EUGENE MLAMBO
versus
TAKAIDZA MUPFIGA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22, 23 & 27 January 2014 &19 February 2014

**Civil trial**

*J.R. Tsivama,* for the plaintiff
*T. Moyo,* for the defendant

**MAFUSIRE J**: This was a debt collection matter. In simple terms, and in outline form, the plaintiff claimed payment of an amount of ninety five thousand United States dollars (US$95 000), together with costs of suit on an attorney and client scale and interest on the capital amount at rates charged from time to time by Stanbic Bank of Zimbabwe. The claim was based on a set of liquid documents, an acknowledgement of debt and a deed of pledge. The plaintiff also sought an order authorising him to sell two Mercedes Benz motor vehicles. These vehicles were under his custody and control. The defendant, according to the plaintiff, and to the written deed, had pledged them as security for the debt. To avoid the liquid documents the defendant pleaded duress.

In the acknowledgement of debt the plaintiff was described as the creditor and the defendant the debtor. Clause 1 read as follows:

> "1. TAKAIDZA MUPFIGA of Harry Pitchanick (sic) Drive, Alexandra Park, Harare acknowledges that he is truly, lawfully and unconditionally indebted to the Creditor, for (sic) the sum of US$95 000.00 (ninety thousand (sic) United States dollars) being the value of a motor vehicle namely a Land Cruiser 100 series which the debtor sold on behalf of the creditor and converted the proceeds of the sale to his own use."

Despite the difference between the amount in figures and that in words it was common cause that the correct sum was US$95 000.

Both the acknowledgement of debt and the deed of pledge were standard documents typical in the world of commerce. Among other things, in terms of the acknowledgement of debt, the debtor would repay the debt in instalments. There was the usual acceleration clause

in the event of a breach. The debtor had renounced the benefit of some legal exceptions, including that of *non causadebiti* (no cause or reason for the debt). And in the event of legal proceedings the debtor would pay all the costs incurred by the plaintiff on an attorney and client scale, collection commission and any tracing charges.

In the deed of pledge the defendant pledged and delivered to the plaintiff, as security for the debt, the Mercedes Benz motor vehicles aforesaid. Repeating some of the clauses in the acknowledgement of debt such as the liberty to repay in instalments; the acceleration clause in the event of a default, and the issue of costs on a higher scale, the deed of pledge, among other things, obliged the debtor to insure the vehicles. The defendant had also declared himself the legal owner of the vehicles. The relevant clause on that read like this:

> "4. I declare that I am the owner or legal holder of the pledged articles and that no other person has any interest in or right to the pledged articles. The pledged (sic) article is not subject to any right of retention or other limitation or encumbrance and may be pledged and delivered by me without any limitation."

**(a) <u>THE EVIDENCE</u>**

The story behind the acknowledgement of debt and the deed of pledge (hereafter referred to as "**the claim documents**"), as told by the plaintiff, was that he was the chief executive officer of a finance group called Tetrad; that the defendant was someone known to him; that sometime in October 2007 he had arranged with the defendant for the latter to dispose of his Toyota Land Cruiser motor vehicle,100 series (hereafter referred to as "**the Toyota 100 series**") whose proceeds the defendant would use to procure an upgraded vehicle of the same make but with an Amazon specification to it (hereafter referred to as "**the replacement vehicle**"or "**the Toyota Amazon**") ; that in pursuance of that arrangement the defendant had sold the Toyota 100 series for the equivalent of US$105 000 but which amount the defendant alleged had subsequently depreciated to US$95 000 owing to a delay in payment; that in spite of the plaintiff acknowledging the depreciationof the sale proceeds the defendant had still failed to procure him the replacement vehicle and had eventually disappeared from the scene altogether for some time.

The plaintiff further testified that after frantic efforts over a period of some two or so years during which, in desperation, he had been communicating with one Chamunorwa Tsvakai, the defendant's agent and the one actually commissioned to procure the Toyota Amazon (hereafter referred to as "**Chamu**"), he had finally located the defendant with the assistance of some private investigators or tracing agents. The plaintiff had reported the

defendant to the police for theft by conversion. On 9March 2010 the defendant had been arrested and charged with contravention of s 113 of the Criminal Law (Codification and Reform) Act, [*Cap 9:23*, namely theft. The police had informed the plaintiff that the defendant had wanted to talk settlement. The plaintiff had engaged his lawyer, one Tatenda Mawere ("**Mr Mawere**"). The claim documents had been prepared. The defendant had signed them. The signing had been done in Mr Mawere's office in the presence of the defendant's own lawyer, one Succeed Takundwa ("**Mr Takundwa**"). Mr Takundwa had been engaged at the instance of Mr Mawere. Mr Mawere had insisted on a lawyer representing the defendant specifically to remove any suspicion of coercion.

Thereafter, the defendant had personally made arrangementsfor the delivery of the pledged vehicles to Tetrad's premises. At the defendant's request the plaintiff had offered drivers. There were now three vehicles, the Mercedes makes aforesaid and a Jeep Grand Cherokee vehicle (hereafter referred to as "**the Jeep**"). The Jeephad not been mentioned in the deed. But it had been part ofthe pledge. The defendant had assured the plaintiff that he owned the vehicles or that they were under his custody and control.There had been other vehicles. But the defendant had offered these three specifically.

The defendant had subsequently delivered to the plaintiff the registration particulars for all the vehicles. At the time of the trial, almost fours later, both the vehicles and their registration particulars were still in the plaintiff's custody and control.

The plaintiff's evidence concluded. The defendant had never paid a single instalment. Mr Mawere had made a follow up. The defendant had pleaded for more time. But despite being given more time he had never paid. Mr Mawere had issued summons. The defendant had pleaded duress. His defence was that he had been coerced by the police and Mr Mawere to sign the claim documents. He said he had been threatened with prolonged incarceration if he did not agree a settlement with the plaintiff and offersecurity for the debt. The defendant had counter-claimed for the cancellation of the claim documents and for the return of the vehicles.

