IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 112 OF 2018

BETWEEN:

STEVE BANDA AND 181 OTHERS **CLAIMANTS**

AND

MESSRS. MAKIYI, KANYENDA AND ASSOCIATES

(A FIRM) **DEFENDANT**

MOTA ENGIL ENGENHARIA E CONSTRUCAO SA **PARTY CITED**

Coram: JUSTICE M.A. TEMBO,

Panyanja, Counsel for the Claimants
Lihoma, Counsel for the Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this court's order on the defendant's preliminary point of estoppel against the claimants' action, raised during the scheduling conference which was held in this matter in terms of Order 14 rule 2 Courts (High Court) (Civil Procedure) Rules. The defendant seeks dismissal of the current proceedings on account of the alleged promissory estoppel. The claimants oppose the preliminary issue.
2. It is convenient to set out the statement of case of the claimants and the defendant's defence at this stage.
3. The claimants statement of case states that:

i. The claimants are citizens of Malawi and were at all material times clients of the defendant.

ii. The defendant is a law firm based in the City of Blantyre and had, at the material time, legal practitioners who by law were, among others, duty bound act honestly and diligently when advising their clients or otherwise representing them before the court of law.

iii. Sometime in March, 2014, claimants instructed the defendant through, Mr David Kanyenda, to respresent them in their claim for damages for unfair dismissal against Mota Engil.

iv. On 12th March, 2014, the defendant lodged a claim on behalf of the claimants before the Industrial Relations Court, sitting at Blantyre, Matter number 102 of 2014 in which the claimants sought a number of remedies including but not limited to compensation for unlawful termination and/or dismissal and severance allowance.

v. The claimants aver that during the pre-trial briefing, the defendant advised the claimants that the reasonable compensation was K9 000 000 000.00 and during the pre-trial conference, the defendant demanded the said amount from the claimant's employers as compensation.

vi. The claimants repeat paragraph v hereof and avers that since then the defendant never communicated to them on any negotiations that were there with their employer until when they were called to collect payment purported to be compensation details as set out below:

Particulars of payment

(See the attached list of names of the people and their corresponding amount received)

vii. The claimants further aver that when they went to court to check the file record, they noted that the defendant withdrew their claim without their consent and as if this was not enough, one of the terms of the consent order withdrawing

the claim precluded them from bringing any subsequent claim arising from the same facts against their employer, to wit, Motor Engil Ltd.

viii. Subsequently, the claimants successfully lodged a complaint before the Disciplinary Committee of the Malawi Law Society where it was found that the defendant failed to account for the sum of K36 000 000.00 which was received from Mota Engil but not remitted to them.

ix. Following the Malawi Law Society's findings, the defendant, through their lawyer, Mr David Kanyenda, called and gave claimants some money without any reasonable explanation.

x. Despite various reminders and requests, the defendant has failed to furnish claimants with evidence of the compensation that was received from their employer and how the same was distributed.

xi. The claimants, therefore, aver that the defendant's conduct amounts to breach of their duties as agents.

Particulars of the Breach

a) Failing to act with diligence
b) Failing to account for the money collected from Mota Engil
c) Failing to act in good faith.

xii. Without derogating from the matters referred to in paragraph xi hereof, the claimants aver that the defendant are guilty of professional negligence.

Particulars of Professional Negligence

a) Withdrawing the claims on behalf of the claimants without instruction from them
b) Failing to account for the money received from Mota Engil on their behalf

c) Failing to comply with code of ethics when handling their claim
d) Failing to act with due diligence.

xiii. By reason of the matters aforesaid, the claimants have suffered loss and damage in the sum of K5 700 000 000.00.

Wherefore the claimants claim for:

a) An order that the defendant should account for the money received from Mota Engil Limited as their compensation for unfair dismissal which include but not limited to payment vouchers, cheques and how the compensation was calculated.
b) General damages for breach of contract.
c) Exemplary damages.
d) Damages for professional negligence to be assessed by the court.
e) Costs of this action.

