IN THE HIGH COURT FOR ZAMBIA **2007/HK/433**

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

BETWEEN:

FRANCINA MILNER JOAN **PLAINTIFF**

AND

ANTHONY GEORGE HODGSON **DEFENDANT**

Before Honourable Madam Justice C.K. Makungu

For the Plaintiff: Mr. D Mulenga of Messrs Derrick Mulenga & Co.

For the Defendant: Mr. S.A.G. Twumasi of Messrs Kitwe Chambers

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JUDGMENT

Texts referred to:

1. *Sutton and Shannon on Contracts (7th Edition) Pub Butterworths (London)*
2. *Chitty on Contracts 21st Edition Volume 2*
3. *Law of Evidence Zambia Cases and Materials 1991 (Muna Ndulo and John Hatchard) Media Publications Lusaka 1991*
4. *Family Law in Zambia cases and Material – University of Zambia Press*
5. *Chitty on Contracts Volume (1) General Principles 13th Edition*
6. *Chitty on Contracts – General Principles 13th Edition Sweet and Maxwell*

Cases referred to:

1. *Forman and Company vs The Ship Liddesdale (900) AC. 190*
2. *Maskell vs Horner (1915) 3 KB 106*
3. *Broodryk vs Smuts S. (1942) TP D 47*

4. Becker vs Pettikins (1978) SRFL(Edition) 344

5. Kaufman vs Gersom (1904) 1 QB 591

6. Roscorla vs Thomas (1842) 3 QB 234

7. Re McArdle (195)1 ch 669

8. Fenias Mafemba vs Ester Sitali (2007) ZR 45

9. Enlanger vs New Sombrero Phosphate Co. (1870) App Cas 1218 at 1279

10. Halpern vs Halpern (No. 2) (2008) QB 195

The plaintiff claims the following reliefs:

1. A declaration that the agreement of 5th May 2007 is valid henceforth enforceable.
2. An order of specific performance requiring the defendant to fulfill his obligation as per 5th May 2007 agreement.
3. Any other remedy the court may deem fit and proper.
4. Interest.
5. Legal costs.

In brief the Defence and Counter Claim as pleaded is that the Defendant was induced to make and execute the agreement referred to in the Statement of Claim by duress on the part of the plaintiff. The defendant will aver that there was no consideration for the agreement or that there was only past consideration which is insufficient to support the agreement. Upon paying US$30,000 and recovering his documents the defendant repudiated the agreement. The defendant therefore counterclaims US$30,000 which was paid under duress with interest and costs.

In the pleadings Reply and Defence to Counter Claim, the Plaintiff claims that there was a common law marriage between the

parties for the defendant held himself out as the plaintiff's husband and father to her children. For all intents and purposes they lived as husband and wife. The Plaintiff further pleads that there was no property adjustment. The defendant entered into the agreement willingly. She therefore denies the counter claim and prays that it be dismissed.

In summary the evidence adduced herein is as follow:-

PW1 Francina Joan Milner said that she had an affair with the defendant in 1997 whilst she was married to Mr. Shabor Malik with two children, both girls named Rhihana Malik and Shamim Malik whom she was living with in Itawa, Ndola. She later sued her husband for divorce, in the Ndola High Court, divorce was granted.

Thereafter she went to reside with the defendant in Kitwe with her two children. After living with the defendant for two years they decided to buy house number 2 Madzimoyo Close, Kitwe. They made extensions, renovations to that house before they moved in between 2003 and 2004. She did not contribute financially to the purchase price but she is the one who found the house.

PW1 further stated that she sold her house number 4 Kafironda Drive Ndola in order to pay College and University fees for her children as her salary at Steve Blagus Travel Agents were she was working as a Manager was inadequate. She felt insecure because they were not legally married.

PW1 added that in April 2007 the defendant decided to get back together with his old girlfriend by the name of Brenda Bringingcamp. Thereafter her relationship with him went bad and the defendant decided to end it.

The defendant had on several occasions expressed his love for her and promised to marry her. She referred to an e-mail from the defendant to herself dated 27th October 2000 where the defendant proposed that they should set a marriage date.

