

BELLIE MABAISA

Versus

DR KUDAKWASHE G. MUCHARAMBEYI

And

**THE DIRECTOR OF HOUSING & COMMUNITY
SERVICES, CITY OF BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 31 MAY & 17 JUNE 2011 & 2 FEBRUARY 2012

Ms S. Ncube for the plaintiff
R. Ndlovu for 1st defendant

Judgment

NDOU J: The plaintiff is a widow aged seventy four (74) years old. She is the mother of one Thando Mabaisa who had dealings with the 1st defendant. The salient facts of the case are the following. Sometime in October 2008, the 1st defendant (“the defendant”) who is based in South Africa learnt that there was a house for sale in Nkulumane and that it was being sold by Calderwood, Bryce Hendrie and Partners Legal Practitioners. The defendant went to the offices of these legal practitioners and saw Thando Mabaisa who was then employed there. Thando confirmed to the defendant that house number 3988 Nkulumane was for sale. The defendant went to view the house and did not find anyone. Thando told him the house belonged to a deceased estate. From what he had seen from outside the defendant decided to buy this Nkulumane house. The purchase price was ZAR180 000,00. The defendant made a cash payment to Thando at the said legal practitioners’ offices. The defendant paid a total sum of ZAR200 000,00 i.e. ZAR180 000,00 for purchase price and ZAR20 000,00 for transfer charges. The defendant was duly issued with receipts in name of Calderwood, Bryce Hendrie & Partners Legal practitioners for this amount. Thando purported that the amount would be kept in the said legal practitioners’ Trust Account. Thando had in fact issued the defendant with fake or forged receipts. She then converted the said cash into her own use. The defendant discovered the theft of his money and looked for Thando. He met Thando in December 2008 in South Africa and she assured him that the transfer was being done. In February 2009, the defendant discovered that he had been defrauded by Thando as the Nkulumane house in fact belonged to one G. Sibanda and it was not for sale and he confronted Thando in South Africa where she now lives. The two agreed to return to Zimbabwe and sort out this issue. The defendant arrived on

22nd February 2009. Thando arrived a day later. Thando directed the defendant to her sister's house in Hillside where the plaintiff was temporarily resident. What transpired at the Hillside house is hotly disputed. The events in Hillside are crucial to the determination of the issue at hand. I will revert to these events when I consider the evidence of the various witnesses in turn. It is at Hillside that the "surety" document was signed by the plaintiff. The defendant and some of the plaintiff's relatives proceeded to Hillside Police Station. From Hillside Police Station the parties and their relatives proceeded to Mpopoma Housing Office. At the said office the plaintiff executed yet another document where she sought to "sell" the house in issue. I will revert to this document later. From the Housing Office the parties went to the plaintiff's property where the defendant took possession.

After three days of these transactions the plaintiff approached this court under a certificate of urgency challenging all the above transactions that were made on 23rd and 24th February 2009 on the basis that she did what she did and signed under duress. Although the matter commenced as an urgent chamber application, the matter was later referred to trial with the papers filed of record standing as pleadings. According to the joint pre-trial conference memorandum the issues for trial were the following:

- "a) whether or not all the documents signed by the plaintiff including the surety document or agreement of sale, were signed under duress.
- b) whether or not plaintiff offered 1st defendant house number 61119 Pelandaba, Bulawayo in settlement of Thando Mabaisa's debt.
- c) whether or not the 1st defendant is entitled to house number 61119 Pelandaba, Bulawayo."

The alleged surety document was written in long hand and it states:-

"23/02/09

I Thando Patricia Mabaisa I/D 63-909108 W 39 do admit receiving R200,00 from Dr Kuda as purchase of a house. We have therefore agreed to surrender to him house number 61119 Pelandaba surety which belongs to my mother and she has also agreed to give to Dr Kuda until repayment of the full amount by mid-September 2009. It will be changed to Dr Kuda's name at the Council on 24/2/2009.

