further payments in excess of the original purchase price. Instead the appellant continued paying his instalments and the increased levy.

Even if one were to accept Mr *Paul's* submission that the appellant still feared that his truck would be repossessed, such fear was not reasonable in the light of the ruling in *Johnsen's case, supra*.⁴ For duress to be a defence it must be reasonable.⁵ The duress, after knowledge of the Supreme Court ruling in *Johnsen's case, supra*, if there ever was such duress, was not reasonable. The second ground of appeal also fails.

In the result the appeal is dismissed with costs.

ZIYAMBI JA: I agree

MALABA JA: I agree

² 1995 (1) ZLR 165 (S)

³ 1995 (1) ZLR 165 (S)

⁴ 1995 (1) ZLR 165 (S)

Wintertons, appellant's legal practitioners

Chinamasa Mudimu & Chinogwenya, respondent's legal practitioners

⁵ *Paragon Business Farms (Pty) Ltd v Du Preez* 1994 (1) SA 434