At the end of the relationship she requested the defendant for a financial settlement as she was unemployed at that time. They agreed that she moves out of the house. At that time her two children were at the University in South Africa. She added that the defendant used to help her financially whenever she asked for it. He paid for Medical Aid for both her daughters and air fares for the second born daughter.

She said on separation she left with only her clothes and garden chairs. They agreed that the defendant would pay her US$60,000 plus rent for a year and provide funds for furniture and a Lap Top. It was also agreed that the defendant would take care of her first born daughter for two years whilst she was at the University. It was further agreed that the defendant would pay her medical fees in South Africa and Zambia for a year because she suffers from a disease of the gums called periodontal.

On 5th May, 2007 the defendant showed her a Draft Agreement which he said was made by his lawyer Mr Elijah Banda. Although

she was not happy with some of the clauses, both parties signed the Agreement. Her friend Mrs. Danniel Storti signed it as a witness. That Agreement is on pages 1 - 4 of the Notice of Intention to produce documents filed herein on 29th June 2009.

PW1 further stated that on 19th May 2007 she wrote an e-mail to the defendant which is on pages 5 of the same Notice of Intention to produce Documents in which she specified the amounts of money to be paid for rent and furniture and that the period for payment of her medical bills be increased. She put the rent at US$700 per month and requested for US$10000 for furniture and a computer. She said the defendant agreed with her by signing a copy of the same e-mail as shown in the exhibited document.

It was the defendant who wrote below the e-mail that he had agreed to the issue on rents and furniture provided that all personal documents belonging to him were returned and no further copies had been made.

The defendant freely paid her US$30,000.00 in July 2007 but has not honoured the rest of the proposed agreement. She said although she was holding onto some of the defendants documents which she would have used against him, she did not use duress to make him sign the Agreement. She maintained her prayer according to the Statement of Claim.

Under cross examination she said that her marriage had problems. She needed to divorce her husband before she could continue with the relationship she had with the defendant. Her

ex-husband refused to look after the children of the marriage. Her first born is 27 years old and financially independent.

As for the second born her family helps to pay her University fees. She further stated that for the house No.2 Madzi Moyo Kitwe, the defendant paid for all the renovations and she paid for the garden. The defendant bought all the furniture in the house. He generally maintained the whole family. The defendant refused to pay for both children's University education although he had paid for their education earlier. She added that she did not share with the defendant the proceeds of sale of her house which was in Ndola. She did operate a business called ERS Services that gave her income which was used to maintain herself and the children. She said the defendant would sometimes change his mind about wanting to marry her.

As regards the Agreement in question PW1 said she was keeping the defendants work contracts, investment contracts and other financial policies. Some of the documents relate to his employment with Sandvic Limited. She kept them as an assurance for herself because they were sensitive to the defendant who works as a foreigner in Zambia although he is Zambian. She said she could have reported him to the Zambia Revenue Authority and gotten him into trouble by using the documents. She signed a document promising not to use the documents against the defendant (re P.5 Notice to Produce Documents filed on 29/06/09). She said if she had used the documents even the defendant's employer would have been

affected. She held on to the documents in order to urge him to make an agreement with her. She is the one who demanded a formal agreement and he signed it so that he could marry his present wife.

The defendant only offered her US$20,000 before she told him about the documents she was holding on to. When she asked for more money and told him about the said documents, the figure went up. She said she received US$30,000 through an Insurance Broker.

In re-examination she said that she had lived with the defendant for ten years. She knew that in Zambia she had no rights as a woman in such a relationship, so she told the defendant that she would use the documents against him if he did not settle with her family. The issue of the documents arose after signing the initial agreement.

PW2 Danniel Storti said that she has known the plaintiff since 2007. However, she does not know the defendant. In May 2007 the plaintiff went to her house and asked her to sign a Financial Agreement as a witness. She said the document she signed is the one produced herein by the plaintiff. When she was signing, she saw the other two signatures on it but did not read the whole document.

DW1 Anthony George Hodgson testified that in 1997, he started an affair with the plaintiff. At that time the plaintiff told him that her marriage was rocky and she had intentions of leaving her

husband. In February 1998 they started living together in a rented house. In 2007 he decided to end the relationship because he wanted to start afresh with his old girlfriend. Then the plaintiff requested for a payment for the break up.