(Signed) [Thando Mabaisa]

Witness (Signed) [S. Ndlovu]

23/02/09

Witness (Signed) [S A Nkabinde]

The above statement was written at my presence on 23/02/09

(Signed) [Siphiwe Ndlovu]

The above statement was written in my presence on 23/2/09

(Signed) [S A Nkabinde]

I have given my house to Dr Kuda for reasons stated by my daughter Thando.

(Signed) [B. Mabaisa]"

It is common cause that this document was taken to Hillside Police Station as alluded to above where an Assistant Inspector Shilling date stamped it and attested his signature. This was done in the absence of the plaintiff but in the presence of Thando and other relatives of the plaintiff. The next relevant document was one written by Thando's sister at the Mpopoma Housing Office and signed by the plaintiff. It reads as follows:

"Mina Bellie Mabaisa the owner of house number 61119 Pelandaba sell my house to Dr Kudakwashe Godfrey Mucharambeyi I/D No 63-832643 G 42 hold Form No 103-2-2009

Signed (B.Mabaisa)"

I now propose to consider the testimony of the various witnesses in turn. The following witnesses testified on behalf of the plaintiff.

Bellie Mabaisa

She is the plaintiff and she did not know the 1st defendant prior 23 February 2009. She said on account of ill-health she had moved from her house number 61119 Pelandaba to go and stay with her daughter Siphiwe Ndlovu and her husband at number 47 Weir Avenue, Hillside. She said she knew that Thando had gone to Johannesburg in December 2008. On 23 February 2009 late in the morning, she was ill and alone at 47 Weir Avenue Hillside. The phone rang and she recognized that it was Thando's voice. Thando informed her she was by the gate. She told Thando to push open the gate as she was unable to do so herself and that the gardener had gone to the shops. Eventually Thando entered the house and she asked where she was from. Thando said that she had some papers that she wanted to sort out in Bulawayo. They chatted a while and Thando left for the kitchen. She returned and knelt next to the bed she was lying on. Thando then said "mother I have a problem". She asked her what sort of problem Thando then said she had taken some money from certain people and these people want their money back. She narrated that she had taken the money at the time she was employed at Calderwood Legal Practitioners. She was in tears when she made this narration. She said these people are in the sitting room. At that stage the plaintiff said she was severely ill such that she had difficulty in walking. But upon hearing what Thando said she took a walking stick and forced herself to walk

up to the telephone chair and sat there. In the sitting room she found some strangers and greeted them. In the sitting room there was a man and two women. She also saw yet another man standing outside the verandah. She asked who these people were since she did not know them. The women were youngish and one was coloured and the other African. The African woman introduced the 1st defendant as Dr Kuda and the coloured woman as Dr Kuda's wife and herself as Kuda's sister-in-law. She did not introduce the man standing outside. She asked them how she could be of assistance. The coloured woman said they had come with Thando because they gave her their money R200 000 to buy a house before Thando left for South Africa. She asked Thando if what the coloured woman was explaining was true and Thando said it was. She then informed them that she understood their problem with Thando but she could not help them. She also informed them that such issues cannot be discussed in Hillside as this was her son-in-law's house and he was in South Africa. She told them that she knew nothing about Thando's offence. The coloured woman then said "we want our money now!" She indicated to them that Thando was a grown up woman aged 45 years so they should deal with her. They asked Thando how she had spent the money but she could not explain. At that stage the 1st defendant was not saying anything but it was the two women who did the talking. After she told them to sort out the issue with Thando she felt exhausted and she went to bed to rest. She does not know what they remained discussing with Thando. After a while Thando came to the bedroom and said to her "mother can you assist me give me your house so that I pay these people with it." She told Thando that she would do no such a thing. Thando left and only to return thereafter with the same request. She gave Thando the same answer after a while she decided to get up and go back to the sitting room where these people were. When she got there, the coloured woman said Thando offered them the Pelandaba house. She informed them that the Pelandaba house did not belong to Thando but to her. They insisted that since Thando owes them money they will eventually get the Pelandaba house. An argument ensued on this issue. She eventually went to bed to rest again. She believes that Thando phoned her sister Sipiwe who arrived after 2pm and came and greeted her in the bedroom before going to Thando and these people were. She followed her. These people narrated to Sipiwe Ndlovu how Thando had taken their money. Thereafter she saw these people grouping and discussing and at some stage call Thando to talk to her outside. After a while Sipiwe said the 1st defendant was going to call the police. She, i.e. the plaintiff, felt relieved as she felt the police were the best people to deal with such a matter as she realized that what Thando had done was wrong. The man who was standing by the verandah drove away in a van and returned with three men seated at the back of the van. She thought they were policemen. At that time the defendant and the two women were standing outside chatting. Two of the men who had just arrived jumped off the van and ran into the house. The other one remained outside with the driver of the van. Thando came and sat next to her on the floor. The defendant came into the house and sat on a chair. When these two men entered the house they asked "Where is the

