

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 03/2016

In the matter between:

LUKAS TANGI NDAMANGULULA DAMA

APPELLANT

and

OLD MUTUAL LIFE ASSURANCE LIMITED

RESPONDENT

Neutral citation: *Dama v Old Mutual Life Assurance Limited* (CA 03/2016) [2017]
NAHCNLD 117 (04 December 2017).

Coram: CHEDA J

Heard: 06.10.2017

Delivered: 04 December 2017

Flynote: A party seeking to avoid its obligation on the basis that it is based on an agreement obtained through duress must prove on a balance of probabilities that there was such sufficient duress which threatened his/her life or limb and he/she had no alternative, but, to sign the acknowledgment of debt.

Summary: Appellant appealed against a decision of the magistrate's court wherein a judgment was granted against him on the basis of an acknowledgment of debt. He argued that he had signed the acknowledgment of debt under duress. The court

examined the circumstances surrounding the signing of the said documents. Appellant failed to prove on a balance of probabilities that he signed under duress. The appeal was dismissed with costs.

ORDER

1. The appeal is dismissed with costs.
-

JUDGMENT

CHEDA J:

[1] This is an appeal against a decision of the magistrate sitting at Oshakati on the 23 March 2016. Respondent had sued appellant for N\$24 223-66 on the basis of an acknowledgment of debt executed on the 08th March 2010.

[2] Appellant defended the said action. The matter was heard at the magistrate court and judgment was granted in favour of the respondent. Respondent is a company registered in Namibia and operating as such. Appellant was an employee of respondent.

[3] It is a fact that applicant signed an acknowledgement of debt to respondent for N\$24 223-66 which respondent alleges that it was a loan which was due to be paid by a date stipulated in the said document.

[4] In the court *a quo*, appellant defended respondent's claim on the following grounds:

- a) that he signed the acknowledgement of debt under duress;
- b) the money claimed by respondent was not a loan, but, a salary and/or commission which he had received from respondent as he was employed as a Sales Manager at the relevant time; and

c) that he had never applied for a loan from respondent.

[5] Appellant argued that he signed the said acknowledgement of debt under duress and further that the said debt is *contra bonos mores*, i.e. against public policy.

[6] Appellant attacked the findings and conclusion of the court *a quo*, amongst the attacks are that;

- a) the court failed to appreciate that appellant being an employee was not an independent contractor which is clearly defined in the Labour Act, Act 11 of 2007;
- b) that it was not in dispute that appellant had the amount in dispute deducted for Medical Aid and Social Security;
- c) that the amount owed was not a loan, but, was income earned as an employee; and
- d) that he signed the acknowledgement of debt under duress.

[7] This was the gist of his arguments in the main. The long and short of his argument is that the trial court misdirected itself by finding that the acknowledgment of debt was valid. Further that respondent failed to prove the existence of a loan.

[8] On the other hand respondent argued that appellant borrowed the said money and agreed to pay back in the terms and conditions therein, on his free will. In other words there was no pressure or duress that was made to bear upon him.

[9] The determining factor, in my view is whether or not there was undue pressure or duress that was made to bear on appellant. In the modern contractual context, duress is a means by which a person or party for that matter can be released from a contract if he proves that force or coercion was used to obtain his/her consent to oblige. The duress, or undue influence should be such that the victim had no alternative, but, to append his/her signature as a sign of consent.

[10] It is a requirement that the pressure must be directed towards the formation of the contract and it must be exercised unlawfully or *contra bonos mores*, see *Ilanga Wholesalers v Embrahim & others 1974 (2) SA 292 (D) at 297 H*.

[11] What should be understood as well, is that where duress or *metus* has been established, the contract is not void *per se* but voidable at the instance of the victim. Further, in order for a party to succeed in setting aside the contract obtained under duress, the party must prove the existence of certain factors as laid down in *Broodryk v Smuts No. 1942 TPD 47 at 51-52*, where Ramsbottom J stated:

- ' a) there has to be actual violence or reasonable fear;
- b) the fear must be caused by the threat of some considerable evil to the party or his family;
- c) it must be threat of some considerable evil to the party or his family;
- d) the threat or intimidation must be *contra bonos mores*; and
- e) the moral pressure used must have caused damaged.'