DW1 said he had provided for the plaintiff and her two daughters adequately during the period they stayed together. He paid for the children's primary and secondary school education and medical bills. He also paid the plaintiff's medical bills when the relationship ended. Out of good will he offered the plaintiff half of the money he had in the bank which was US$25,000. The plaintiff rejected the offer and demanded US$100,000. When he maintained his offer the plaintiff told him that she was keeping some documents which she would use against him so that he loses his job. After discussing the matter for a while, he agreed to pay her US$50,000.00 because he was threatened.

The Plaintiff demanded that the agreement be put in writing before she releases the documents. He later asked his lawyer Mr Elijah Banda to prepare an Agreement for him. When the Agreement was ready, he took it to the plaintiff who read through it and signed it. He also signed it under duress because he feared that the plaintiff would do something to disturb his life. The Agreement was taken to Mrs. Storti who signed it as a witness on behalf of the plaintiff. Thats the same Agreement which the Plaintiff and PW2 referred to.

When they got back to the house, the plaintiff demanded US$60,000 saying that US$50,000 was not enough.

Acting under duress he allowed the amendment of the Agreement as regards the amount payable and both parties signed for the amendments. He later paid US$30,000.00 to an Insurance Broker who was handling the plaintiff's Insurance Policy.

Thereafter, the plaintiff gave back his contract of employment, Revenue Authority documents, Insurance Policy and Pension Fund documents. He realized that if the Contract of Employment was publicized he would be summarily dismissed from employment because that was against Company Policy. There was no way of knowing whether she had kept some copies of the documents. About a week later the plaintiff by e-mail dated 19th May, 2007 demanded that he pays her US$700 per month for rent and US$10,000 for a Computer and extend her medical Aid until the end of 2007. She threatened him again that if he did not meet those demands she would expose the documents. He therefore accepted the demands. Then she gave him another set of the same documents after signing documents No.5 in the plaintiff's Notice to Produce i.e. copy of the said e-mail. Thereafter she moved out of the house. The defendant added that he took the plaintiffs furniture to her mother's house in Chingola. He also gave the plaintiff US$17,300.00 being proceeds of sale of his vehicle. The plaintiff took away all her clothes and jewelery including what he had bought her. The defendant further stated

that he refused to pay the second instalment of the agreed sum because he had given the plaintiff enough.

The plaintiff owned a house in Ndola which she had put on rent. He had no share of the rents. The plaintiff later sold her house and did not share the proceeds with him. In May 2000 he bought the house which they started living in. The defendant added that he was not married to the plaintiff but the general public perceived them as husband and wife. He prayed that his counter claim be granted.

Under cross examination he said that he cohabited with the plaintiff for about 10 years. He admitted having written an e-mail to the plaintiff indicating that he wanted to marry her. The plaintiff benefitted from the medical contribution that came from his employer.

He said the plaintiff contributed to the search for the house in Kitwe i.e. No. 2 Madzi Moyo Close Parklands Kitwe which he bought and the arrangement of the garden. He said he left the plaintiff after meeting his current wife whom he married in September 2007. The documents to pay off the plaintiff were made long before his wife moved in.

It is not in dispute that the parties hereto started cohabiting in 1997 until 2007 when their relationship ended. They were living with the plaintiff's two biological daughters, namely Rhihana Malik and Shamim Malik whom she had with her ex-husband Shabir Malik. Initially they stayed in a rented house until 2003 when the

defendant bought house number 2 Madzi Moyo Close, Parklands Kitwe which they moved into. The Plaintiff had helped to find the house to buy but did not contribute to the purchase cost or the price of the renovations. She however, made a garden at the house and maintained it.

The plaintiff and defendant were considered by members of the public in general as a married couple. The defendant proposed to marry the plaintiff but changed his mind. During the period of cohabiting the defendant maintained himself, the plaintiff and her two children with very little financial assistance from the plaintiff. The plaintiff's daughters are now 29 and 26 years old. The plaintiff paid for the school requirements for both children and medical fees for them and the plaintiff. The defendant refused to pay for the children's college or University education.

