

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HP/0665



B E T W E E N:

MALAMBO MUNYATI

PLAINTIFF

AND

BOSTON MUSADAMBWE

DEFENDANT

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 8th day of
November, 2017**

For the Plaintiff : *Mr. P. Mwikisa, Messrs PW Mwikisa and
Company*
For the Defendant : *In Person*

J U D G M E N T

Cases Referred To:

1. *Colgate Palmolive (Z) Inc. v Able Shemu Chuka & 110 Others Appeal No. 181 of 2005*
2. *Nkongolo Farms Ltd v Zambia National Commercial Bank & Others Appeal No. 101/2004*

Other Works Referred To:

1. *Chitty on Contracts, 26th Edition, Volume 1*
2. *Trettel, the Law of Contract, 13th Edition, Sweet & Maxwell, 2011*

The Plaintiff issued a Writ of Summons and Statement of Claim seeking the following reliefs:

- i. Weekly bus product at the rate of K200 x 6 for 3 months*
- ii. Lump sum payment of K58,000.00*
- iii. Interest at current bank lending rate*
- iv. Costs*

The particulars given in the Statement of Claim are that the Plaintiff bought a 16 seater Hiace mini bus for his transportation business. He employed the Defendant's son as his driver, who later disappeared with his mini bus. The Plaintiff states that he made several attempts to contact the driver but failed and his bus was never recovered. After the incident, he informed the Defendant, who willingly executed an agreement with him on 26th February, 2013.

In that agreement, the Defendant undertook to pay the Plaintiff a lump sum of the gross cost of the mini bus at K58,000.00. He further, undertook to redress the Plaintiff for his loss, the weekly bus product at the rate of K200.00 x 6 days. The Defendant further agreed to redress the Plaintiff within a period of ninety days from 26th February, 2013. The Plaintiff claims that the Defendant has failed or neglected to comply with the agreement and has not paid him any money to date.

The Defendant settled a Defence and avers that he recovered the Plaintiff's mini bus from Mkushi, three weeks after his son disappeared with it. He only learnt that his son was hiding in Mkushi and that the mini bus was involved in an accident. He recovered the bus with the assistance of the police.

The Defendant states that the Plaintiff is aware that the mini bus is parked at his house but he has refused to collect it. He also states that he is not liable for his son's deeds as he was not the person employed by the Plaintiff. The Defendant avers that the Plaintiff took him to Chilenje Police Station and forced him to sign the agreement under duress. He also avers that the Plaintiff should have pursued a motor accident claim with his insurance company because all public service vehicles must be insured.

The Defendant states that the Plaintiff should pursue his son being an adult and who is capable of fending for himself. He prayed to the Court to dismiss the action for lack of merit.

The Plaintiff testified as **PW1**. His evidence was that he employed Musadabwe Musadabwe the Defendant's son as his

driver, in November, 2012. He had just bought a mini bus registered as ALF 9853. He told his driver to park the bus at his house in Arackan Barracks at 21.00 hours on a daily basis. On a certain date in November, 2012, his driver did not return the bus and when he contacted him, he promised to do so but never kept his word.

PW1 testified that he went to the Defendant's house the following day, and was told that he had not seen his son. He reported the matter to Chilenje Police Station and it was allocated to Detective Sergeant Makalicha. PW1 stated that even after police intervention his bus was not recovered. The police eventually involved the Defendant and his bus was not recovered.

PW1 testified that he was later called to the police station where he met the Defendant. The Defendant undertook to replace his bus and to compensate him for his loss. It was PW1's evidence that he executed an agreement with the Defendant, which was witnessed by the investigating officer Makalicha. It is shown at page 2 of his Bundle. PW1 further stated that the Defendant freely offered the undertakings in the agreement and was under no duress

whatsoever. PW1 testified that the Defendant has not fulfilled his obligations under the agreement and he did not know where his bus was.

In **cross-examination**, PW1 testified that he had been to the Defendant's house before his bus went missing. He did not employ the Defendant. He reported the case of his missing bus to Kabwata and Lusaka Police stations because he was very worried. PW1 was not aware that the Defendant was harassed at Kabwata and Lusaka Police Stations.

PW1 did not know that bus operators are supposed to comprehensively insure their vehicles because he only had 3rd party motor insurance. PW1 stated that he did not claim insurance and was aware that his bus was involved in a road traffic accident. He did not know that the Defendant tolled his bus to Chilenje Police post and later to his home. He never collected his bus from the Defendant's house.

In **re-examination**, PW1 testified that he first met the Defendant after he employed his son.

Boston Mwale Musadabwe testified as **DW1**. His evidence was that sometime in November, 2012, he was asked to go to Chilenje Police Station where he met Officer Makalicha. He was told that his son disappeared with PW1's mini bus and was asked to help to trace him. DW1 stated that he was later called to Kabwata Police Station over the same matter, interrogated and threatened. He was called to Lusaka Central Police where he was treated in similar fashion.

DW1 stated that the episode put him under a lot of stress and the summons to the different police stations were meant to coerce him into revealing his son's whereabouts, which are unknown to him. DW1 testified that he was not party to his son's employment contract and was asked by the police to offer compensation to PW1. A document was drafted, which he signed under pressure.