4. In its defence the defendant stated as follows:

i. Save that the said Steve Banda was amongst the defendant's clients, the defendant puts the 181 claimants to strict proof thereof.
ii. The defendant asserts that they lawfully discharged their professional duties.
iii. The defendant orally received instructions to act on the labour matter against Mota Engil through a leadership of the claimants.
iv. Paragraph iv of the statement of case is admitted. The defendant further asserts that the claim was for unliquidated damages. The pleadings in the Industrial Relations Court did not specify any amount of damages.
v. Paragraph v of the Statement of Case is not admitted and the defendant puts the claimants to strict proof thereof. If, which

is not admitted, any amount was demanded from Mota Engil, it was only for discussion or negotiation purposes.

vi. Paragraph vi of the Statement of Case is not admitted. The defendant will at trial show that in fact the matter proceeded for a hearing before the Industrial Relations Court. The claimants were fully appraised of the developments and they were attending court proceedings. Subsequently, Mota Engil sought a negotiated settlement which eventually materialized.

vii. The claimants accepted the offer which their employer made whereupon we executed a Consent Order withdrawing the action.

viii. The claimants received the money and signed Release and Discharge Forms. Accordingly, the claimants ought to be estopped from instituting the present action.

ix. The defendant deny that the Disciplinary Committee of the Malawi Law Society found them liable for failure to account.

x. The defendant deny that following the Malawi Law Society findings, Mr David Kanyenda gave them some money without any reasonable explanation. At no point did the said David Kanyenda call the claimants to give them money. Rather the defendant, on a purely without prejudice basis and without admission of any liability whatsoever, remitted funds to the Malawi Law Society. In turn the Malawi Law Society facilitated payment to the claimants as full and final satisfaction of their claims against us.

xi. The defendant denies that their conduct amounts to breach of duty and professional negligence and puts the claimants to strict proof thereof.

xii. The defendant denies that the claimants have suffered loss and damage in the sum of K5 700 000 000.00 or thereabout and puts the claimants to strict proof thereof.

xiii. The defendant denies that the claimant is entitled to any reliefs sought.

xiv. Save as herein specifically admitted, if at all, the defendant denies each and every allegation of fact contained in the

Statement of Claim as if the same were herein set forth and traversed seriatim.

xv. Wherefore the defendant prays to this Court that this action be dismissed in its entirety with costs.

5. Counsel Chancy T. Gondwe, acting for the defendant, filed a sworn statement in support of the preliminary issue of estoppel. He stated that:

iii. The claimant commenced this action in April 2018 seeking various reliefs.

iv. The defendant contests the action and duly lodged a defence.

v. Paragraphs of the said defence raised the issue of estoppel as a bar to the claimants' institution of proceedings against the defendant.

vi. The defendant avers that the claimants executed release and discharge forms upon receipt of compensation.

vii. The claimants agreed to release the defendant from any action, claim, demand, suit or proceedings for damages, loss, debt, restitution. Equitable specific performance or any other type of claim whatsoever in repeat of the action in the Industrial Relations Court Principal Registry as IRC Matter No. 102 of 2014 between James Banda and Others v Mota Engil.

viii. The defendant avers that the claimants are estopped from reneging on the Release and Discharge and commencing the instant action through which they undertook to refrain from commencing proceedings against the defendant.

ix. The defendant prays that the question of estoppel be determined as a preliminary point of law since it may lead to final disposal of the action in the event it is determined in the defendant's favour.

x. In view of the foregoing, the action herein be struck out with costs.

6. Steve Banda, one of the one of the claimants, filed a sworn statement in opposition stated that:

i. I am one of the claimants in this matter and I make this statement on behalf of myself and the rest of the claimants.

ii. I have read the sworn statement of Chancy T. Gondwe filed on behalf of the defendant in support of the preliminary issue that the claimants are caught by estoppel, and I respond as below.

iii. We are a group of former employees of the party cited. The party cited dismissed us unfairly.

iv. We retained the defendant to act on our behalf in claiming compensation for unfair dismissal from the party cited. I hereby produce a copy of the matter commenced in the IRC marked and exhibited as SB1.

v. The defendant, through Mr Kanyenda, informed us and the Industrial Relations Court at a prehearing conference in Matter No. IRC 102 of 2014 that they claimed a total sum of K9 000 000 000.00 in the matter.

vi. After some time, the matter before the IRC was withdrawn because the defendant, whilst acting on our behalf, and the party cited had executed an out of court settlement in our favour.