It is also not in dispute that during the period of cohabitation the plaintiff sold her house number 4 Kafironda Drive Itawa, Ndola and did not share the proceeds with the defendant. In April 2007 the defendant decided to end his relationship with the plaintiff because he had met his old girlfriend Brenda Bringingcamp whom he wanted to marry. Then the parties agreed to separate. However, the plaintiff asked for a financial settlement.

The defendant had initially offered to pay the plaintiff US$25,000. The plaintiff rejected the offer and asked for US$100,000. When the plaintiff threatened to use some important documents belonging to the defendant to get him fired from his employment

by Sandvic Mining Company, the defendant offered to pay US$50,000 which the plaintiff accepted.

The parties also agreed on other terms which came out in the written agreement made at the plaintiff's request. The defendant went and requested Mr. Elijah Banda an advocate to draw up an Agreement or Contract which was later signed by the parties as amended by them. The Contract before it was amended was to the effect that the defendant would pay the plaintiff US$50,000. The initial payment of US$30,000 to be paid into the plaintiff's nominated account and the balance of US$20,000 would be paid in five equal monthly instalments commencing at the end of June 2007. The other terms were that the defendant would pay reasonable economic rent to the plaintiff for the next twelve months from the date of the agreement. In addition the defendant would be responsible for the plaintiff's medical expenses at the company clinic for as long as she continues staying in Zambia up to a maximum of twelve months from the date of the agreement. He would also purchase basic furniture and a computer and pay for the plaintiff's medicals for twelve months from the date of the agreement.

It was also a term of the agreement that the defendant would continue providing financial support for Shamim Malik for the duration of her studies at Cape Peninsula University including R2,000 per month for accommodation, R2,000 per month for living expenses, R2,000 payable immediately to cater for medical bills and other incidentals, Tuition fees, medical aid for the

duration of her studies, one return air fare from Cape Town to Ndola per year for the duration of her studies, which was from January 2008 to December 2009. In the same agreement the parties also undertook not to interfere in any way with each other's private lives from the date of the agreement. There was also a Waiver and Indemnity clause. It is also not dispute that the said Agreement was amended to indicate that US$60,000 was payable instead of US$50,000 and that rent would be paid for the plaintiff from the date of securing accommodation and not from the date of agreement. I find that the amendment was caused by the plaintiff who was still threatening the defendant that she would ruin his life.

It is also not in dispute that on 19th May, 2007 the plaintiff wrote an e-mail to the defendant saying that she required US$700.00 per month for rent and US$10,000.00 for furniture and a Computer. She also requested for an extension of the Medical Aid until the end of 2008. She further stated in the e-mail that she hoped that one day he would appreciate the investments she had put in his life and that she wanted the agreement in writing. The defendant therefore wrote at the bottom of the copy of the e-mail in his own hand writing that he was agreeing to the issue of rental and furniture provided that all personal documents belonging to him were returned in full and no copies had been made which could be used against him. Both parties signed for that on 22nd May, 2009. I find that even at that stage the plaintiff was threatening the defendant that she would publish his personal

documents if he did not agree with her. Thereafter the plaintiff handed over to the defendant another set of his documents.

It is also not in dispute that pursuant to the Contract the defendant paid US$30,000.00 to the plaintiff through an Insurance Broker as agreed with the plaintiff. The defendant has not performed the rest of the Contract.

The plaintiff moved out of the house by July 2007 when her daughters were out to College and University. She took all her belongings with her. The defendant married the said Brenda Bringingcamp in September, 2007.

Learned Counsel for the plaintiff i.e. Mr Mulenga stated that the question to be decided by the Court is whether the Agreement in question is enforceable at law. He submitted that the plaintiff went alone to see Mr Elijah Banda. The Agreement made on 5th may 2007 places obligations and benefits on both parties. The first clause of the Agreement which says the cohabitation ended on the date of the agreement was very important to the defendant so that he chose to put it on top. It shows that the defendant's motive was to see to it that the plaintiff left the house so that he could be free to marry and move his spouse to the same house.