person who took the money?” They went straight to Thando and started beating her up asking her where the money was. One of them was holding some weapon to assault her but she was unable to say whether it was made of rubber or metal. At that stage the plaintiff said that she started crying. She told them that that was her son-in-law’s house and that they were likely to destroy her son-in-law’s property. After she said this these men dragged Thando outside the house to the verandah where they continued assaulting her. They kept on saying Thando should give them the money and Thando kept on confessing to taking the money and used it but said she had no money on her person. The assault became very severe and she became terrified. Sipiwe was also crying as she witnessed these events. She at some point moved back to the bedroom. The assaults stopped and Thando moved to where she was in the bedroom. Thando said to her “mother do you want people to kill me in your presence whilst you refuse to give me your house.” She said to her Thando forget about the house I can never give you the house no matter what happened. These people were milling around the premises and chatting when the beatings had stopped. As all this was happening the day was getting by and at about sunset, these people said they wanted Thando’s property. On account of the ordeal she had just experienced, and as mother, she offered her four plate stove and a refrigerator to Thando to use as part of the property that these people where demanding. At that stage the situation was bad and they took the refrigerator and stove carried them out. They saw Sipiwe’s deep freezer and the coloured woman told the men to take it as well even though she tried to protest that it was not part of the property being offered. They also took Thando’s kitchen table with four chairs which was being kept at Hillside. At some point Thando had asked Sipiwe to phone her other sister Sibonginkosi Nkabinde to come to Hillside. After taking the property, these people left with her daughters and she remained behind. She later received a telephone call from Sibonginkosi to the following effect. “Mother things are bad here. These people are now taking the house in Pelandaba. They say they are taking it”. Sipiwe later called as well saying “Mother there is a document written by Thando pledging your house for the offence that she committed. They are saying if we do not sign it they were not going to release us ...” These calls traumatized her. They affected her emotionally. As a person who suffers from high blood pressure she does not know what transpired thereafter until she came to her senses and she saw a neighbour and the gardener attending to her. She remained lying down until her daughter and these people returned from Pelandaba. She heard these people implying that she was feigning illness and demanding that she be given her medication so that she could sign the document written in her absence i.e. the surety document. The document had been written in Pelandaba. Whilst she was feeling very weak and seated on the bed she heard these men say that this old woman will come to her senses after we have killed her children or kidnapped them. The three men moved to the door of the bedroom. They said this old lady will come to her senses when we have killed one of her children or all of them. One of the man entered the bedroom and the other two remained by