DW1 testified that he retrieved PW1's bus three months after he signed the agreement and it was involved in an accident. He tolled the bus from Mkushi to Lusaka and was advised by officer Makalicha to park it at his house because he feared that it would be vandalized at the police station. It was DW1's evidence that a day

after he parked the bus at his house, police officers went to inspect it. PW1 refused to go to collect the bus, which is currently parked at his house.

In **cross-examination**, DW1 stated that he collected the bus from Mkushi and it was involved in an accident. He had no evidence to show that he was threatened and intimidated at the police stations. DW1 reiterated that he signed the agreement under duress at Chilenje Police Station and at the police's instructions. He offered to look for the mini bus in order to maintain peace with PW1. PW1 testified that the only evidence of his harassment was the number of interrogations he was subjected to at different police stations.

In **re-examination**, DW1 stated that he did not react well to the police threats and had to be very cooperative in resolving the dispute.

The Court issued a subpoena for Detective Sergeant **Njongolo Makalicha** who testified as **CW1**. His evidence was that sometime in November, 2012 he was allocated a docket for conversion not amounting to theft by his supervisor, Chief Inspector Chama. PW1

reported that his driver Musadabwe Musadabwe disappeared with his mini bus and cut off communication with him. CW1 stated that as part of his investigations, he summoned DW1 to Chilenje Police Station, where he asked him about the whereabouts of his son. His response was that he did not know where his son was and he proceeded with other investigations. CW1 stated that after ninety days, his investigations did not yield anything and DW1 asked him to meet PW1 to broker an agreement.

It was CW1's evidence that he facilitated a meeting sometime in February, 2014 between PW1 and DW1. At that meeting, DW1 told PW1 that he was sympathetic for his loss and proposed to compensate him from the date that his bus went missing to the date of the meeting on its daily cash takings of K200 per day. The second proposal DW1 presented was that if the bus was not recovered, he would pay PW1 K58,000, which was the cost of the bus. According to CW1, PW1 agreed to the proposal because it would benefit him. CW1 stated that DW1 typed the agreement and he signed as a witness at the request of the parties.

CW1 stated that DW1 received information about the bus in Serenje and he travelled to recover it. He later drove it to his house and informed CW1 who later went to view the mini bus at DW1's house. He noticed that the mini bus was damaged and the fleet number had been changed from LSK to KPM 1313. CW1 testified that he contacted PW1, who told him that he had seen the mini bus at DW1's house.

CW1 stated that he did not take the mini bus to the police station because of the agreement between PW1 and DW1. He added that DW1 told him that he wanted to take the bus to a garage in order to rehabilitate it and hand it over in good order to PW1. DW1 also told him that if PW1 was not happy with the arrangement, he would organize K58,000 to pay him and then keep the bus so that he would not lose on his money.

In **cross-examination by the Plaintiff**, CW1 stated that he witnessed the agreement at the request of the parties. DW1 offered to compensate PW1 in order to settle the matter. DW1 was not criminally responsible for his son's acts and was not intimidated or threatened by the police. CW1 testified that PW1 never forced DW1

to sign the agreement. He added that if DW1's son is found, he will be charged with the subject offence.

In further **cross-examination by the Defendant**, CW1 stated that he did not know if PW1 and DW1 met at the police station for the first time. He did not know how PW1 employed DW1's son. He did not know if PW1 reported his case to more than one police station. CW1 admitted that the value of the bus was given by PW1 when he reported the matter to the police. CW1 was not aware that DW1 made four attempts to recover the mini bus but was aware that he found the bus in Central Province. He was not aware that PW1's vehicle was supposed to be comprehensively insured and stated that he did not tell DW1 to park the mini bus at his house.

Learned Counsel for the Plaintiff filed written submissions for which I am grateful. I shall not reproduce them but refer to them in the Judgment.

I have seriously considered the pleadings, evidence and the submissions of Learned Counsel. It is incontrovertible that PW1 employed DW1's son Musadabwe Musadabwe sometime in

November, 2012. He had barely settled in employment when he disappeared with PW1's mini bus to Mkushi. PW1 reported the matter to the police who drew DW1 into their investigations. Consequently, PW1 and DW1 executed an agreement, where DW1 agreed to compensate him for the loss. DW1 eventually recovered PW1's mini bus in Mkushi and it was involved in an accident. PW1 refused to collect the bus from DW1 insisting that he had to honour the agreement they executed. DW1 alleged that he was coerced into signing the agreement.

The issue that falls for determination is whether the agreement executed between PW1 and DW1 is valid and enforceable.

It is a fundamental principle of the law of contract that an agreement is a legally binding document, which is enforceable at law. The Learned **Authors of Chitty on Contracts, 26th Edition, Volume 1** at paragraph 772 state that:

“Where the agreement of the parties has been reduced into writing and the document containing the agreement has been signed by one or both of them, it is well established that the parties signing will be bound by the terms of the written agreement, whether or not he has read them or whether or not he is ignorant of their precise legal meaning.”

