

**MZWELI MKWANANZI**

**Versus**

**LESLIE BHEKIMPILO SIBANDA**

**and**

**CAROLINE VUTABWASHE**

**and**

**DAVID COLTART**

**And**

**JOSEPHAT TSHUMA**

**And**

**NORMAN JAMES PATISON**

**And**

**CHENA LUTCHMAN-DOOLAB**

**and**

**Z B BANK LIMITED**

**and**

**REGISTRAR OF DEEDS BYO**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 5 OCTOBER 2020 & 1 JULY 2021

**Civil Trial**

*T. Masiye-Moyo* for the plaintiff

*Advocate Siziba* for the defendants

**MAKONESE J:** This matter has been brought before this court as a stated case in terms of Rule 199 of the High Court, Civil Rules, 1971. The rule provides that parties to a civil action or suit, may after summons has been issued, concur in a statement of the questions of law arising therein in the form of a special case for the opinion of the court. Rule 199 (3) makes further provision that upon the argument of such case, the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any defence, whether of fact or law, which might be drawn therefrom is proved at trial.

The parties in this dispute resolved and agreed that the bundle of pleadings filed of record shall stand as the complete relevant pleadings for the disposal of the matter.

**Factual background**

The plaintiff is a resident of Bulawayo. He is an accountant by profession. Sometime in November 2016 he responded to an advertisement flighted by R.E.D Estate Agents to the effect that the said estate agents were offering for sale a property known as number 107 Edenfield Road, Matsheumhlophe, Bulawayo, also known as Lot 1 of stand 117 in Matsheumhlophe. Plaintiff expressed his interest in the property. By arrangement he visited and inspected the property in the company of his wife. On arrival at the property he was

welcomed by 1<sup>st</sup> and 2<sup>nd</sup> defendants. Plaintiff was led on a tour of the property. Plaintiff and his wife were satisfied with the property and placed an offer of US\$70 000 as the purchase price as guided by the estate agents. Plaintiff was informed that his offer would be considered together with other offers that had been placed. In January 2017 plaintiff received communication from R.E.D Estate Agents indicating that the offer was still available for the purchase of the property. On 3<sup>rd</sup> January 2017 plaintiff signed an agreement of sale in respect of the property. 1<sup>st</sup> and 2<sup>nd</sup> defendants represented the attorneys for the estate agents Webb, Low and Barry. At that time 1<sup>st</sup> defendant was employed by Webb, Low and Barry as a professional assistant. The agreement of sale was signed on behalf of the defendants by David Coltart a senior partner in the legal firm, by way of a power of attorney. Plaintiff went ahead and secured mortgage finance for the purchase of the property. With the mortgage bond in place, the property was transferred to plaintiff under Deed of Transfer 763/2017, mortgage bond number 1566/2017.

In terms of the agreement between the parties, plaintiff was entitled to vacant possession of the property upon giving 3 months' notice to the sellers after receipt of the purchase price by the bank. On 11<sup>th</sup> April 2017 plaintiff wrote and delivered a letter to defendants in which he gave 3 months' notice to vacate the property. Defendants refused to vacate the property.

Prior to the agreement of sale in respect of the immovable property in question, the 1<sup>st</sup> defendant had been involved in some criminal activities at his firm, Webb, Low and Barry. Unusual transactions had been observed in relation to 1<sup>st</sup> defendant's involvement with certain trust funds. 1<sup>st</sup> defendant had confessed in July 2016 that he had misappropriated trust funds. 1<sup>st</sup> defendant was suspended from employment in July 2016. On the 11<sup>th</sup> of August 2016, 1<sup>st</sup> defendant signed an acknowledgment of debt acknowledging his indebtedness to the parties of Webb, Low and Barry in the sum of US\$404 567,00. In this acknowledgment of debt 1<sup>st</sup> and 2<sup>nd</sup> defendant also agreed to sign a power of attorney enabling the firm to register a second mortgage bond against the immovable property being 107 Edenfield, Matsheumhlophe, Bulawayo. By way of summons dated 24 October 2016 under case number HC 280/16, Webb, Low and Barry made a claim against 1<sup>st</sup> and 2<sup>nd</sup> defendant for payment of the sum of US\$226 154,73, together with interest, and that the immovable property being stand 107 Edenfield, Matsheumhlophe, Bulawayo be declared specially executable. This is the same property sold to the Plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The claim was not opposed by 1<sup>st</sup> and 2<sup>nd</sup> defendants and default judgment was granted on 16<sup>th</sup> February 2017 under case number HC 11/17. The judgment confirmed that 1<sup>st</sup> and 2<sup>nd</sup> defendants owed a debt in the sum of US\$226 154,73, together with interest and costs. Further, the judgment stated that the immovable property in question was specially executable. This judgment remains extant.