[12] This has been the approach by our courts and is therefore settled law in this jurisdiction. Appellant has the onus of proving on a balance of probabilities that there was duress which was made to bear on him, which resulted in him appending his signature on the acknowledgment of debt.

[13] In this jurisdiction, this principle could not have been vividly put better than it was in *MB De Klerk & Associates v Eggerschweiler & another (I 2674/2005) [2013] NAHCMD 285 (16/10/2013) para 51*, where Damaseb JP ably stated:

' The test for duress as a ground for avoiding a contract

[51] if a proper case for duress is made out the agreement which resulted therefrom is voidable on the basis that there is no true consent ¹⁶(*Broodryk v smuts N.O 1941 T.P.D 47 cited in Kahn E, Contract and Mercantile Law through the cases, at 147-148*). The improper influence must have been the direct cause of entering into the transaction. The person alleging such duress bears the onus of proof. The pressure must be directed to the party, or to his/her family, must relate to an imminent injury to be suffered by the party himself in person or in property. Additionally, it must be proved that the pressure was exercised unlawfully or *contra*

bonos mores ¹⁷(*Namibian Broadcasting Corporation v Kruger & Others* 2009 (1) NR 196 at 209 A-B; *Broodryk v Smuts* No. 1942 TPD 47).’

[14] In *Namibian Broadcasting Corporation v Kruger & others* 2009 (1) NR 196 (SC) at 209 A-B; *Broodryk v Smuts* No. 1942 TPD 47, the court examined the kind of pressure necessary for the court to set aside the acknowledgment of debt. It concluded that it entirely depends on the circumstances surrounding the transaction. The court will no doubt look and examine the positions, age, sex and any other relationship of the parties. As to whether what fear qualifies for this, is a matter of a diligent enquiry by the court which then uses its judicial discretion. The need for a thorough scrutiny of duress was laid down in the leading case of *Union Government (Minister of Finance) v Grewar* 1915 AD 426 at 452 where Wessels AJA stated:

‘ An act could be set aside where it was done under circumstances which showed that the act was not voluntary, because it was done under pressure. What the exact amount of pressure is which will enable a Judge to set aside an act, depends very much upon the surrounding circumstances. It is true that the Judge may use his discretion, but it must be a judicial discretion, and an act must not lightly be rescinded as having been induced by *metus*. The pressure necessary to set aside a payment must be of such a nature that it is clear to the Court that, but for this pressure, the payment would not have been made. The same principle was followed in *Smith v Smith* 1948 (4) SA 61 at 67 where the learned Judge quoting Voet 4.2.1 remarked:

“(T)he fear ought to be justified in the sense of being grievous enough. It should be such fear as properly descends even upon a steadfast person. For idle alarm there is no excuse; and it is not enough for one to have been alarmed through the influence of any sort of fright. Nevertheless in assessing what fear must be said to be serious enough regard must be taken of the age, sex and standing of the persons. Hence the question, namely what fear is sufficient, is one for the investigation and discretion of the Judge.

[53] In the matter of *Union Government Minister of Finance* (supra) Wessels AJA further remarked that “duress is not satisfied if one exerts pressure in circumstances in which it is open to the affected party to adopt an alternative course of action for dealing with his predicament.” (my emphasis)

[15] Duress is not easily inferred, but, is a factual matter, in that the violence and/or pressure should be real and not imagined. Having regard of the above authorities it can be gleaned that:

- a) the improper influence must have been the direct cause of entering into the contract;
- b) the pressure must have been directed to the party or to his/her family and also relate to an imminent injury to be suffered by the party himself/herself or in property; and
- c) that the pressure was unlawful or *contra bonos mores*.