In the case of **Colgate Palmolive (Z) Inc. v Able Shemu Chuka and 110 Others**¹, the Supreme Court citing with approval the case of *Printing Numerical Registering Company v Simpson* held that:

“If there is one thing more than another, which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of Justice.” (underlining my own)

In order to put this matter into perspective, I find it necessary to reproduce the agreement executed by the parties. It reads:

“AGREEMENT

This Agreement between I, BOSTON MUSADBWE of Lusaka on one part and Mr. MALAMBO MUNYATI also of Lusaka on the other part.

PURPOSE

The purpose of this Agreement is to bring closure to a matter of a missing mini bus a property of Mr. Munyati taken away by a driver he employed to operate the bus and that driver, is my son (BOSTON MUSADABWE)

The following factors have compelled me (BOSTON MUSADABWE) to propose this Agreement.

After a long and wide but unsuccessful search for the missing bus and driver it is reasonable to assume that the stolen bus has depreciated to undesirable level where ever it may be by now.

To support Mr. Munyati’s bus business idea by committing myself to redress him with the daily bus product at rate K200 x 6 every week.

To make payment to Mr. Munyati, a total gross purchase cost of the missing bus at an agreed sum of K58,000 net.

SPECIAL CONDITIONS

- 1. The period of AGREEMENT is fixed at 90 days.**
- 2. The payment of the agreed bus gross cost price of K58,000 will be made as lump sum.**

3. The lump sum payment will cease the bus product payments immediately.
4. The bus product payments will be secondary to the agreed initial lump sum payment of K58,000 net.
5. The lump sum payment will justify ownership letter of transfers from the current owner.
6. The validation date of this Agreement commences from the date of signing the agreement.
7. The Agreement must be witnessed by the Police dealing Officer and any other desired persons.

BY THIS AGREEMENT;

The hands of I, BOSTON MUSADABWE and Mr. MUNYATI are hereby tied to the terms and conditions of this Agreement.”

The evidence of PW1 and CW1 is that DW1 freely executed the agreement. DW1 alleged that he was coerced into signing the agreement. I have carefully considered the agreement and find that the special conditions contained two derivatives on payment. The first was to pay the bus gross cost of K58,000 and transfer the bus to DW1 or to pay the daily bus product until the bus was recovered and the eventual bus gross cost without any transfer to DW1. It is peculiar that the agreement employed compulsive language as follows:

“ The purpose of the agreement is to bring closure to the matter between PW1 and DW1’s son on account of “factors that have compelled DW1 to propose the agreement.”

A careful perusal of the language shows that it was quite involuntary and contrived. It cannot be described to be that of a free minded person.

I find that there was undue influence exerted by PW1 in the execution of the agreement. PW1 was the stronger party in the transaction since his bus was stolen by DW1's son and he led the police to DW1 who netted him into the criminal investigations. The **Learned Author Trettel, on the Law of Contract, 13th Edition, Sweet & Maxwell, 2011, at page 447** states that:

"A transaction can be set aside in equity, if because it has been procured by undue influence exerted by one party on the other, it cannot fairly be treated as the expression of free will."

The Learned Author Trettel further states at page 449 that:

"The first group of cases in which equity gave relief on the ground of undue influence are those in which one party had induced the other to enter into the transaction by actual pressure which equity regarded as improper but which was formerly thought not to amount to duress at common law because no element of violence to the person was involved. For example, a promise to pay money could be set aside if obtained by a threat to prosecute the promisor or his close relatives or his spouse for a criminal offence. Such threats would now constitute duress but the equitable concept of pressure is still wider than that of duress at common law, for undue influence can be exercised without making illegitimate threats or indeed any threats at all."

The evidence of DW1 and not gainsaid by PW1 is that he reported the matter to at least three police stations namely, Chilenje, Kabwata and Lusaka Central. DW1 testified that he was interrogated and threatened at all these police stations. The agreement in dispute was facilitated by CW1 the investigating officer in the criminal case against DW1's son. In my view, CW1 compromised the integrity of the investigation by facilitating an agreement, which he later witnessed probably at PW1's insistence. The agreement was signed by the parties at a police station. If at all PW1 and DW1 intended to freely execute an agreement, then they should have done it without the involvement of CW1 who had no role whatsoever in a civil arrangement.

In **Nkongolo Farms Ltd v Zambia National Commercial Bank and Others**³, the Supreme Court held *inter alia* that:

“The current trend of the law on the application of the doctrine of undue influence is to ensure influence of one person over another person is not abused.”

In casu, I find that PW1 and CW1 abused their influence over DW1. PW1 unduly reported DW1 to several police stations and allowed CW1 who was investigating his son to facilitate the agreement. In addition, CW1 is a police officer and it is quite

natural for any person to yield to his authority just because of his uniformed status.

I therefore set aside the agreement between PW1 and DW1 on the ground that PW1 exerted undue influence on DW1. In so doing, I dismiss PW1's claims in their entirety.

I award costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 8th day of November, 2017.

M. Mapani
M. Mapani-Kawimbe
HIGH COURT JUDGE