

INTERNATIONAL EXPORT TRADING
COMPANY ZIMBABWE (PVT) LTD
versus
EDMORE TAPERESU MAZAMBANI

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 2, 17 February & 28 February 2017 & 22 March 2017

Civil Trial

G Nyengedza, for the plaintiff
M Mahaso, for the defendant

DUBE J: The plaintiff instituted these claims based on two acknowledgments of debt documents, [hereinafter referred to as AODs]. The plaintiff claims \$26 258-12 and \$38 402-03 being monies advanced to the defendant in respect of wheat and soya beans farming respectively. It claims that the defendant has failed, refused and neglected to pay the amounts in breach of the AODs. The defendant admits signing the AODs but claims that he did so under duress and undue influence. The issue referred to trial is whether the AODs were signed freely and voluntarily.

The plaintiff called Terrence Carbutt in support of its case. He was employed by the plaintiff with the responsibility of managing and distributing inputs to commercial growers. The defendant failed to deliver the contracted tonnage in respect of wheat and soya beans due to mismanagement of the crops. The witness was present when defendant signed both AODs. He signed them freely and voluntarily in order to access further funding for continued farming operations. The soya AOD was signed in Harare at the defendants' premises and he was present. The defendant was not forced or threatened. The defendant understood that he needed to continue farming and took ownership of the debt. After signing the AOD he signed the options to clear the soya beans debt which he also breached. The witness insisted under cross examination

that he was present at the signing of the soya AOD and denied that the defendant signed the AOD after excessive pressure was applied on him.

The plaintiff's agronomist, Mr. Hensman was present when the wheat AOD was signed. The defendant was not forced and he did not indicate that he was uncomfortable signing the AOD. He cannot recall if he took other documents with him but he probably took a statement of account. The witness denied under cross-examination that the defendant signed the AOD for wheat under duress or neither threats nor that he signed the AOD after a heated argument between them. He also refuted that the defendant signed the AOD after he advised him that accurate statements would follow and that he did not have any statements to confirm amounts on the AOD. The defendant never complained about the figure claimed. He also denied that he exercised excessive pressure on the defendant amid threats of cutting off further funding to him. The witness testified well and maintained his story under cross examination. The witness was an honest and fair witness. His evidence was clear and straightforward. He maintained his version of events. He was quick to point out if he did not remember events involved.

The defendant called two witnesses in support of his case. The defendant's version is as follows. He entered into agreements with the plaintiff wherein he was supplied with farming and monetary inputs for soya beans, wheat and maize. He had tea with the plaintiff's country director, Ms. Roberts on 9 July 2013 when he had gone to collect some cash for use at the farm. He was given the options to clear debt form, statement of account for soya beans and an AOD. His efforts to point out irregularities in the statement of account were strenuously ignored by Ms. Roberts. The statement had no weigh bridge vouchers to support total deliveries made to plaintiff. The queries upset Ms. Roberts and she declared that he sign the AOD or they will cease further supply of inputs and money towards his wheat crop which he had gone into contract with plaintiff on 7 May 2013. He took issue with the fact that he was said to be owing \$80 000-00 when his contract stipulated that the total contract amount was \$59 000-00. She maintained her stance and he had to sign as they would cease further funding for the wheat crop. He pinned his hopes on option C. He reluctantly, under duress signed the AOD fully knowing that the amount owing maybe wrong. After signing the AOD she took it to the reception to have someone witness it. He insisted under cross examination that the last witness was not present at the signing of the soya beans AOD.

On 23 November 2013 Mr. Carbutt and Mr. Hensman, visited his farm for the usual evaluation of crops visit. After touring the farm, the last witness said to him that he must sign the AOD on wheat. He resisted as there was no debt owing. He was still delivering the wheat and these deliveries were not accounted for. There was a heated argument at the end of which the last witness said that this was not a proper AOD because this was merely as estimate as the defendant had not finished delivering wheat. He would furnish him with proper statements after the deliveries. His son and irrigation foreman were present. Mr. Carbutt said that if he did not sign the AOD, there would be no more inputs and financial assistance. He was in a difficult position and decided to sign and hoped that another accurately captured AOD would be done. With the threat of withdrawal of further funding for his maize crop, he succumbed and signed the AOD. The witness testified under cross examination that he was not in breach of the contract on soya but that it is the plaintiff that was in breach because it decided to withdraw vital information regarding the total tonnage of his deliveries in violation of the contract. The witness was very argumentative, avoided answering questions and was generally hostile under cross- examination and very emotive.

The defendant's irrigation foreman, Farai Mubhumuri testified as follows. Mr. Hensman came in the company of another person and toured the fields. After the tour they went to the car park and a misunderstanding ensued with the defendant. They requested the defendant to sign documents. The defendant refused saying he could not sign the papers since they were not enough. He was in about 2 – 3 meters away from the car park. They argued until the defendant signed the papers. The discussions were not cordial and took about 40 minutes to an hour. He heard the plaintiff's witness say that the defendant should sign the AOD so that he would get more inputs and that if he does not do so he would not get them.