The plaintiff called Mr Mawere. He corroborated the plaintiff's testimony in all material respects. He gave some more details on some aspects. He had come to the police station where the defendant had been held. This had been at the request of the plaintiff. He had not negotiated any settlement terms with the defendant. The parties had already agreed between themselves. His role had simply been to reduce the agreement to writing. Before he did he had confirmed the essential terms with the defendant. To avoid any suspicion of undue

influencelater onseeing thatthe defendant had been in police custody Mr Mawere had enquired from the defendant whether he knew of any lawyer that could assist him. The defendant had mentioned Mr Takundwa. Mr Mawere had immediately contacted Mr Takundwa on his mobile phone. He had apprised him of the matter. Mr Takundwa had agreed to speak to the defendant. Mr Mawere had handed over the phone to the defendant. The two had talked. It had finally been agreed that they would all meet at Mr Mawere's offices on the following day.

On the following day the claim documents had been executed in Mr Mawere's office. The defendant had been escorted to Mr Mawere's office by some police details. Mr Takundwa had initialled every page of the claim documents and had signed as a witness on the signature page. Thereafter, the police had taken the defendant back to the station to facilitate his release from custody. The registration particulars for the Jeephad been submitted much later.

Mr Mawere went on to state that when the first instalment under the claim documents had not been paid on the due date or at any time thereafter the defendant had called at his office and had asked for more time. It had been agreed to defer the payment date to the following month. But again the defendant had not paid. Sometime thereafter Mr Mawere had met the defendant by chance at some eating place in town. The subject of the plaintiff's debt had naturally come up. Again the defendant had asked for more time. On none of those occasions had the defendant ever indicated that he would be disowning the claim documents. He had never mentioned coercion or anything like that. When the defendant had not paid Mr Mawere had issued summons.

After Mr Mawere's testimony the plaintiff closed his case. The defendant opened his. The essential aspects of his testimony were that at no time prior to the execution of the claim documents had he agreed to owing the plaintiff US$95 000. Regarding the original arrangement, he had no more than offered to assist Tetrad, through the plaintiff, to upgrade the Toyota 100 series to the Toyota Amazon. He had been a mere fuel dealer. He had little knowledge about vehicles. He had merely introduced the plaintiff to Chamu. Chamu had been a car dealer. The plaintiff had then gone on to enter into an agreement with Chamu and to deal with him directly without any furtherinvolvement of the defendant.

The defendant said he had sold the Toyota 100 series to a local buyer for two hundred and thirty billion Zimbabwean dollars (ZW$230 billion). On the parallel market that amount had translated to US$105 000. However, there had been a delay by the buyer in making

payment. Due to the spiralling inflation at that time the purchase price had reduced to US$95 000 by the time the buyer had finally paid. On plaintiff's instructions US$80 000 of the purchase price had been transferred to Chamu. The defendant would retain US$15 000. This would be invested in the defendant's fuel business in order to raise the cash for the import duty required to be paid when the replacement vehicle would eventually arrive.

On Chamu's instructions the plaintiff had remitted the US$80 000 to an account domiciled in the United Kingdom belonging to Chamu's nominee. This had been done although the deposit could not immediately be traced. However, contrary to their agreement, the plaintiff was now dealing directly with Chamu. The old arrangement in terms of which the replacement vehicle had been specified as a Toyota Amazon had been abandoned. The plaintiff had now agreed with Chamu to import a Toyota Land Cruiser, 200 series motor vehicle (hereafter referred to as "**the Toyota 200 series**") or anS-class Mercedes Benz.

The plaintiff and Chamu had had further dealings together. Among other things, the plaintiff had engaged Chamu to import some motor vehicles for his family, including a Toyota Corolla for one of his children.

The defendant denied that Chamu had been his agent. He maintained that the plaintiff had entered into a separate agreement altogether with Chamu. He had not been a party to that agreement. He had just been kept abreast of developments by copies of their e-mail communication. His role had remained that of simply having to provide the US$15 000 for the import duty required for the replacement vehicle, whenever it would eventually arrive.Chamu had in fact successfully imported the Toyota 200 series for the plaintiff. However, Chamuhad eventually sold it elsewhere to defray expenses when the plaintiff had failed or declined to pay the commission that Chamu had demanded.

The defendant said that contrary to the plaintiff's claim, he had never abandoned his usual residence in Harare. The police had arrested him from that residence. Initially, the plaintiff had reported a case of fraud against him. However,the defendant had convinced the police that there had been no fraud. He had produced documents from Chamu showing that the replacementvehicle had been on its way. The police had released him. However, the plaintiff had subsequently reported another criminal case. It was nowthat of theft. He had been arrested. He had spent two nights in filthy, inhuman and degrading police cells. The police had threatened him with a longer and indefinite period of incarceration until Chamu was found. They would oppose any bail. However, if he agreed to settle with the plaintiff and "securitize" the debt they would release him.

Regarding the actual execution of the claim documents, the defendant said that he had been arrested in the morning of 9 March 2010 and had been detained at Avondale police station. He had been subjected to intense interrogation by the police on the motor vehicle transaction with the plaintiff. It had been put to him by the police that he either "securitised" the transaction or he would rot in jail. Around 4.00 pm he had been informed that the plaintiff had come to talk to him. However, he had later been told that the plaintiff would be coming back with his lawyer the following day. He had had to endure another night in the deplorable conditions of the police cells. The following day Mr Mawere had come together with the plaintiff. Mr Mawere had virtually repeated the police threats and had demanded security for the US$95 000 in the form of an immovable property. The defendant had told Mr Mawere that he had no immovable property or any other assets that he could pledge as security. Plaintiff had mentioned that the defendant operated a garage somewhere in town. It had then been agreed between Mr Mawere and the police that vehicles would be seized from that garage and pledged as security. The vehicles and their registration particulars had been seized on that day by the police and the plaintiff's agent.

