

ANTONIO DOS SANTOS  
**versus**  
MARGARET SIKHUNDLA  
and  
THE ESTATE OF THE LATE JOSIAH SIKHUNDLA  
and  
GWANDA RURAL DISTRICT COUNCIL N.O  
and  
DEPUTY SHERIFF BULAWAYO N.O

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 16 MAY 2018 AND 14 JUNE 2018

### **Opposed Application**

*Ms M N Sibanda* for the applicant  
1<sup>st</sup> & 2<sup>nd</sup> respondents in person

**MATHONSI J:** The applicant is a businessman who has been operating a bottle store known as Lumene Bottle Store located at Glass Block Lumene in Gwanda since 2001 in terms of a written agreement of sale signed between himself and the first respondent, who is the widow of the late Josiah Sikhundla who died on 2 June 1989. He has made an application for an order compelling transfer of the said bottle store to his name in terms of the sale agreement he entered into with the first respondent.

The applicant's case is that the first respondent, as the heiress to the estate of her late husband and therefore entitled to inherit the bottle store in question, after some of the deceased's property had been dealt with when the estate was administered, sold her rights, title and interest to her for \$80000-00. She attached to her founding affidavit the agreement signed by the parties on 9 May 2001. It is short and to the point;

“09/05/2001

I Mrs M Sikhundla being the wife of the late Mr Josiah Sikhundla of Plot 10 Esigodini is selling my Bottle Store at Glass Block Lumene in Gwanda. I have received the sum of \$80000 from A. B Dos Santos of No 3 Red Stone Drive Riverside Bulawayo. We are

hoping to conclude the transfer as soon as possible. Together with my son Bowness Sikhundla we have received \$80000, eighty thousand dollars, from A. B Dos Santos.”

It was signed by the parties including Mr B. Sikhundla. The applicant stated that he paid the full purchase price but despite demand, the first respondent has neglected to effect transfer to him. In fact he has, on several occasions, been approached by the first respondent’s daughter with a request that the purchase price be increased given that it had been paid in Zimbabwe Currency. He has not acceded to that request as he holds the first respondent bound by the agreement they entered into. Meanwhile, as owner of the property he has effected improvements on it.

The applicant denied that when the agreement was signed the first respondent was under any form of duress particularly bearing in mind that, not only did she not disclose that to the applicant, she has never reported that to the police since 2001. The applicant has enjoyed peaceful and undisturbed possession of the property all this time. Assuming the first respondent was indeed afraid of her son Bowness during his lifetime, she had nothing to be scared of after his death on 1 November 2002. She should have taken up the matter after that but has held her peace for several years only to allege duress in response to this application.

The application is opposed by the first respondent who has raised conflicting defences. Initially the first respondent stated that the heir to her late husband’s estate was her son Bothwell Sikhundla. She attached a certificate of heirship issued by the Customary Court at Esigodini on 18 October 1989 showing that indeed Bothwell Sikhundla was listed as heir to the estate. What is however apparent from the first respondent’s papers is that the Customary Court abandoned the process of administering the estate in terms of customary law upon realizing that the first respondent and the late Josiah Sikhundla had a registered civil marriage. It then transferred the estate to the office of the Assistant Master of the High Court.

What is also indisputable is that Bothwell Sikhundla did not inherit the Bottle Store because it is common cause that it is still registered in the name of the deceased at the Gwanda Rural District Council offices. Upon realizing the frailties of that defence the first respondent tried another one. She alleged that the applicant and her son Bowness Sikhundla threatened her in 2001 into signing a document whose contents she was not aware of and that she did not receive the purchase price.

In written heads of argument filed on the date of the hearing the first respondent submitted that she did enter into the sale agreement with the applicant but it is voidable at her instance because it “was fraudulently signed in her name,” was signed under duress and undue influence and was made effective against her son who lacked capacity because he abused alcohol. It does appear that the first respondent will say anything in order to side-foot the consequences of the sale agreement.

The starting point is that the first respondent signed the agreement of sale herself. The *caveat subscriptor* rule therefore applies to her. The following passage in the learned author R. H Christie’s book *Business Law in Zimbabwe*, 2<sup>nd</sup> edition, Juta & Co Ltd at p67 is seminal and has been quoted with approval in a number of cases:

“The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprise would become hazardous in the extreme. The general rule, sometimes known as caveat subscriptor rule, is therefore that a party to a contract is bound by his signature whether or not he has read or understood the contract.”

See also *Oasis Medical Centre (Pvt) Ltd v Beck & another* HH 84-16; *Fusire v Chitoro* HH 15-16.

Apart from that, our courts have always upheld the parole evidence rule. Its principle was explained by WATERMEYER JA in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at p47 (which was quoted with approval by our Supreme Court in *Nhundu v Chiota and Another* S-28-07) in the following words:

“Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.”

The first respondent has alleged duress but does not even give particularity to that claim. She suggests that her son Bowness threatened to kill her and then commit suicide if he had not signed the agreement of sale. In examining that it is prudent to bear in mind that the onus is on the coerced party to prove duress. In order to establish duress the first respondent must satisfy all its requirements namely actual violence or reasonable fear; the fear must be caused by the threat of harm to the party; the intimidation must be unlawful or unjustified and the threat must

have resulted in prejudice or damage of some kind. I am not persuaded that the requirements have been met in this case.

In any event, if indeed Bowness had put the first respondent under duress to sign the sale agreement, she would have taken steps to seek redress a long time ago. Bowness, the source of the threat and duress, died in 2002. This application was filed on 28 February 2011 and by then the first respondent had not taken any measures against an agreement she alleges she had been coerced to sign. Quite to the contrary, the applicant had been allowed to occupy the bottle store while effecting visible improvements throughout that period. No attempt was made to reverse the sale at all. Even in the present application, there has been no counter application seeking a cancellation of the agreement. The first respondent's lack of *bona fides* is there for all to see.

What appears to be the case is that the first respondent sold the bottle store which she inherited from her late husband which is located at a rural business centre. The applicant paid for it and took occupation maintaining a presence there without taking transfer, itself not an unusual occurrence in a rural set up. Much later when the applicant asked for transfer the first respondent and her children felt hard-done by considering that she had been paid in Zimbabwean currency. It appeared like a pittance in light of dollarization and the first respondent then saw an opportunity to claim more money by withholding transfer. This court cannot come to the aid of a party seeking to resile from a binding agreement no matter how unfair the terms may be. See *Magodora and Others v Care International Zimbabwe* 2014 (1) ZLR 397 (S). The first respondent is bound by the agreement.

In the result, it is ordered that:

1. The agreement of sale between Margaret Sikhundla and Antonio Dos Santos is hereby confirmed.
2. The first respondent shall sign all documents necessary to effect transfer of Glass Block Lumene Bottle Store situated in the District of Gwanda to the applicant within 10 days of the grant of this order.
3. In the event of the first respondent's failure to comply with paragraph 2 above, the Sheriff for Zimbabwe or his lawful deputy is hereby authorised and directed to sign the said documents for and on behalf of the first respondent.

4. The first respondent shall bear the costs of suit.

*Vundhla-Phulu & Partners*, applicant's legal practitioners