Under cross-examination, he testified that he was with the defendant's son laying irrigation pipes in the field as the discussion took place. He was not far from the carport at the beginning. He was concentrating on laying pipes. The defendant's son did not hear anything. They were not at one place when laying the pipes. By the time the AOD was signed they were far away and could not hear the discussion. He could not say whether by the time the defendant signed the AOD he was unhappy. He could not say whether the parties eventually

agreed over the signing as he did not hear the entire discussion. He did not witness the actual signing but was later told by the defendant that he signed the papers unwillingly.

It is common cause that the parties entered into two contract farming agreements where the plaintiff would supply the defendant with funding and inputs for wheat and soya beans farming. The plaintiff duly supplied the defendant with funding and inputs. The defendant went on to sign two separate AODs acknowledging liability for amounts owing. The court is being called upon to resolve whether the defendant signed the AOD's under duress and if undue influence was brought to bear on him.

R H Christie in his book *Business Law in Zimbabwe* 2011 ed @ 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 firmness, taking into account the sort of person the victim is (e.g. young or old woman.”

The author goes on to state that the threat must be of an imminent or inevitable evil. In *Broad Tyk v Smuts* 1942 TDD 47 @ 52 the court held that the threat must be directed at the party or his family. In *Arend and Anor v Astra furnishers (Pty) Ltd* 1974 (1) SA 298 (c) @ 305, the court said the following of duress,

“It is clear that a contract may be vitiated by duress (metus), the *raison d'être* 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 in him a 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. It must be the threat of an imminent or an inevitable evil.
4. The threat or intimidation must be unlawful or *contra bonos mores*.
5. The moral pressure must have caused damage.

See also *Gbenga – Oluwatoye v Reckitt Beckiser Sa (Pty) Ltd and Another* (2016) 371 LJ 902 (LAC).

In the case of *Muza v Agricultural Bank of Zimbabwe Ltd* (22/02/02) [2004] ZW SC 138 the court said the following 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 were a stronger person physically overcomes a weaker person and puts a pen in his hand and forces his hand to write his signature on a written contract.”

Duress and undue influence are common law doctrines. A litigant alleging the use of duress and undue influence to induce him to sign a document is essentially saying that he was forced to do the act complained against. Duress has different forms and includes threats of violence, to property, threats of unlawful restraint and economic duress. The requirements for economic duress are, that the person alleging duress must protest. He must show that he had no other viable course of action. Also to be considered is whether he took steps to avoid the forced contract or AOD. See *Bpoe Bank Berperk v Van ZYL* 2002(5) SA 165 C and the *Arend case*. A litigant may therefore raise economic duress as a ground for challenging an AOD. This occurs in a commercial setup where the terms of an AOD are accepted and signed for under duress. Undue influence on the other hand is pressure that does not amount to duress. It has to be shown that one party did something that resulted in him getting an unfair advantage. It includes threats to end a relationship.

In a nutshell, 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. Where a person claims that he was forced to sign an AOD through economic duress, he is required to show that he was forced to accept the terms of the AOD and sign it because of his economic situation by a person who was in a more economically stronger than him. An AOD signed under duress and undue influence renders the AOD invalid and unenforceable. No right to a claim damages arises from duress.

The defendant claims that the treats to withdraw funding amounted to economic duress and undue influence. The following aspects of the evidence adduced make it apparent that the defendant's version that he was forced to sign the AODs is improbable. The plaintiff's witness insisted that the soya beans AOD was signed in his presence. There is no reason why Mr. Carbutt would insist that he was present on this occasion when he was not. He has nothing to gain by lying that he was there. If he had wanted to lie, he would have lied that he was present when the contracts themselves were signed. I found him to be an honest witness and believed him when he said that the AOD was signed in his presence. I find the defendant's version that he was invited for a cup of tea in the garden by Ms Roberts, only to be ambushed with a request to sign the soya AOD improbable. The environment spoken of is inconsistent with the conduct complained against. The defendant is an educated man, an agronomist of 32 years standing. He is not an unsophisticated person. It is hard to believe that he would be invited for a cup of tea and then be forced to sign the AOD. He did not appear like the sort of person who would be forced to acknowledge a debt he did not owe or be threatened by a lady over a cup of tea.

The defendant states that the reason why he signed the soya AOD is that he was in a quandary regarding the withdrawal of funding as he had a wheat crop already planted. The witness was not being candid with the court. The wheat crop had already been funded and inputs already received. The issue regarding funding and withdrawal of inputs does not arise. Funding required was for the maize crop for which he signed an option to pay form. When the defendant was cross-examined over funding of the wheat crop, he failed to explain why he did not refuse to sign the soya AOD as he had already received the funding. The fear that there would be a withdrawal of funding for the winter crop when funding had already been advanced is not realistic and reasonable. The fear, if any, was unreasonable

The defendant stated that he resisted signing the wheat AOD because there were no supporting documents. He testified that he was not able to say how much he owed because there were no records revealing how much wheat had been delivered to the plaintiff. The witness was evasive when giving information on the deliveries. When asked in cross examination if he had delivered on the wheat contract, his response was simply "I don't know", yet he was insisting that he was not given details of his deliveries. The plaintiff insisted that the defendant would have known the amounts owing as he would have been be issued with statements at intervals.