[16] It will not be available to a party who had an alternative to the pending compliance induced by the undue and improper pressure, see *Alexander Forbes Namibia Group (Pty) Ltd v Andrew Nangombe* (I 2452-2014) [2015] NAHCMD 167 (24/07/2015) where it was stated:

‘ Duress is not satisfied if one exerts pressure in circumstances in which it is open to the affected party to adopt an alternative cause of action for dealing with his predicament.’

[17] This principle was also emphasised in *MB Deklerk & Associates* (supra), and *Lombard v Pongola Sugar Milling Co. Ltd* 1963 (4) SA 860 (A). It is appellant’s case that when the acknowledgment of debt was presented to him, he queried the basis of the said debt and indicated that the money which is said was due was not a loan, but, money which he had received as a salary in his employment as a Sales Manager. It was further submitted on his behalf that a Mr Nikanor who was his boss threatened him with unspecified action if he did not sign.

[18] Respondent denied these allegations and argued that appellant was aware of his indebtedness.

[19] They further relied on the doctrine of *caveat subscriptor*, simply put, that a party is presumed to know why he/she is appending his/her signature to a document and is bound by the contents above his/her signature, see *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 (3) SA 210 (T) 215 and *Standard Bank Namibia Ltd v Alex*

Mabuku Kamwi (I 2149/2008) [2013] NAHCMD 63 (7 March 2013) (Unreported) where the court held that;

‘ It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, he or she has no one to blame but himself.’ (my emphasis)

[20] Appellant’s averment regarding duress which led to him into appending his signature, in my view, cannot be taken in isolation, but, in totality with all the surrounding circumstances. A person in the position of appellant, who is very literate and holds a position of a Sales Manager could not have signed a document without reading and understanding its contents, if he did, then he has to satisfy the court why he did so. Such proof is on a balance of probabilities. As the court has no crystal ball, it must use its judicial discretion either to accept or reject his explanation. The explanation must be reasonable. It is not correct that respondent was supposed to prove anything other than the production of the acknowledgment of debt. All respondent was required to do was to produce the document which it sought to rely on and nothing more.

[21] If appellant is to be believed that respondent through Nikanor threatened him with unspecified harm in the office he should have proved it. Appellant should have shown that he had no alternative to avoid signing due to the threat which in my mind, should be a specific and live threat. He is said to have threatened to “spoil appellant’s life.” In as much as this could be taken to be a threat, but in order for it to qualify as a threat which would release him from the obligation, it should have been;

- a) a threat which was sufficient to affect the mind of a person of ordinary firmness; see *Steiger v Union Government* 1919 NPD 75 at 79; or
- b) such threat as would not unreasonably be capable of affecting an ordinary self possessed man, see *Steiger* (supra) or;
- c) must be reasonable fear, see *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C) 449 B.

[22] Appellant further argued that the acknowledgment of debt was vague. As pointed out above, a man of his education, age, sex and position, in my view, could not have signed such a document. He had all the opportunity to refuse to do so as it was an unreasonable threat. It appears that it was nothing, but, an empty threat that was not enough to cause him to sign. He understood what he was signing. He cannot be allowed to resile from this contract. Appellant does not strike me as an idle minded person as he was in the position of a Sales Manager.

[23] In my view, the said threat is not the type of threat that would have instilled fear in him to an extent of causing him to sign a document, contents of which had a financial negative impact on him. In addition, thereto, appellant would have left the place where they were. It is trite that the courts are slow in allowing parties to resile from contracts at the slightest flimsy opportunity. The courts will always want to respect the intention of the parties.

[24] I am aware that this court has to use its judicial discretion in determining this matter. I find that appellant has not discharged the onus on him with regards to proving that there existed such duress which resulted in him signing the said acknowledgment of debt.

[25] Taking into account all the surrounding circumstances in this matter, I find that the defences raised lack merit and appellant should be bound by what he signed for.

Order:

1. The appeal is dismissed with costs.

M Cheda
Judge

APPEARANCES

PLAINTIFF:

G. Mugaviri
Of Mugaviri Attorneys, Oshakati

DEFENDANT:

C. Tjihero
Of Dr. Weder, Kauta & Hoveka Inc., Ongwediva