vii. The defendant did not disclose the terms of the settlement agreement to us despite being our legal practitioner. Strange enough, the defendant claimed that the settlement agreement was a confidential matter which could not be accessible to us. The agreement remains a mystery up until the present date.

viii. Afterwards, the defendant informed us that the party cited had made the payment under the terms of the settlement agreement, and that we were to finally receive our respective shares of compensation. The figures, however, were not revealed to us at any point whatsoever.

ix. On August 29, 2016, around 10 or 11 O'clock in the morning, the defendant came and found us gathered at Zalewa to give us our shares of compensation, one by

one. Mr Kanyenda, of counsel, came with two other delegates from the defendant's office.

x. Before the whole process begun, we asked Mr Kanyenda to establish to us how much the party cited paid in compensation; how much we would receive per individual; and the respective proof of payments accordingly. Neither of these were provided to us. In fact, what we were audibly and expressly told was that it was either we get the money or leave without getting a penny if we remained arrogant or curious for details.

xi. Mr Kanyenda and his delegates then started to call each one of us to be getting their money. What happened is that we would first sign what he called a discharge form and then get our money.

xii. The terms of the discharge form were hidden from us with a piece of paper, and the only visible part was the signatory's area. The defendant had signed, and then each respective claimant has to affix their signature as well. Now, because we desperately needed the money since we had been discharged and were not working, we took our shares. For our friends who stuck their ground that they were not going to receive until the defendant explained how much was given in total and provided proof of payment, they have not received any penny up until today.

xiii. After signing, we would then get our cheques. There were no figures written in advance on the cheques. The distribution formula, which the defendant unilaterally devised and imposed on us, was that those who had worked for the party cited for more than six months were getting K700 000.00; those who had worked for about three months K300 000; and those in the Committee which facilitated the case and was in close contact with the defendant got K2 000 000.00 each.

xiv. Even though we got the money, we were not satisfied with the process. We then proceeded to lodge a complaint with the Malawi Law Society which found

through a disciplinary hearing that the defendant failed to account for K36 000 000.00 received from the party cited. I hereby produce a copy of the Malawi Law Society Disciplinary Committee decision marked and exhibited as SB2.

xv. After several attempts to recover the money from the defendant which all proved futile, we commenced the present action claiming for an order for account, damages for breach of contract and for professional negligence as well as costs.

xvi. We verily believe that this matter is not caught by the doctrine of estoppel. I pray that the court should not dismiss this case on account of estoppel.

7. David Kanyenda then filed a sworn statement in reply to the sworn statement in opposition. He stated that:

iii. The claimants' action in the Industrial Relations Court was for unliquidated damages. The level of compensation as at large. The pleadings did not claim a specific amount as damages. Therefore, we did not and could not have informed the claimants that their claim was for the sum of K9 000 000 000.00.

iv. We orally received instructions to act for the claimants in or around February 2014. The claimants did not write us any letter appointing our firm to represent them. They had constituted a leadership committee tasked with identifying a legal house to act on their behalf. The said committee members personally delivered relevant documentation for instance appointment and dismissal letters to enable us initiate legal proceedings on their behalf in the Industrial Relations Court against their previous employer. At all material times, the leadership of the group enjoyed authority to bind the remainder of their colleagues. They had rightly considered it to be logistically impracticable for each of the 200 odd applicants to physically and personally instruct us.

This was the true nature and scope of the dealings, interaction and negotiations between ourselves and the claimants. The claimants delegated to their leadership through whom we communicated. Throughout the course of our retainership spanning from around February 2014 till September 2016 the claimants were content with this mode of dealings and voiced no disapproval of the same presumably due to the efficacy of the same.

v. The matter was settled on receipt of instructions from the claimants' representatives who had initially appointed us.

vi. The claimants were informed about the proposed settlement terms when they agreed thereto and allowed us to proceed to conclude the matter. The terms included execution of a deed of settlement at the instance of Mota Engil. Mota Engil proposed that we keep the settlement confidential in order to protect their corporate image. After discussion with the claimants' representatives, it was felt that the execution of the deed of settlement incorporating confidentiality clauses would not cause prejudice or detriment to the claimants after all they were informed of its terms especially the amount in compensation. There is now shown and produced to me a copy of the Deed of Settlement marked DK1 and exhibited hereto.