the doorway. At that stage Sipiwe and Sibonginkosi were seated next to her. The man who had entered the bedroom pushed a document to her and said sign hear old lady. She signed the document induced by fear of having her daughters killed. She did not even read the document but signed the document which had been written by Thando. After she signed the document the 1st defendant and these people left with Thando. Before they left they said they would return in the morning to take them to Mpopoma Housing Office so that they would sign the house into 1st defendant's name. As soon as these people left, Sipiwe and Sibonginkosi phoned their brother Joel Mabaisa and nephew Jotham Gumede and told them what had happened. It was agreed that these two would come the following morning before these people returned. In the morning Sipiwe and Sibonginkosi picked their brother Joel from Tshabalala. They reported the matter at Hillside Police Station as they feared these people may harm Thando. Police told them to contact them as soon as these people arrived. Indeed 1st defendant and his group arrived and the police were contacted and they came to 47 Weir Avenue Hillside. The police took 1st defendant and his group together with Joel, Jotham and Sibonginkosi to Hillside Police Station. She said that she did not go to the police station but remained with Sipiwe at the house. She does not know what transpired at the police station but police referred them to Mpopoma Housing Office. They went to Mpopoma Housing Office. She went in the company of Sipiwe, Sibonginkosi, Joel and Jotham whilst 1st defendant went in the company of Thando and others in his group. At Mpopoma Housing Office they were attended by an officer Dube. Dube gave her a piece of paper to write which Sipiwe wrote on her behalf the above-mentioned document and she signed on account of fear. After she signed 1st defendant ordered that they go to Pelandaba house to remove the property. They went to Pelandaba and did as ordered because she was still scared of what had previously occurred at Hillside the previous evening. She felt helpless as these people now knew where all her daughters resided. She had tenants in the Pelandaba house but 1st defendant and his group ordered that their property be loaded into a truck. The tenants and the property were dumped at Sipiwe's house at Hillside. She further explained that her Pelandaba house was nowhere near the Nkulumane house that Thando purported to sell to 1st defendant. She described in detail all the improvements to the Pelandaba house which enhanced its value to about R500 000 i.e. more than double the value of the house that Thando offered to sell to 1st defendant. (It is common cause that the transaction between plaintiff and 1st defendant was done without property being evaluated). After dumping the tenants and their property at Hillside the 1st defendant went back to South Africa with Thando. The following morning she then sought legal advice on the matter resulting in these proceedings. This witness was subjected to detailed, determined and tactful cross-examination. Every aspect of her *viva voce* testimony and affidavits that she filed in the urgent application were tested. She was not shaken under such detailed cross-examination. I am satisfied that she is a credible witness. Her version remained consistent throughout.

Rowan Kailizi: He was the plaintiff's tenant at the Pelandaba house at the material time. He said that on the evening of 23 February 2009 the plaintiff's daughters Thando, Sipiwe and Sibonginkosi arrived at the Pelandaba house in the company of the 1st defendant and one Debrah who introduced herself as 1st defendant's wife and another woman and three men. He said from the manner they approached he sensed that there was a problem. It was as if there was a death. It appeared that some of these people were upset. Debrah told them i.e. people resident at the Pelandaba house that as from the following day (24 February 2009) the house would belong to the 1st defendant as he had bought it from Thando for ZAR200 000 in October 2008. He said he told Debrah that he understood that but as a tenant he required that he be given the usual notice to vacate. He also proposed that they wait for his fellow tenant Shelton Moyo to arrive before any action is taken. All this time the 1st defendant was seated quietly but it was Debrah who did the talking. As they were waiting for Shelton, Thando was seated on the floor. 1st defendant asked Thando why she had done what she did. Thando appeared scared and could not even talk. Debrah and the other female started kicking Thando. Thando appeared to be the centre of attention. There was a man in their company whom they referred to as "Malume". This witness said he pleaded with him that he be given notice but the man insisted that they had to vacate the following morning as ordered by Debrah. They took Thando from the lounge to the kitchen. They took a piece of paper and they said "we are now going to sign on this paper that we are taking the house as surety to secure the repayment of the money that was paid." At that stage Thando was crying. Of the three men who came with them, two went outside and one remained in the house. The two who went outside came back armed with about one metre long iron rods and started prodding Thando with these rods. It is at that stage that Thando took a pen and wrote what they wanted her to write. After she had finished writing, she was told to sign the document. She did. Thereafter Sipiwe and Sibonginkosi were also ordered to sign. They protested but these two men armed with iron rods then became "chaotic". They concentrated on Sipiwe and she eventually signed. They then focused on Sibonginkosi but she refused to sign saying they would rather kill her. The sisters were refusing to sign saying the house does not belong to them. Sibonginkosi eventually signed. 1st defendant and Debrah then ordered the men armed with rods to offload their property that they had brought along as the sisters had signed. (This was done even before the owner of the Pelandaba house had signed the document.) 1st defendant had effectively taken possession of the Pelandaba house even before the owner of the house had seen and signed the surety agreement. 1st defendant and Debrah stated moving around the house as if they were assessing its value. Sipiwe and Sibonginkosi left. Thando remained behind with 1st defendant and his group. After assessing the house they also left. The following day on 24 February 2009 true to his word, 1st defendant arrived with two UD trucks and their vehicles. This time around his landlady, the plaintiff, was also present with members of her family. Like the previous day, 1st defendant was watching whilst Debrah was giving instructions. At some