On enquiry from Mr Mawere whether he knew of any lawyer,the defendant had mentioned Mr Takundwa. Mr Mawere had spoken to Mr Takundwa on the phone and had handed the phone to him. Mr Takundwa had never asked anything about the transaction. He had suggested that they all met at Mr Mawere's office on the following day.

At Mr Mawere's office on the following day Mr Takundwa had never spoken to the defendant separately. The defendant had been brought into the office under police custody. The police details had remained in attendance throughout the execution of the documents. Mr Takundwa had signed the claim documents merely as a witness and not as the defendant's lawyer.

After the execution of the claim documents the defendant had been taken back to the police station and eventually released. He had disregarded the claim documents because he had signed them under duress.

In cross-examination the defendant stated that he had sought legal advice from an attorney called Farai Mutamangira ("**Mr Mutamangira**"). Mr Mutamangira had advised him to ignore the claim documents. On further questioning the defendant said that Mr Mutamangira had written a letter of complaint to the police general headquarters on the conduct of the police details involved. However, nothing had come of it. The letter was not produced at the trial.

The defendant highlighted that the only amount he had ever admitted to owing the plaintiff over that transaction had only been the US$15 000 being for the import duty for the replacement vehicle. The whole transaction had been for Tetrad, and not the plaintiff. The plaintiff had known that the defendant would be sourcing foreign currency on the illegal parallel market in order to consummate the deal. The plaintiff had been content to play along. That the plaintiff or Tetrad had got no vehicle had been the plaintiff's fault. He had failed to pay Chamu's commission or the extra costs required for the replacement vehicle. Chamu had ended up selling the vehicle. The defendant was no longer in touch with Chamu. But he himself could not be held liable for the US$95 000 because the claim documents were unenforceable by reason of duress. Nor could he be held liable on the basis of the original agreement. The plaintiff had cancelled it and had entered into a new deal with Chamu directly.

The defendant also stressed that he had not voluntarily surrendered the vehicles. The two Mercedes Benz vehicles belonged to his customers. He ran a motor vehicle repair business with someone else. The case had caused him enormous difficulties with the owners of those vehicleswho were demanding them back. The Jeep belonged to his former employers in South Africa. It had been in his garage for repairs. It was not even registered in Zimbabwe. It had been brought in on a temporary import permit one of whose conditions forbade the sale, pledge or disposal of the vehicle in any way before the expiry of two years unless duty had been paid for it. Nonetheless the police, on plaintiff's instructions, had just seized those vehicles even before the repairs to the Jeep had properly been completed.

The defendant called no witnesses. After his evidence he closed his case.

(b) **THE ISSUES**

The mainpoint for determination is whether the claim documents are valid and enforceable or whether they are void by reason of duress. If the claim documents are valid and not void that should dispose of the whole issue of liability. However, if the claim documents are invalid the next consideration is whether the plaintiff can nevertheless rely on the transaction or the agreement behind those documents.

I must point out that right at the onset of the trial, having seen that the plaintiff's claim was wholly and solely predicated on the claim documents, I enquired from counsel whether in fact that was the case. Mr *Tsivama* was quite bullish. He confirmed that indeed the plaintiff's case would fall or succeed on the basis of the claim documents. He said he was

confident that the evidence would clearly establish that the defendant had signed the claim documents freely and voluntarily and that there would be no question of the defence of duress succeeding. I could not help but feel what a gamble the plaintiff was taking. For he who makes himself a bed of roses must lie on it. As CHATIKOBO J put it in *Matibiri* v *Kumire*[1] when dismissing the plaintiff's case therein which had wrongly been based on the concept of a universal partnership:

> "It may well be that if the plaintiff had identified a suitable cause of action, she could have obtained some relief. She nailed her colours to the mast of the concept of a universal partnership, the existence of which has not been established."

However, *in casu* it seems plaintiff subsequently reconsidered his position. In the closing submissions Mr *Tsivama* changed tack and stated as follows in clause 12:

> "12. In the event that this Honourable Court is still of the view that the defendant signed the acknowledgement of debt under duress it is the plaintiff's respectful submission that the issue of the contract between the parties and which gave rise to the present claim was fully canvassed in evidence so as to enable this Honourable Court to make a finding on it."

I have to dwell on this point a little more and get it out of the way. In the event that I set aside the claim documents, can the plaintiff nevertheless revert to the original transaction or agreement between the parties and claim a refund of the US$95 000? Can he do that when he has neither pleaded that contract nor sought to amend his pleadings in the light of the evidence adduced?I have come to the conclusion that in spite of his blowing hot and cold it seems the plaintiff can. The courts are not made for the pleadings. Rather it is the pleadings that are made for the courts. As INNES CJ put it in *Robinson* v *Randfontein Estates GM Co Ltd*[2] :

> "The object of pleading is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion, for pleadings are made for the court, not the court for the pleadings, and where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

[1] 2000 (1) ZLR 492, at p 502A - B
[2] 1925 AD 173 at p 198

In *Moyo& Another* v *Intermarket Discount House Ltd*[3], the Supreme Court adopted the same approach. At p 272G – H ZIYAMBI JA stated as follows:

> "As Mr *Andersen* submitted, it was clear on the record that there were no further facts requiring investigation and that the legality or otherwise of the acknowledgement of debt was fully canvassed in the court *a quo*. Indeed, there was no suggestion by the appellants that there were any further facts which required investigation. Thus the court a quo had before it all the facts which were necessary to determine the real issue which arose before it …"

Essentially the same position had been adopted in the case of *Middleton* v *Carr*[4]. At p 272C – E in the *Moyo* case the learned judge of appeal quoted with approval the remarks of SCHREINER J at page pp 385 – 6 in *Middleton* v *Carr*, *supra*,:

> "… as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court."