Mr. Mulenga stated that he agrees with the observations of the learned Authors **Sutton and Shannon on Contracts** **(1)** that:

"a party cannot, of course, be made to enter into

> *a contract against his express will and without his consent (as it was held in* ***Forman and Company vs The Ship Liddesdale(1) (1900) A. C. 190)*** *but he must*
>
> *be careful not to conduct himself so as to give the appearance of consent for then he will be bound. It is clear that this is the only principle on which the Courts could act for to admit any other would produce the result that a contract would be obligatory if one of the parties had mental reservation."*

Mr. Mulenga submitted that in line with the observations, the defendant in this case was not induced to sign the agreement by duress because he achieved what he wanted i.e. to quickly get the plaintiff out of the house and marry another woman. He was not acting under duress especially that immediately after execution of the Agreement he paid US$30,000.00 to the plaintiff pursuant to clause 2.1 of the Agreement.

Mr. Mulenga cited the case of **Maskell vs Horner(2)** where duress was defined as:

> *" A coercion of the will so as to vitiate consent. The Court went further to state that in determining whether there was no true consent, it is material to enquire whether or not the person alleged to have been coerced did or did not protest whether, at the time*

> *he was allegedly coerced into making the contract, he did not have an alternative remedy, whether he was independently advised and whether after entering into the contract he took steps to avoid it."*

He further cited the case of **Broodryk vs Smut S**[(3)] where it was held that the elements necessary to set aside a contract on the grounds of duress are as follows:

1. Actual violence or reasonable fear.
2. The fear must be caused by threat of considerable evil to the party or his family.
3. It must be the threat of an imminent on inevitable evil.
4. The threat or intimidation must be contra bono mores (extort something to which one otherwise was not entitled).
5. The moral pressures used must have caused damage.

He therefore submitted that in the two cases the principles are similar. The general principle remains that the basis of duress as a ground of recission of a contract lies in the inability to express an intention in a free and unfettered manner due to improper conduct of the co-contractor. He submitted further that the facts of the case clearly show that the defendant put himself under intense pressure as he did not want to lose the woman he wanted to marry. He was ready to do anything to see to it that the plaintiff left the house. The defendant was independently advised by Mr Elijah Banda. There is nothing to show that he was

compelled to sign the Agreement and that he did not sign it freely.

Mr. Mulenga in addressing the question whether the plaintiff was trying to extort something from the Defendant which she was not entitled to, submitted that the parties were in a common law relationship or marriage because they stayed in the same house, the plaintiff rendered domestic services to the defendant, they had sexual intimacy and the community around them viewed them as husband and wife. Mr. Mulenga relied on the Canadian case of **Becker vs Pettkins**[(4)] where the Supreme Court of Canada upheld the judgment of the Ontario Court of Appeal by awarding Miss Becker one-half interest in the land owned by Mr. Pettkins and in the bee keeping business because the parties had a relationship of cohabitation for almost 20 years.

He said the case is merely persuasive and that he cited it in order to demonstrate that it is not unusual for common law cohabitants to enter into agreements and for the Courts to recognize the relationship with or without an agreement. He argued that the circumstances of this case clearly show that the plaintiff did not intend to extort that which she is not entitled to. He prayed that the defence of duress should fail.

Mr. Mulenga further submitted that only a gratuitous promise or *nodum pactum* is unenforceable in contract law. Consideration under English Contract Law is based on the idea of a bargain and the same is defined simply as the “price” each party pays for the

right to enforce the other parties promise. He argued that the plaintiff gave valuable consideration and performed in expectation that in return the defendant would keep his promise. She suffered a forbearance or detriment by leaving the house where they used to stay for 10 years. She gave up her right to claim for her contribution to finding the house decorating and planting plants. He stated that he was mindful that, in law consideration must not be past. He urged the Court to take into account that the agreement was not drawn up by the defendant's advocates with the view that it would not be performed for luck of valuable consideration? The intention of the defendant was to create an enforceable agreement at law.

In response Mr. Twumasi cited some of the Authorities cited by the plaintiff's advocate such as the Text **Sutton and Shannon on Contract**[(1)] and recited parts of page 31 and 32 which were recited by the plaintiff's advocate, and the case of **Maskell vs Horner**[(2)] as regards what the Court said on duress and coercion.