point 1st defendant was shooting a video of the property. He tried a last minute plea to 1st defendant to be given sufficient time to secure alternative accommodation but 1st defendant was adamant that he wanted them out. Because they had the same men who had been in their company he decided not to resist. His property, together with that of Shelton, was loaded into the trucks and taken to Hillside where it was dumped. Under cross-examination he was adamant that Thando was crying throughout the events of 23 February 2009. She was crying even when she wrote the document. He was subjected to some detailed and tactful cross-examination but he stuck to his story. Having watched his demeanor in the witness stand, I am satisfied that he is a truthful witness. He is a neutral witness who gave a credible account of what transpired.

Siphiwe Ndlovu (nee Mabaisa): She confirmed that she is plaintiff's daughter and Thando's sister. On 23 February 2009 when she was at work, she got a telephone call from her house. On answering it she was surprised that it was Thando. She knew Thando to be in South Africa. Before they even exchanged greetings Thando told her to come home as there was a problem. Because she was staying with her ailing mother she panicked and rushed home. She got home around 1300 hours. She found a number of strangers at her residence. She found her mother crying and in bad state. She found Thando, 1st defendant and his wife Debrah and their friend Bekezela inside her house. Debrah explained to her their mission. Thando confirmed that she had taken 1st defendant's money and spent it. The rest of her evidence from this stage is corroborative of that of her mother in material respects. Suffice to say that she confirmed the severe beating of Thando by these men whom the 1st defendant had brought to her house. About the events at Pelandaba she confirmed what the previous witness said that they were not in the same room as Thando when the document was discussed. She did not witness what transpired in the lounge leading to the decision to write the document. All she saw was Thando being dragged into the kitchen where she and Sibonginkosi were. The witness said that she did not sign the document voluntarily. 1st defendant told them to sign but she and Sibonginkosi refused. That is when 1st defendant said to them harshly "I say sign this document now!!!". 1st defendant told his men "Deal with them if they refuse to sign." This utterance frightened them and they signed. At that stage they had received a telephone call that the plaintiff had collapsed at her house in Hillside. They rushed to Hillside after signing. At Hillside they found her mother lying down in the bedroom with a neighbour consoling her. The neighbour tried to confront these people and one called "Director" held her by the collar and pulled her from the bedroom to the sitting room. She was slapped with open hand by the other one referred to as "JB". Director then took the document and threw it at her mother and said "Old lady if you do not sign this document we will kill one of your children". Although the plaintiff initially protested she eventually succumbed to the pressure and threats and signed. The rest of her

evidence is similar to that of her mother on the events subsequent to the plaintiff signing the document. This witness performed very well in the witness stand. She is a credible witness.

Nontando Ndlovu: Briefly she is Sipiwe's neighbour in Hillside. She said on 23 February 2009 she was called to Sipiwe's house by her gardener. The worker informed her the plaintiff had collapsed. She got to the bedroom where the plaintiff was. She found her on the floor shaking and crying. After a while she managed to clam her and enquired what had happened. She explained something about her child having done something bad to her. She narrated the ordeal to her. Eventually Sipiwe and the others arrived. The 1st defendant arrived with his group. She tried to reason with them but earned insults and threats instead. When the plaintiff was forced to sign the document she was still in the bedroom and realizing the situation was bad she stood up to leave. As she got by the doorway she was slapped by one of the men with open hand. She got out of the kitchen and ran to her house. This witness is equally credible. She is also an uninterested party who was called in to attend to the plaintiff's illness.

Jotham Gumede: His evidence merely corroborated what other witnesses said and I will not repeat it here. Suffice to say that I find him to be a credible witness.

The 1st defendant's case comprise of his own testimony and that of Thando Mabaisa.