In this case, in the event that I find for the defendant on the issue of duress, there will be no injustice or prejudice if I proceed to consider the validity of the transaction behind the claim documents. This is so for a number of reasons. Firstly, the claim documents themselves, particularly the acknowledgement of debt, expressly alluded to that transaction. Secondly, the defendant's own pleadings dealt with that transaction. Thirdly, and most importantly, the transaction was extensively canvassed and ventilated in evidence.

Furthermore, and at any rate, whether or not I find that the claim documents were voidable it seems I still have to determine the validity of the transaction behind them because the defendant, in evidence, essentially said that that transaction was in violation of the exchange control regime in force at the time. He said the plaintiff had known very well that in order for him to consummate or perform that transaction he had had to trade on the "black" market, euphemistically called the parallel market, for the necessary foreign currency. It is trite that courts do not enforce illegal contracts or contracts in *fraudem legis*. It would be contrary to public policy to do so.

The nature of this case and the manner the issues were canvassed during trial inevitably requires me to first consider the transaction behind the claim documents before I

[3] 2008 (1) ZLR 268 (S)
[4] 1949 (2) SA 374 (A)

consider their validity. The defendant said he had been absolved from the obligation to procure the replacement vehicle when the plaintiff had entered into a separate arrangement with Chamu and that at no stage prior to his arrest by the police on 9 March 2009 had he acknowledged liability for any amount in excess of US$15 000.

**(i) <u>Whether the defendant was ever absolved from the responsibility to procure the replacement vehicle</u>**

The defendant's argument was that by causing his arrest, and coupled with the threats of a prolonged and indefinite incarceration by the police and by Mr Mawere, the plaintiff had induced him to admitor to acknowledgeowing a whopping US95 000 thereby exacting or extorting a reward or benefit to which the plaintiff was otherwise not entitled.

During the trial reference was made to some of the contemporaneous communication between and amongst the parties and Chamu. One such was a letter dated 16 January 2009 from Tetrad's attorneys at the time, Mambosasa, to the defendant. It was a kind of a confirmation of an agreement reached between the parties, the attorneys and Chamu at a meeting that had been held on the previous day. During trial there was repeated referenceto paragraph 1 of the letter which I highlight. The letter read as follows:

"**<u>RE: TETRAD AND YOURSELF & CHAMUNORWA TSVAKAI</u>**

The above matter refers. We address you at the instance of Tetrad and confirm holding a meeting yesterday afternoon at Tetrad and in attendance were yourself, MR CHAMUNORWA TSVAKAI, MR EUGENE MLAMBO and the writer. Minutes of same are confirmed as follows:

1. **You confirmed that you sold a Toyota Landcruiser 100 series on behalf of our client about a year ago and you remitted part of the proceeds to MR CHAMUNORWA TSVAKAI in order for him to purchase a Toyota landcruiser Amazon on behalf of our client. You remained with US$15000**

**which you were to invest for purposes of ensuring that the vehicle lands in Harare at no extra cost from our client**.

2. ***Your agent MR CHAMUNORWA TSVAKAI*** confirmed that he managed to secure a Toyota Landcruiser 200 series from New Zealand and same as since been shipped to Durban, South Africa. A copy of the bill of lading ***from your said agent*** shows that the vehicle was dispatched from New Zealand on 22nd December 2008 and the freight company in charge of the consignment is Access Freight of 401 Edwin Swales Drive, Rossburg 4094, Durban, South Africa.

3. ***Your agent*** further confirmed that any authorised representative of our client can verify the presence of the vehicle in Durban by 1100 hours on 16th January 2009.

4. You confirmed that you are liable to pay customs duty to ZIMRA in respect of the vehicle in question albeit pointing out that you will be liquid about mid February 2009.

5. MR EUGENE MLAMBO highlighted how the transaction has compromised his position with our client. ***He also pointed out that client expects the car at no extra cost as agreed upon transacting***.

May you confirm the above as true and correct by affixing your signatures on spaces provided hereunder" (my underlining).

The defendant had signed the letter but Chamu had not. It was the argument on behalf of the defendant that his obligation had at no stage prior to his arrest been to the plaintiff but to Tetrad and that it was only after the involvement of the police that he had wokenup owing the plaintiff. It was also the defendant's argument that his agreement with the plaintiff or Tetrad had subsequently been cancelled and had been replaced by one between the plaintiff and Chamu to which he himself was no longer a party.

The defendant's arguments are illusory. It was the plaintiff's evidence that Tetrad had ceded its claim in respect of the vehicle to the plaintiff. The replacement vehicle was being

procured for his use. It was the plaintiff who had a direct interest over it. That evidence was not challenged.

In my view the letter of 16 January 2009 aforesaid was hardly confirmation that the extent of the defendant's liability at that stage was only US15 000. Nor did that letter absolve him from his liability in respect of the entire proceeds of the sale of the Toyota 100 series. The underlined portions show that Chamu had remained no more than the defendant's agent. The defendant's original obligation had remained. He had to procure the replacement vehicle. He would look for no further payment from the plaintiff either for the purchase price or for the import duty which, in all probabilities, would exceed the US$15 000 that he had retained.

The evidence established that the defendant had linked Chamu with the plaintiff so that the plaintiff could supply the exact specifications of the replacement vehicle.That, in my view, did not terminate defendant's mandate.