The defendant testified under cross-examination that he was later able to get proper statements of account. He refused to answer a question regarding how much he owed the plaintiff. The witness did not fare well. He said that he signed because he was threatened with withdrawal of funding for the maize crop. The defendant failed to explain why the plaintiff would want to withdraw funding for a crop to which it had already committed a large chunk of funding. The maize had already been grown. There seems to be no logical explanation why the plaintiff would want to withdraw funding for the crop as it would also incur losses. He was elusive when asked why he would be given three documents if he was required to sign only one, the witness simply refused to answer the question. It is unlikely that the defendant would be forced to sign the wheat AOD in his own backyard in the presence of his own son and employee.

The defense witness did not make the defendant's version of the signing of the wheat AOD any better. Mr. Mubhamuri was unable to say that he witnessed the defendant sign the AOD and that he did so under duress. He acknowledged that he did not witness the actual signing of the AOD. He was not at the place where discussions were taking place. Initially he said he was 2 – 3 meters away. Later he said he was involved in buying pipes on the field. His attention was elsewhere. He would have been moving around the field. He conceded that he did not hear the entire conversation and did not witness the entire signing. He was unable to say whether the parties eventually reached agreement over the signing. The testimony of the witness is not reliable and does not advance the defendant's case. What his testimony raises questions regarding whether the defendant signed the document under duress and places dents onto the defendant's case. It is interesting that the defendant's son who was with him would fail to hear the same conversation.

By signing the options to clear debts for the two crops, the defendant acknowledged that he still owes the defendant and promised to pay in the future. Interestingly however, he would not say how much he owed. If the defendant had been pressured to sign the AODs, then he should have refused to sign the options to clear debts forms whose purpose it was to manage the debts. He does not assert that he was forced to sign these. His defense that he owed nothing or that he did not owe anything has no merit.

All the defendant was required to do was to acknowledge what he owed, undertake to pay before more funding was released. This seems to me to be a normal and fair business transaction

where a creditor simply through an accepted method was trying to recover what was due to it. Business people who take loans should always do so mindful of the fact that they will one day be required to pay back. It has become highly fashionable to try to wriggle out of debt re-payments by playing victim and challenging AODs on the grounds of duress and undue influence. Courts will not sanction such energy unless a person who has penned his signature to an AOD can convince the court that he was forced or threatened to sign the document. An examination of the requirements of economic duress, reveals that the defense raised is not sustainable. If the defendant was pressured, and was uncomfortable signing the AODs, he was required to refuse to sign them and insist on seeing the statements and supporting documents first. The defendant never took any steps to avoid the AODs at the signing stage. The defendant could have complained to the police or sought assistance of his employees to ward off the plaintiff's representative at the time of signing the wheat AOD. He had a viable course of action open to him after the signing, which was to institute proceedings to declare the AODs invalid and set them aside. The defendant did not take steps to avoid the forced AOD, only to do so months later. He has failed to meet the requirements of economic duress. The concept of *caveat subscriptor* fully applies to the circumstances of this case.

Looking at the requirements of duress generally, I see no basis for the defendant's fear especially with the soya AOD. Evidence was led to the effect that he has a family which is dependent on the farming activities. The threats alluded to are not threats that were imminent or an inevitable evil to his person or family. He signed the options to clear debts forms which meant that the plaintiff was not taking any action against him at that stage for the failure to pay. He was given time to pay. The fear alluded to is not reasonable and not *contra bonos mores*. The defendant was merely asked to acknowledge that he owes which is normal and he did so. At no time did the defendant state that he was threatened with force to sign the AODs. His assertion that he signed the AODs under duress does not find support on the evidence. I view the signing as ordinary commercial transactions where the defendant was signing simply to unlock further funding. The plaintiff's version is more probable. The defendant has failed to discharge the onus on him to show that he signed the AODs under duress or any undue influence. The plaintiff is entitled to the order sought.

Accordingly, I grant the following order;

Judgment is granted in favour of the plaintiff and the defendant is ordered to pay the following,

- a) The sum of US\$26 528-12 being monies advanced to the defendant in respect of wheat; and
- b) Penalty interest on this amount at the rate of 14% per annum from 1st December 2013 to date of payment in full; and
- c) The sum US\$38 402-03 being monies advanced to the defendant in respect of soya beans; and
- d) Penalty interest on this amount at the rate of 10% per annum from the 1st of August to the date of payment in full;
- d) Costs of suit

Scanlen & Holderness, plaintiff's legal practitioners
Madotsa & Partners, defendant's legal practitioners