Kudakwashe Mucharambeyi: He said that he did not know the plaintiff before 23 February 2009 and was only led to her in Hillside by Thando. In brief he disputes ever exerting any pressure on the plaintiff and Thando to execute the two documents he is relying on. He had a problem in explaining why he took possession of the plaintiff's house even before the plaintiff signed the alleged agreement. He could not give a convincing explanation why he took immediate possession of the house even before Thando had failed to pay by mid-September. The manner in which the plaintiff's tenants were removed from the house and dumped in Hillside is obviously consistent with forced removal. At the end of the day I find that the 1st defendant is not a truthful witness. His story is full of inconsistencies. He obviously took the law into his own hands and tried to recover the money Thando stole from him by unlawful means. When he realized that Thando was impecunious he designed this iniquitous method to seek remedy from her mother. That is why he could not explain why it was necessary for him to go to the Hillside house and Pelandaba in the company of many people. It is not clear why they spent the whole day on 23 February 2009 at plaintiff's son-in-law's house. He cannot give a convincing reason why it was necessary to take away Thando from her family on the night of 23 – 24 February 2009. Even more importantly why it was necessary to keep Thando with his group throughout the 23rd and 24th February 2009. Further it is not clear why it was necessary for him to travel with Thando back to South Africa after he had taken possession of the

Pelandaba house. It is not clear why he took over the Pelandaba house without even comparing it with the Nkulumane house that Thando purported to sell to him. Obviously he was aware that houses do not have a generic value. This failure to do proper evaluation is an indication that this transaction is tainted with illegality.

Thando Mabaisa: She said that she executed and signed the surety document because the 1st defendant had “hired” some thugs to come and kill her” and members of her family. She said she did not voluntarily sign the document. She said she also feared for her daughter’s safety who was in South Africa at the time and working for 1st defendant’s company. This witness was called by the 1st defendant and without him successfully declaring her a hostile witness what she said remains part of his case. The evidence is overwhelming that the so-called surety agreement was procured by assault on Thando and threats of violence upon the persons of her immediate relatives. The agreement was signed by the plaintiff on account of duress, *metus*. The law is that such an agreement signed under duress is voidable at the instance of the coerced party – *Broodryk v Smuts NO 1942 TPD 47 ant 53*; *Smith v Smith 1948(4) SA 61 (N)* at 67-8; *Savvides v Savvides & Ors 1986(2) SA 325 (T)*; “*The Law of Contract in South Africa*”, R H Christie (2nd Edition) at 367; A J Kerr, “*The Principles of the Law of Contract*,” 4 Ed pp 238-9 and *Ferguson & Partners v Zimbabwe Federation of Trade Unions and Ors 2004(1) ZLR 475 (H)* at 483-4. *In casu*, evidence clearly shows that there was actual violence perpetrated on the plaintiff’s daughter and threat to kill or harm the plaintiff’s family if she does not sign the agreement. It is clear that this improper pressure or duress was directed towards the formation of the contract. The improper pressure *in casu*, is of the kind and severity as to render the contract voidable. The agreement was not voluntary – it was not freely entered by the plaintiff. On this point alone I set aside the disputed agreement for lack of volition on the part of plaintiff. The plaintiff was the coerced party so she is entitled to assail it. On this point alone the plaintiff’s claim must succeed.

Accordingly, it is ordered that:

1. Exhibits 1 and 2 be declared a nullity.
2. The Director of Housing and Community Services of City of Bulawayo does not transfer the rights and interests in stand number 61119 Pelandaba, Bulawayo to the 1st defendant.
3. The plaintiff be declared the owner of the property described in paragraph (2) above.
4. The 1st defendant and all those claiming title through him be evicted from the property described in paragraph (2), above within 48 hours of the service of this order and possession thereof restored on the plaintiff.

5. The 1st defendant and those acting on his behalf are ordered not in any way to interfere, intimidate or harass the plaintiff and members of her family.
6. The 1st defendant pays costs of suit on the legal practitioner and client scale.

Coghlan & Welsh, plaintiff's legal practitioners
Messrs R. Ndlovu & Company, 1st defendant's legal practitioners