Furthermore, that the plaintiff dealt with Chamu purely as the defendant's agent is plain from a seriesof the other letters written on behalf of Chamu by his legal practitioners at the time, T. H. Chitapi & Associates ("**Chitapi**"). Little or no attention was paid to these letters during trial. They unequivocally rebutted the notion that there had been a separate agreement between Chamu and the plaintiff. I highlight those letters.

In response to the letter of 16 January 2009 aforesaid, Chitapi had written to say Chamu had not signed that letter because he had taken it merely as one for information purposes since "***… there is no privity of contract between him and your client, …***"

On 20 January 2009 Tetrad's attorneys had written back to Chitapi, *inter alia*, insisting that Chamu could not be absolved from the agreement between the plaintiff and the defendant who they described as Chamu's "***principal***". Chitapi had responded on 13 March 2009 denying that Chamu had "***…ever expressly or impliedly [accepted] any liability … on the contract between Mupfiga and your said client***."

Then on 11 May 2009 Chitapihad written directly to the defendant. He had demanded from the defendant payment of the various sums of money that Chamu had allegedly incurred in respect of the replacement vehicle. The amounts were said to include the balance of the purchase price, port charges in South Africa, import duty and freight charges. The letter contained the following:***"Further our client is constantly being engaged by Tetrad <u>despite the fact that you and not our client are contracted to the Tetrad Group</u>.***" (my underlining).

The letter ended by making a formal demand for payment from the defendant or else the vehicle, which was said to be held at the Durbanport in South Africa, would be sold to

defray expenses. And there was this: "***In such event our client reserves the right to either refund the funds you paid to him or source and allocate another unit to yourself***." Of course, the funds referred to were the US$80 0000 from the proceeds of the plaintiff's Toyota 100 series.

There was no evidence that at any stage the defendant ever refuted the claim that Chamu had been his agent. Therefore it could only be to the defendant that the plaintiff could legitimately look up to for a refund of his money.

Furthermore, and as stated earlier, at no stage prior to the defendant's arrest could it be said that the defendant had absolved the defendant from liability in respect of the entire proceeds from the disposal of the Toyota 100 series. E-mail exchanges between the parties from about September 2008 to January 2009 showed that, contrary to the defendant's assertion, both he and the plaintiff had been of the same mind on that point.He had remained the person with the primary responsibility to deliver the replacement vehicle. The evidence established that the plaintiff may have been prepared to accept from Chamu alternative vehicles such as a Toyota 200 series or a Mercedes Benz, S-class vehicle. However, that had not detracted from the fact that it was the defendant who had remained liable. A sample of some of the e-mails will help to illustrate the point:

- On 14 January 2009 the defendant wrote to the plaintiff essentially pleading for patience and understanding given his parlous financial position. He proposed some quicker way to arrest the spiralling port charges at Durban whilst he chased up payment from his other deals.

- The plaintiff responded by flatly turning down any suggestion that he or Tetrad could ever be expected to bail him out. This e-mail, on 14 January 2008 which was from the plaintiff to the defendant and copied to Chamu, was extensively highlighted by both parties during trial. It is necessary to reproduce it full:

  "Taka,

  What you are suggesting is totally unworkable. ***You are the last person to absolve yourself from this transaction***. Let me remind you that you are the one who is responsible for where we are. Over a year ago you are the one you (sic) undertook to sell the Tetrad Land Cruiser, not only did you sell the vehicle ***but you also commissioned your brother Chamu to buy the replacement vehicle*** which we agreed

at the time would be a Toyota Amazon. I still remember at the time that you sold the Land Cruiser for over US$100,000-00. You then subsequently delayed sending these funds to your brother. Apart from that your brother still claims you never sent him all the US$85,000-00 that you say you sent him. I spoke to Chamu this morning, he still insists that you have not given him the agreed funds. To make matters worse your brother also abused the funds that you sent which resulted in huge delays to the delivery of the vehicle. More than a year later Tetrad are no longer getting an Amazon but a Land Cruiser which was not the original agreement. Fine, let Tetrad accept a land Cruiser ***but you cannot by any stretch of the imagination seat (sic) there and absolve yourself of your huge responsibility of ensuring this vehicle is cleared and delivered to Tetrad. Claiming you have no funds is not an acceptable excuse. You caused the delays and you never ever fully accounted for all the funds from the sale of the original sale (sic) of the Land Cruiser***. Life is not that simple. That apart Taka, you went off to South Africa in early December, I visited and called your office on numerous occasions leaving messages for you to call me. I also asked Chamu to pass on the same message. This is the first time I have heard from you which is through this e-mail, not even the decency to call me back" (my emphasis).

- On the same day at 5: 08 the defendant had responded. He explained the developments beginning with the disposal of the Toyota 100 series in Zimbabwean dollars, the conversion of the proceeds into foreign currency on the parallel market; the remittance of part of the proceeds to an account in the United Kingdom and his retention of the US$15 000 meant for duty. He implored that the replacement vehicle be moved to avoid "*another looming complication*". He ended as follows: "***I am not absolving myself from the situation I just do have the desired solution***."

- Earlier on, that is on 15 September 2008, there had been an exchange of e-mails between the plaintiff and Chamu in which the plaintiff had evinced an intention to accept an S-class Mercedes Benz vehicle if it was now the one available as the replacement vehicle. The plaintiff had also indicated a willingness to clear the duty for this vehicle. Chamu had confirmed that such a vehicle had been available. However, apparently nothing had come of this development. On 23 September 2008

the plaintiff had gone back to the defendant complaining about his unwillingness to resolve the matter.

It was from such communication that the defendant was claiming he had been absolved from his responsibility to deliver the replacement vehicle. Clearly he was not.I find that he and his agent, Chamu, had driven the plaintiff to the point of desperation. They had sent him on a wild goose chase. It is from that background that I have to analyse the validity of the claim documents against the defence of duress.