He further quoted the author of **Chitty on Contracts**[(2)] twenty first edition volume 2 paragraph 1055: which says:

> *"duress of the person may consist in violence to the person/or threat of violence, or in the abuse of legal proceedings. How serious it must be in order to constitute duress depends on the physical and mental condition of the person threatened."*

He gave an example of the case of **Kaufman vs Gersom**[5] where the plaintiff had obtained from the defendant a contract by threats of a prosecution against her husband for an offence which he had committed, the consideration for the contract being that the plaintiff would not prosecute the husband. The means to obtain the contract were described by the Court of Appeal as "pressure amounting to torture" and it was held that, apart from the point that the agreement involved the stifling of a prosecution, such coercion had been used that the contract could not be enforced.

Mr. Twumasi submitted therefore that since the plaintiff used threats and the defendant in his evidence clearly shows his state of mind that he feared that he would suffer irreparable damage if the plaintiff exposed the documents, the agreement was obtained under duress. Therefore it is not invalid. He further submitted that by refusing to adhere to the agreement the defendant made it void. The defendant acted in accordance with the case of **Maskell vs Horner**[2].

Mr. Twumasi further submitted that there was no consideration. Even if there was any consideration the same was past consideration. He said invalidity of past consideration is demonstrated by the following case: **Roscorla vs Thomas**[6] where it was held that, after a horse had once been sold, a warranty of its soundness was without consideration and void, and that the warranty had nothing to support it but the past consideration of the sale, and therefore the case failed. In **Re**

McArdle[7] the occupants carried out certain improvements and decorations to a house at a cost of £488. After the work was done, those beneficially interested in the house executed a document by which they promised, in consideration of the execution of the work, to pay £488. It was held that the consideration for the promise was past, as the work had been completed when the promise was made, the claim to recover £488 therefore failed."

Mr. Twumasi submitted therefore that there being no consideration or the same being past consideration, the agreement is invalid.

He submitted further that the plaintiff was not entitled to anything for the cohabitation. As was observed in the case of **Fenias Mafemba vs Ester Sitali**[8]

1. "In Zambia there are only two types of marriage that are recognized and practiced namely Statutory Marriage and Customary Marriage.
2. "No length of cohabiting can legalise a relationship into marriage."

Applying to the facts of the present case the case of **Forman and Company vs The Ship Liddesdale**[1] and the observations made by the Authors of **Suttan and Shannon on Contracts,** I am of the view that the defendant entered into the contract against his express will. He was forced to accept all the plaintiff's demands because of her threats. He had to go to an Advocate to

have the contract drawn up because the plaintiff wanted it to be in writing. The defendant was afraid that he would suffer serious consequences if the plaintiff published the documents which she was keeping. The plaintiff in actual fact blackmailed him.

It is clear that when the plaintiff initially demanded to be compensated after the breakup, the defendant offered her US$25,000.00 which she rejected and demanded US$100,000.00. She had the agreement amended twice through blackmail. It was not the intention of the defendant to pay for the plaintiff's daughters College or University education. It was also not his intention to be paying rent for the plaintiff, to buy her Furniture and a Computer and pay for her medical requirements and her daughter's medical needs after the relationship broke up. The incorporation of all those conditions in the contract was due to the blackmail.

Applying the case of **Maskell vs Horner**[(2)] I find that in the present case the defendant did protest initially during the negotiations but did not see any other way out of the situation even after he was independently advised by his advocate. I must say at this point that there is no evidence of what advice he received from the advocate. However, it is clear that after entering into the Contract he took steps to avoid it even though he had made part payment.

Following the case of **Broodryk vs Smuts**[(3)] I find that all the grounds upon which a contract can be set aside for duress have

been established by the defendant. I have already explained how grounds 1 up to 3 have been satisfied. As regards ground 4, I find that the plaintiff was not entitled to compensation for having cohabited with the Defendant.

In relation to this, I will now tackle the issue as to whether or not a marriage existed between the plaintiff and defendant under common law.