The plaintiff seeks to enforce the agreement of sale and secure vacant possession of the property. The 1<sup>st</sup> and 2<sup>nd</sup> defendants argue that they were placed under undue influence and duress to sign a special power of attorney to pass transfer of the property to the plaintiff. 1<sup>st</sup> and 2<sup>nd</sup> defendants contend that the special power of attorney dated 15 September 2016 was expressly revoked by the defendants. In the result, the 1<sup>st</sup> and 2<sup>nd</sup> defendants argue that they have a valid right of retention of the immovable property as they have a pending case

against the legal firm, Webb, Low and Barry. The issues for determination by this court are set out in an amended joint pre-trial conference memorandum filed with the court on 5<sup>th</sup> October 2020. The issues are as follows:

1. From the agreed facts, whether or not 1<sup>st</sup> and 2<sup>nd</sup> defendants signed the acknowledgment of debt and special power of attorney in favour of Messrs Webb, Low and Barry under duress.
2. Whether or not the special power of attorney signed by 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 15 September 2016 is invalid for want of alleged proper notarizations.
3. Whether or not the irrevocable special power of attorney in (1) above was revocable and was in fact revoked.
4. Whether or not anything, notwithstanding plaintiff's title to the property may be impeached.

Onus: Upon 1<sup>st</sup> and 2<sup>nd</sup> defendants on all the issues.

### **Special case**

The bundle of pleadings filed of record shall stand as the complete relevant pleadings for disposal of this suit. The rest of the issues set out in the minute are administrative and procedural in nature regarding the disposal of this dispute.

In view of the fact that no *viva voce* evidence was led by the parties, I shall rely on the voluminous pleadings and annexure to achieve a resolution of the issues before the court. I shall proceed to determine each issue in turn.

### **Whether or not the acknowledgment of debt and special power of attorney in favour of Webb, Low and Barry was obtained under duress**

The power of attorney executed and signed by 1<sup>st</sup> and 2<sup>nd</sup> defendants on 11<sup>th</sup> August 2016 was signed at the offices of Webb, Low and Barry. In the statement of agreed facts it is noted that a meeting was held on 21<sup>st</sup> July 2016 between 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is an admitted fact that 1<sup>st</sup> defendant confessed that he had misappropriated trust funds from clients of 3<sup>rd</sup> to 6<sup>th</sup> defendants. The 1<sup>st</sup> defendant was suspended from employment by letter dated 22 July 2016. On 11<sup>th</sup> August 2016 1<sup>st</sup> defendant tendered his resignation from employment. The letter was rejected by 4<sup>th</sup> defendant on the grounds that it did not disclose the reason for resignation. The letter was supplemented by 1<sup>st</sup> defendant by a further letter in the following terms:

*“10 August 2016  
The Senior Partner  
Webb, Low & Barry  
**Bulawayo***

### **Reference: Dismissal: Leslie B. Sibanda**

*I accept that there are legitimate grounds for me to be summarily dismissed from Webb, Low and Barry arising from inter alia, my fraudulent and misappropriation of*

*over US\$100 000 from the firm's trust account and my wrongful misappropriation of funds which should have been deposited in the firm's trust account.*

*I also accept that I am not entitled to any terminal benefits which will be set off against the loss suffered by the firm as a result of my illegal conduct."*

In paragraph 18 of the statement of agreed facts 1<sup>st</sup> defendant concedes that on several occasions he was told that it was better for him to co-operate as the management of the firm did not want 1<sup>st</sup> respondent arrested, prosecuted and sent to prison, particularly as his wife was pregnant. The question that arises is whether the 1<sup>st</sup> defendant was subjected to duress as would vitiate the voluntariness and free will under which the defendants appended their signature to the documents. It is clear that 1<sup>st</sup> defendant, who was a practicing legal practitioner weighed his options. The 1<sup>st</sup> and 2<sup>nd</sup> defendants clearly understood that by executing the acknowledgment of debt, the matter would not be reported to the police. The 1<sup>st</sup> defendant was in the end arrested and prosecuted. His gripe in the whole matter is that 3<sup>rd</sup> to 6<sup>th</sup> defendant did not keep their end of the bargain. That complaint does not, however, translate to duress. The facts as set out in the pleadings clearly show that there is no evidence of duress. No brute force was used. The 1<sup>st</sup> defendant voluntarily opted to sign the acknowledgment of debt in the hope and belief that he would be spared the agony of arrest and prosecution. 1<sup>st</sup> and 2<sup>nd</sup> defendants concede in their submissions that in order for the defence of duress to succeed, the act complained of must not only be unlawful but must be contrary to public policy. The allegation of duress is clearly unfounded and an afterthought. Once the defendants learnt from the law firm that for tax purposes, the fraud had to be reported to the police, the defendants immediately attempted to revoke the power of attorney. What clearly seems to have been playing out is that the defendants were essentially saying that now that the law firm was not keeping its promise, they were entitled to repudiate the contract.