(ii) **Whether the defendant signed the acknowledgement of debt and deed of pledge under duress.**

Duress or coercion, in jurisprudence, is where someone performs an act as a result of violence or threats of violence or some other pressure. In the law of contract, duress, or *metus*, relates to a situation where someone enters into an agreement as a result of threats. Such a contract is voidable at the instance of the aggrieved party. Consent which is a result of coercion is not true consent: see *Broodryk* v *Smuts NO* 1942 TPD 47 at p53 and*Arend* v *Astra Furnishers (Pty) Ltd* 1974 (1) 298 (C) at p 305 – 306.

Where a party seeks to avoid a contract on the basis of duress he or she must establish five elements. These are:

1. That the fear was a reasonable one.

2. That the fear was caused by the threat of some considerable evil to that party or his family or property.

3. That the threat was that of an imminent or inevitable evil.

4. That the threat or intimidation was unlawful or *contra bonos mores.*

5. That the moral pressure used caused damage.

See *Arend's* case, *supra,* at p 306A – C and *Machanick Steel & Fencing (Pty) Ltd; Machanick Steel & Fencing (Pty) Ltd* v *Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265

(W). See also RH CHRISTIE: *Business Law in Zimbabwe*, 2nded, at p 83, and the cases referred to therein.

In my view, the five elements above are considered cumulatively. A contract that is induced by threats of a criminal prosecution may be set aside. The signature on a liquid document that is procured by reason of such threats may render the document unenforceable. Such a threat may be illegitimate. It may be *contra bonos mores*. It may amount to the crime of compounding. A person who is legally entitled to lay a criminal charge against another does no legal wrong in bringing the charge. However, it is *contra bonos mores* for him to resort to a criminal process, or to threaten to resort to it in order to induce a promise for the payment of a private debt; see the passages from WESSELS: *Law of Contract*, 2nded, s 186, quoted by CORBETT J in *Arend's* case, at p 306 – 307. In *Arend's* case it was found that an acknowledgement of debt had been induced by an illegitimate threat of a criminal prosecution and was therefore unenforceable.

Compounding is an offence. It refers to an agreement to stifle a prosecution in return for a reward. Such conduct stifles the proper administration of justice; see FARLAM AND HATHAWAY: *Contract: Cases, Materials and Commentary*, 3rd ed. at p 364. In the context of contracts induced by threats, compounding relates to the linking of one's right to recover one's private debt to the right to bringing a public prosecution for the crime committed by the debtor. The test in determining the validity of an acknowledgement of debt procured under a threat of a criminal prosecution is whether by such a threat the creditor exacted or extorted something to which he was otherwise not entitled. In the *Machanick Steel* case NESTADT J noted the differences in approach among the various provincial courts in South Africa. I refer to a passage on p 273 of his judgment which helps to shed some light on the problem:

> "A compromise approach seems to be that adopted in *Ilanga Wholesalers* v *Ebrahim& Others* 1974 (2) SA 292 (D) in which it was held that where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which was due, the creditor does not act *contra bonos mores* in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these circumstances he is doing no more than exercise his legal rights. Where however, the creditor does not know and probably cannot establish the amount of the debtor's indebtedness, it is an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. No doubt,

even where the creditor does not know the exact amount stolen he is fully within his legal right in threatening to prosecute the debtor, but to use the threat of such proceedings to extort an undertaking to pay an amount which he knows he cannot prove to be due in a court of law constitutes an abuse of his legal rights."

Thus the threat of an arrest or of a criminal prosecution to induce a promise to pay that which was due is not *contra bonos mores*. It is the threat to extort a promise to pay that which was not due or was unknown which is illegal. Such an approach is one that commends to me. It is one I wish to adopt. It seems also to be the same approach recommended by the learned author CHRISTIE in his book above. At p 83 he says:

"Much less easy to decide is the question whether the signatory of a promissory note or IOU can resist a claim brought on it by proving that he was induced to sign by a threat to prosecute him for theft (of the amount recorded in the document) if he did not sign. The question whether such a threat is unlawful is linked with the question whether it amounts to a compounding of the theft and whether it causes damage to the party threatened. The answer to these questions is not settled, **but the argument that ought to be decisive is that although the debtor has worsened his position by signing the promissory note or IOU he has not worsened it as much as if he had responded to the threat by paying what he owed in cash, and if he had done that he could have had no complaint**" (my underlining).

It should be often the case that an acknowledgment of debt induced by a threat of an arrest or a criminal prosecution gives the creditor a reward or an advantage to which he may otherwise not have been entitled. Some of the more obvious and common rewards or advantages may be:

1. That the creditor removes or minimises the burden of proof on him in that where he would have had to prove liability and quantum he would now merely have to produce the liquid document which often speaks for itself.

2. That with regards to quantum in particular, where there was some doubt or dispute as regards the actual amount allegedly due,whether as capital or as interest and

other charges, or both, the liquid document would settle all that, even together with the issue of the costs of suit.

3. That a typical acknowledgement of debt would have an acceleration clause where, among other things, in the event of a default the entire balance of the amount outstanding at the time of the default would become immediately due and payable.

4. That the benefits of the legal exceptions such as *non causa debit* would inevitably be renounced by the debtor.

5. That the liquid document would give the creditor the advantage of proceeding to recovery by way of summary procedures such as provisional sentences or summary judgment applications.

The above list is by no means exhaustive.

In the present matter, even though the defendant vehemently denied that he had at one time disappeared from the scene, the evidence did not bear him out. He had secured a job in South Africa where he had worked for some period. The Jeep was said to belong to his employers from there. I find that he had indeed disappeared for some time. The significance of this detail is that given the manifest breach of his mandate, the plaintiff had been within his rights to have reported him to the police for theft. In terms of s 113 of the Criminal Law (Codification and Reform) Act, *Cap 9: 23*, theft covers the failure to account for trust money. It covers the use of trust money for a purpose other than that to which it was supposed to have been used. It covers the conversion of trust money to one's own use. The proceeds from the sale of the Toyota 100 series were undoubtedly trust money. Therefore, by reporting the defendant for theft, the plaintiff was no more than exercising his rights.