> *"common law is one of the main sources of law in Zambia just like principles of equity.*[3]*"*

Common law marriages are reasonably presumed in a situation such as that of the plaintiff and defendant. However there must be evidence that the parties celebrated the marriage. In the Text **Family Law in Zambia Cases and Material**[4] at page 69 the author states as follows:

> *"Today a common law marriage is one where two people from different jurisdictions celebrate their marriage according to the law of the place of the marriage (lex loci celebrations) where formal requirements of a valid marriage according to English Law are not fulfilled, for instance celebrating a marriage without a priest or a person with holy orders."*

In the present case there was no celebration of marriage at all. Therefore the parties cannot be presumed to have been married under common law.

In the case of **Fenias Mafemba vs Ester Sitali**[8] the facts in brief were that the parties had stayed together as husband and wife for 14 years and had two children. Since the case was initially filed in the Local Court the relationship was viewed as a customary law marriage. The Supreme Court upheld the High Court decision that Lozi customary law on marriage was not followed by the parties as there was no dowry paid. The Court held inter alia that:

> *"1. The appellate judge was on firm ground when he held that the appellant was not a husband to the deceased despite the fact that the two had stayed together as husband and wife for 14 years and had two children."*

The differences between that case and the present case are that the Court dealt with Lozi customary law of marriage whilst in the present case the claim is that there was a common law marriage. In that case the parties cohabited for 14 years and had two children. In the present case the parties cohabited for 10 years and kept the plaintiff's two children. The two cases are similar in that the parties were not married under any law. Therefore following that case I find and hold that the parties hereto were not husband and wife.

The foregoing analysis of law shows clearly that the plaintiff in the present case was trying to extort something from the defendant which she was not entitled to.

Considering the 5th ground upon which an agreement could be invalidated on the ground of duress, I find that the moral pressures did cause damage to the defendant as he suffered mental torture, anxiety and loss of a lot of money.

Coming to the issue of consideration, I accept Mr Twumasi's submission that there was no consideration for the agreement. If there was any, it was past because the relationship had ended and the plaintiff was supposed to move out of the defendant's house anyway as she had no legal right to continue staying there.

I will now tackle the counterclaim. The authors of **Chitty on Contracts**[(5)], at paragraph 7 - 053 have explained the general effect of duress as follows:

> **"Contract under duress is voidable**. Despite earlier doubts, it is now seemingly clearly established that a contract entered into under duress is voidable and not void, consequently, a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased, and if he has voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, or if after escaping from the duress,

he takes no steps to set aside the transaction, he may be found to have affirmed it."

In Paragraph 7-054 on **Counter - restitution of benefits** the same authors say:

"In some circumstances a person may not be able to avoid a contract he has entered into under duress unless he is able to restore the benefits he has received under the contract, at least in substantially the same form, or make adequate monetary allowance, there are no separate rules for duress at common law and other grounds on which a contract may be avoided in equity. The Court will:

"..... give ... relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

Enlanger vs New Sombrero Phosphate Co, [(9)] *(1870)*3 App Cas. 12 18 at 1279."

The same Authors say. "However, the prime concern is to prevent unjust enrichment of the party who made the threat, that he should not be prejudiced is a secondary consideration and whether counter-restitution in any form will be required will depend on the circumstances of the case. (**Halpern vs Halpern** (No. 2) (2007) EWCA GV 291 (2008) QB 195 at page 70 - 73)[(10)] it was submitted that counter- restitution or at least pecuniary

compensation will normally be required where the transaction to be set aside involved an exchange from which the victim obtained some benefit."

In the present case, the defendant has adduced evidence that after signing the contract he intended to pay only US$30,000.00. He also said that there was no way of knowing if the plaintiff was keeping some more of his papers but he believed that the threat had been removed. I accept his evidence and find that he acted under the contract with full knowledge of all the circumstances. However the compromise that resulted from the plaintiff's demand which is not legally justified is still invalid for lack of consideration, so he cannot be held to have ratified it. It is unenforceable on that ground and I hereby set the contract aside.

Under the circumstances, the plaintiff should be prevented from unjustly enriching herself. There is no requirement of counter-restitution. I therefore grant the defendant's counter claim. The plaintiff is ordered to refund US$30,000.00 without interest. Costs will be borne by the plaintiff, to be agreed upon or taxed in default of agreement.

Dated the ..... day of ..... 2011.

.....
C.K. MAKUNGU
JUDGE