1<sup>st</sup> defendant is a legal practitioner by training. For more than a year after he signed the documents complained of, he was happy to take no step whatsoever to set aside the acknowledgment of debt and special power of attorney on account of having been signed under duress. The inescapable conclusion is that the conduct of the defendants is consistent with the fact that they fully appreciated their legal undertaking. There was no form of duress shown by the conduct of the defendants to render the documents void *ab initio* as claimed.

In the case of *International Export Trading Company of Zimbabwe (Pvt) Ltd v Mazambani* HH-195-17 at page 4 of the cyclostyled judgment the court aptly stated thus

R. H. Christie in his book, *Business Law in Zimbabwe* 2011 ed @ p 82-83 says the following on duress:

*"a contract obtained for or by fear induced by threats of force obviously cannot be allowed to stand, but because of the infinitely variable nature of force, fear and threats the limits of this principle require careful attention. The fear must be such as would overcome the resistance of a person of ordinary fairness, taking into account the sort of person the victim is (e.g. young or old women)."*

The author goes on to state that the threat must be of imminent or inevitable evil. In *Broad Tyk v Smits* 1942 TPD 47 at p 52 the court held that the threat must be directed at the party or his family. In *Arend & Anor v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305, the court stated the following of duress;

*“It is clear that a contract may be vitiated by duress (metus), the raison de’etre of the rule apparently being that intimidation or improper pressure renders the consent of the parties subject to duress not true consent ... Duress may take the form of inflicting physical violence upon the person of a contracting party or inducing into him fear by means of threats.”*

The case outlines the following as requisites of threats constituting duress;

1. The fear must be a reasonable one.
2. It must be caused by the threat of some considerable evil to the person concerned or his family.
3. The threat must be of an imminent or inevitable evil.
4. The threat or intimidation must be unlawful or *contra bonos mores*.
5. The moral pressure must have caused damage.

Duress and undue influence are common law doctrines. A litigant alleging the use of duress and undue influence used to induce him to sign a document is essentially saying that he was forced to do an act against his wish. The onus is always on the party alleging undue influence or duress to establish that he did not sign the document willingly. As I have already indicated the 1<sup>st</sup> defendant as a legal practitioner knew exactly what to do if the documents had been executed by the use of undue influence. In my view, the 1<sup>st</sup> defendant failed to show that he was compelled or forced to sign the acknowledgment of debt. He took a deliberate and conscious choice to sign the documents in the hope that he would not be prosecuted. That deliberate election to sign the documents does not, by any stretch of imagination extend to duress as completed by the law.

In *Muza v Agricultural Bank of Zimbabwe Ltd* SC-70-03, the Supreme Court warned that;

*“Contracts that are void ab initio of 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 physically stronger person physically overcomes a weaker person and puts a pen in his hand and physically forges his hand to write his signature on a written contract.”*

### **Whether or not the special power of attorney by 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 15 September 2016 is invalid for want or alleged proper notarization**

The allegation by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is without merit. The two defendants do not deny that they appended their signatures to the power of attorney complained of. As a matter of fact they accept that they signed the power of attorney. A power of attorney is not itself the mandate. It is evidence of the mandate given. This is practical common sense. The complaint by the defendants is not that the power/mandate was not given. The argument advanced by defendants is that while the power and mandate was given by them, the evidence

of that power is irregular. Defendants submit that their contention is supported by the case of *Stand Five Four Naught (Pvt) Ltd v Salzman ET Ciesa* SC-30-16.

In this matter the court held that:

*“A signature cannot be said to have been verified if it is not clear whether or not it was signed in the presence of the Notary Public.”*

The discussion in the case referred to involved a special power of attorney executed outside Zimbabwe. The issue of the signature was in dispute in that matter. In this matter the signatures are not in dispute. In *Malinga & Anor v Siziba & Anor* HC 29-08 NDOU J had occasion to deal with the validity of a power of attorney signed outside Zimbabwe but not before a Notary Public. Having decided that the power of attorney was defective the judge had this to say:

*“Because the “General Power of Attorney” is defective, there is no actual authority. The only issue left for me to determine is whether there is apparent authority. It is trite law that a person who, intending or apparently intending that the representation is to be acted upon, represents or permits to be represented, to a third party that he has given authority to another, becomes bound to a third person, if the third person, induced by the representation enters into a transaction reasonably believing that the other person has authority which he had represented to have – Monzali v Smith 1929 AD 382 ...”*

The learned judge went on to comment that:

*“This allegation is lack of authority is clearly an afterthought.”*

It is clear that even assuming that there was no actual authority (which is denied) given by the two defendants for the sale of this property, there was clearly apparent authority given. 1<sup>st</sup> defendant misses the point as regards the purpose of the power of attorney complained of. The power of attorney was for the purpose of the sale of the house. It was not intended as a power of attorney to pass transfer. The power of attorney to pass transfer is given to an appearer who appears before the Registrar. It is common cause that in this case the power of attorney complained of vests no party with any power to appear before the Registrar of Deeds for purposes of passing transfer. The power of attorney to pass transfer was given by 3<sup>rd</sup> defendant, signed by him and witnessed by two persons. It is valid for all purposes. It stands to reason that even assuming the power of attorney needed authentication, it not being a power of attorney in favour of the appearer, the Registrar of Deeds would have been entitled to act on it as she did.