In my view, there was no illegitimate pressure that was exerted on the defendant to induce him to sign the claim documents. The police did not hold him in custody for any period longer than that permitted by law. In cross-examination the defendant conceded that the alleged threat by the police to hold him indefinitely had been no more than their warning to him that they would oppose bail unless Chamu was accounted for. I find nothing *contra bonos mores*. It is something common place. Where an accomplice suspect is still unaccounted for it is normal for the police to oppose bail for the suspect already in custody.

The onus to prove duress in the execution of the claim documents lay on the defendant. He failed to discharge it. I reject his version of events. It was implausible. What I find to be more probable is that he had offered to settle with the plaintiff in order to remove himself quickly from the inhuman and degrading conditions of the police cells. He knew he had never executed his mandate to the plaintiff. He knew he owed the plaintiff a replacement vehicle, or at the very least, a refund of the proceeds of the Toyota 100 series. These amounted to US$95 000. From his own evidence the kind of replacement vehicle that his agent claimed he had procured would cost more than the US$95 000. With freight and port charges as well as the import duty the amount would be phenomenal. Yet the plaintiff seemed willing to settle for just the US$95 000. So for the defendant it would be a bargain. He had snatched it. Given his circumstances it made more sense to settle with the plaintiff for US$95 000 and hopefully get the plaintiff to withdraw the charges.

The defendant has sought to demonise Mr Mawere as a legal practitioner. But I find Mr Mawere's version of events more consonant with the probabilities. Undoubtedly, the only reasona second lawyer had featured on the scene on 10 March 2010 was because Mr Mawere had insisted so that the defendant's own interests would be protected. This much was common cause. It was also common cause that the second lawyer had been in the person of Mr Takundwa as proposed by the defendant, not Mr Mawere. That Mr Takundwa, a lawyer more senior to Mr Mawere, would go on to append his signature on the claim documents without having first apprised himself of the situation and without having advised the defendant of his rights is most improbable. That would go against some of the most basic and elementary tenets of legal practice.

Whilst Mr Takundwa may not have been a compellable witness at the instance of the plaintiff, he certainly was a compellable witness for the defendant. The attorney and client privilege was for his protection. But he could have waived it and called Mr Takundwa to contradict Mr Mawere's version and that of the plaintiff. In fact, if Mr Takundwa was not acting for him as the defendant insisted, then there was no attorney and client privilege in the first place. All the reason why the defendant ought to have called or have subpoenaed Mr Takundwa. He did not.It is not difficult to see why. Mr Takundwa was hardly likely to confirm the defendant's version that he had merely appended his signature to the claim documents without as much as having apprised himself of the situation, without having properly advised the defendant and without having obtained his mandate to protect his interests in his capacity as a lawyer.

Mr Mawere testified that when the defendant had failed to pay the first instalment on due date he had asked for more time. He also testified that when again the defendant had failed to pay even by the extended date they had met by chance at some eating place at which the defendant had acknowledge his obligations in terms of the claim documents and had promised to pay. None of this was challenged.

I do not believe the police and or the plaintiff seized, or caused to be seized the motor vehicles. The Jeep may not have been part of the pledged vehicles. However, that does not detract from the fact that the defendant had, in my view, voluntarily delivered it together with the rest. It is implausible in my view that the police and or the plaintiff would have known where the registration particulars of those vehicleswerebeing kept. It could only be the defendant or someone under instruction from him who would have delivered the registration particulars.

If it is true that Mr Mutamangira had written a letter of complaint against the police such a letter would have been material evidence in favour of the defendant. But neither was such a letter produced in evidence nor Mr Mutamangira called to testify. Related to this, is the absence of any other effort taken by the defendant to challenge the claim documents or to take steps to set them aside at the earliest opportunity prior to the plaintiff taking action for the recovery of the debt.

In all the circumstances I find that the defendant signed the claim documents freely and voluntarily. That should dispose of the matter. However, there is a third aspect still to be considered. The defendant has argued that the agreement behind the claim documents is unenforceable by reason of a breach of the foreign currency regulations.

(iii) **Whether the agreement between the parties was vitiated by illegality**

Section 4 of the Exchange Control Regulations, 1996 (SI 109/96) (hereafter referred to as "**the regulations**") prohibits anyone in Zimbabwe, without exchange control authority, from buying, selling, borrowing, lending or exchanging any foreign currency other than to an authorised dealer. The section also prohibits Zimbabwean residents, without exchange control authority, from buying or borrowing outside Zimbabwe any foreign currency so as to create a debt payable in or from Zimbabwe. It also prohibits Zimbabwean residents, without exchange control authority, from lending or selling foreign currency which originated from Zimbabwe

or from exchanging any foreign currency if the result is to create a debt payable in or from Zimbabwe.

Section 4 also regulates the manner in which people may deal in foreign currency. However, among other things, free funds or lawful transactions with money in a foreign currency account are exempt from the various proscriptions.

Section 10 of the regulations prohibits, among other things, anyone in Zimbabwe, without exchange control authority, from paying or crediting a foreign resident or paying or crediting a Zimbabwean resident on behalf of a foreign resident. However, this prohibition does not apply to a payment lawfully made from moneys held in a foreign currency account.

Section 11 of the regulations, among other things, prohibits Zimbabwean residents, unless authorised by an exchange control authority, from making any payment outside Zimbabwe, or incurring any obligation to make a payment outside Zimbabwe. But again free funds or moneys held in a foreign currency account are exempt.