### **Whether or not the irrevocable special power of attorney was irrevocable and was in fact revoked**

This issue as raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is itself contradicting. The first problem facing the defendants is that the pleadings do not make logical sense. The two defendants vigorously contend that the power of attorney is *void ab initio* and that in a sense you cannot put something on nothing. In the same vien the defendants take a turn and argue that the power of attorney was revoked. These two patently contradictory pleadings are not

made in the alternative. The defendants cannot have revoke a document whose validity is denied. It is either, the position is that the power of attorney existed in which case, one can speak of its revocation. This point is raised in desperation in the hope that something can stick. In other words, the two defendants by raising this defence in this manner are simply casting their net wide.

As a general rule, authority may be revoked even in instances where the document vesting such authority says that the authority given is irrevocable. In a scenario where an irrevocable power of attorney is coupled with an interest, the principal may not successfully revoke that authority. In other words, where the power of attorney is coupled with some benefit to the agent, the principal cannot unilaterally revoke it. This position was stated authoritatively in *Chevron South Africa (Pvt) Ltd v Ufundu Transport (Pvt) Ltd & Others* 2016 ZAGPJ HC 251.

The facts of this matter clearly show that the sale of the property of the defendants was for the benefit of 3<sup>rd</sup> to 6<sup>th</sup> defendants who had been defrauded. The power of attorney was therefore clearly coupled with an interest and is an exception to the general rule. In any event on 17<sup>th</sup> January 2017. 1<sup>st</sup> and 2<sup>nd</sup> defendants conceded the point that the power of attorney they granted to named persons was irrevocable. They are consequently estopped from the point as the transfer has passed on the basis of the concession. I therefore make a finding that the special power of attorney was valid for all purposes.

**Whether or not anything notwithstanding plaintiff's title to the property in dispute may be impeached**

Nowhere in the pleadings and bundle of documents constituting the stated case is there a suggestion that plaintiff was not an innocent third party. At they very least, 1<sup>st</sup> and 2<sup>nd</sup> defendants should have applied to have the documents complained of voided when the time permitted, before transfer. The defendants did not do so. The documents in issue have already been acted upon and they have already served the purpose. The horses have already bolted in full view of the defendants. The principles governing the remedy of action *rei vindicatio* are settled.

In *Lafarge Cement Zimbabwe Ltd vs Chayizambura* HH-413-18, the court reiterated the principle stating that the crux of the principle is that the relief of *actio rei vindicatio* is enforceable against the whole world. The principle established by this doctrine is that one cannot be deprived by his or her property against his or her will.

The owner need only prove his right of ownership to the property and that he was the possessor at the commencement of the proceedings. Ownership in the immovable property in question passed to the plaintiff in January 2017. These proceedings were initiated in September 2017.

Plaintiff has been deprived of the beneficial use of the property since 2017, a period close to 4 years. Defendants stubbornly refused to vacate the property that is registered in the plaintiff's names. It is my view that there is no legal or factual basis to impeach the plaintiff's title to the property. The defendants have failed to discharge the onus to sustain their claims on a balance of probabilities. To some degree, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have tended to abuse court process and remain in occupation of the property.

**Disposition**

I am satisfied that the acknowledgement of debt and the special power of attorney were not obtained under duress. The plaintiff has made out a good case for the relief sought. Having come to that conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> defendant's claims against the plaintiff must consequently fail.

In the result, the following order is made:

1. 1<sup>st</sup> and 2<sup>nd</sup> defendants' claims be and are hereby dismissed.
2. 1<sup>st</sup> and 2<sup>nd</sup> defendants and all those claiming rights through them be and are hereby ordered to vacate Lot 1 of stand 117 of Matsheumhlophe, also known as 107 Edenfield Road, Matsheumhlophe, Bulawayo, failing which the Sheriff of Zimbabwe or his lawful deputy be and are hereby authorized and directed to evict them.
3. 1<sup>st</sup> and 2<sup>nd</sup> defendants, jointly and severally, the one paying the other to be absolved, to pay the costs of suit.

*Masiye-Moyo & Associates*, plaintiff's legal practitioners  
*Advocate Siziba instructed by Tanaka Law Chambers*, defendants' legal practitioners