The defendant argued that the parties' agreement in this matter violated the law. These events happened prior to the adoption of the multi-currency system in Zimbabwe in February 2009. The defendant singled out s 4 (1), the one relating to the buying, selling, borrowing or lending of foreign currency without permission, and said it was the law that was violated. He argued that transacting in foreign currency was not *per se* forbidden but that it is certain conduct in dealing in foreign currency that is prohibited.

An agreement that is contrary to the law, or one resulting in conduct which the law forbids, is contrary to public policy. It is unenforceable; see*Schierhout v Minister of Justice* 1926 AD 99, *Dube* v *Khumalo* 1986 (2) ZLR 103 (S), *Matsika* v *Jumvea* 2003 (1) ZLR 71 (H) and *Gambiza* v *Taziva* 2008 (2) ZLR 107 (H). In *Schierhout's* case INNES CJ said, at p 109:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. …. So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act"

The defendant alleged that the plaintiff instructed him to source foreign currency on the parallel market and that this was illegal. He alleged that it was the plaintiff who instructed him to dispose of the Toyota 100 series to raise money for the replacement vehicle. He said the plaintiff knew that the old vehicle had been sold in Zimbabwean dollars and that the

replacement vehicle could only be purchased in foreign currency. This, according to him, was in breach of s 4(a) (i) of the regulations.

Even though the defendant singled out s 4(1)(a)(i) of the regulations I have to consider all the relevant sections, particularly those set out above, and see if, in the light of the evidence, the parties or one or either of them, breached the law. The law says that where the parties are *in pari delicto*, that is, equally at fault, the loss stays where it falls: see *Dube's* case at p 109D – F, a passage quoted with approval by GOWORA J, as she then was, in *Gambiza's* case, at p 113D – G. In full, the maxim is expressed thus: *in pari delicto estpotior condition possidentis*. This means 'where parties are equally in the wrong, he who is in possession will prevail.' However, seeing that a grave injustice may be caused by a rigid application of the rule, the courts use their discretion to tamper with it in order to avoid an unjust enrichment for the one party and to do justice between man and man.

In my view, the *in pari delicto* rule is irrelevant in this matter. There was no evidence that the parties entered into an illegal contract or one whose performance would be illegal. None of the parties explained in what respect the defendant was going to gain from their deal. All that the evidence established was that the defendant had offered to dispose of the plaintiff's old vehicle and to procure a replacement. Nothing was said in evidence as to where or in what currency the old vehicle would be disposed of, or from where or in what currency the replacement vehicle would be procured. The parties' transaction was not to buy, sell, borrow or lend foreign currency. Even if it was, but which it was not, all that would be required to make the transaction legitimate would be to secure exchange control authority or to use free funds or moneys in a foreign currency account. Not unexpectedly, the evidence did not at all concern itself with these aspects. They were simply irrelevant. How the defendant would perform his mandate had undoubtedly been left to his endeavours. That the defendant had sold the vehicle in local currency which, to the knowledge of the plaintiff,had to be converted to foreign currency at the parallel market, did not make the plaintiff a party to that transaction.

In the premises I find that the arrangement between the parties was not vitiated by illegality.

(iv) **Defendant's counter-claim**

The defendant counter-claimed for the cancellation of the claim documents and for the release of all the vehicles. This was on the basis that the claim documents were invalid by reason of duress. I have just ruled them valid.

None of the vehicles was registered in the name of the defendant. The two Mercedes Benz vehicles had Zimbabwean registrations. The Jeep had a South African registration. Amongst the defendant's bundle of exhibits was correspondence from an entity based in South Africa claiming ownership of the Jeep. The vehicle had not been part of the deed of pledge. There was no claim in respect of it in the plaintiff's summons and particulars of claim. Even though I have accepted the plaintiff's version of events and have rejected that of the defendant in relation to the delivery of the vehicles to the plaintiff, I am not satisfied that it had ever been intended that the Jeep would be part of the pledged assets. Accordingly, it must be released back to the defendant.

With regards to the Mercedes Benz vehicles, I am satisfied that they had properly been pledged and delivered. In law one does not have to be the owner of the goods that one may sell or pledge. All that the seller or pledgor needs do is to guarantee the transfer of ownership or delivery of possession of those goods: see RH CHRISTIE, *supra*, at p 149.In my view the warranty against eviction that is implied in a contract of sale is also implied in a pledge. Furthermore, Zimbabwean vehicle registration books carry a warning that reads: "**WARNING: This registration book is not proof of legal ownership**".

In the circumstances I find that the defendant could legitimately pledge the two Mercedes Benz vehicles.

(c) **DISPOSITION**

Judgment is hereby entered for the plaintiff against the defendant. Save for the claim in respect of the Jeep Grand Cherokee motor vehicle the defendant's claim in reconvention is hereby dismissed. The following orders are made:

1. The defendant shall pay the plaintiff the sum of ninety five thousand United States dollars (US$95 000) together with interest thereon at the rate charged from time to time by Stanbic Bank Zimbabwe Limited reckoned from 10 April 2010 to the date of payment in full.

2. The following motor vehicles are hereby declared executable:

2.1 Mercedes Benz, S280, registration number AAG 8369, engine number 10494422002897, chassis number WDB1400282A174158,

2.2 Mercedes Benz, E200, registration number AAW 1601, engine number 11195732340615, chassis number WDB2100482B464459,

3. The defendant shall pay the plaintiff's costs of suit on an attorney and client scale and collection commission in terms of the Law Society of Zimbabwe by-laws.

4. The plaintiff shall return to the defendant the Jeep Grand Cherokee motor vehicle, licence number PSK673 GP, engine number 4Y113324, chassis number 1J8G868A94Y113324.

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