vii. The payments were made upon prior agreement and arrangement with the claimants' representatives who informed the rest of the group about the date of disbursement of the funds.

viii. It is not true that the claimants were not made aware of the amount of compensation. In fact, they had been informed prior to the settlement agreement and instructed us to proceed with closure of the matter.

ix. Our firm received the sum of Kxxx from Mota Engil consistent with the settlement terms. At all material times the claimants were informed about this sum. There is now shown and produced to me a copy of the cheque we received marked DK2 and exhibited hereto.

x. We did not know each of the claimants personally. Accordingly, they were advised by their representatives and ourselves the amount of money each would get; they were also told that each would receive a cheque and that they would execute a release and discharge form to the effect that they would not lodge further claims.

xi. No one protested and they were all satisfied with the procedure. Hence each received his cheque and signed the release and discharge form. Thereafter, each proceeded to cash his or her cheque at the bank. There is now shown and produced to me copies of the release and discharge forms marked DK3 and exhibited hereto.

xii. It is totally false that we hid the release and discharge form at all.

xiii. It is also totally false that there are some claimants who have not been paid to date. I challenge the claimants to produce names of such claimants.

xiv. None of the claimants refused to receive payments on the alleged grounds or at all.

xv. Each claimant received his cheque upon verification of his identity. It is difficult to understand the claim that the cheques had no figures yet they were eventually cashed. Nothing turns on the time when the actual figures were written. Suffice to say that each claimant received a cheque with an amount indicated and signed the release and discharge form.

xvi. The claimants then went to the Malawi Law Society. After conducting a hearing as opposed to a disciplinary we were directed to reimburse the claimants the sum of K36 000 000.00. We remitted the amount to the Malawi Law Society on a purely without prejudice basis and as full and final satisfaction of the action. The Malawi Law Society proceeded to disburse those funds to the claimants. There is now shown and produced to me a copy of the covering letter to the Malawi Law Society marked DK4 and exhibited hereto.

xvii. After the Malawi Law Society remitted the funds to the claimants, there was no further communication between the claimants and us since this marked the closure of this matter. The claimants voluntarily accepted a further sum of K36 000 000.00 as thorough satisfaction of their claim against us. It is not true that they tried to recover any money after all we remitted the funds as per directions of the Malawi Law Society.

xviii. The claimants therefore ought to be estopped from maintaining this claim against us in light of the preceding paragraphs.

8. Steve Banda and Geoffrey Ndalema then filed a sworn statement in response. They stated that

ii. We have read the sworn statement of David Kanyenda in reply to Steve Banda's sworn statement in opposition to preliminary issue of estoppel and respond as below.

iii. We refer to paragraph iv and v of the said sworn statement and admit that we indeed gave oral instructions and elected a committee to act on our behalf. The committee was to act as middlemen in that they would brief the rest of the claimants on the progress of the matter as advised by the defendant. The claimants as a group would make decisions, and the committee was meant to carry those decisions to the defendant as our legal practitioner.

iv. The claimants did not instruct the committee to settle the matter. At no point whatsoever was the committee mandated to make binding decisions without involving us. After the court adjournment when settlement was suggested, the claimants were waiting for communication from Mota Engil through the defendant on the settlement terms, after which the claimants were to deliberate and agree or not.

v. We refer to paragraphs vi, vii, viii and ix of the sworn statement of counsel Kanyenda and state that the defendant did not relay the offer or any communication from Mota Engil to the committee. In that scenario, the committee did

not have knowledge of any proposed quantum from the cited party which they could inform the rest of the committee members. We raised the issue of transparency to the defendant but the defendant did not take heed of our request.

vi. The defendant told us Mota Engil was willing to settle the matter out of court, and that any further information regarding the proposed amount would be communicated in due course. The defendant never at any point informed us of the amount that came from Mota Engil. In the absence of that communication, we could not agree on anything, not even instructions on settlement were referred to the defendant through the committee.

vii. The defendant did not communicate to us how much was received from Mota Engil.

viii. On distribution criteria, we never at any point agreed amongst ourselves and the defendant on specific sums of money each claimant was to receive because we had no idea of how much was received from Mota Engil, until to date. It is the defendant who imposed the amount each one of us would get on the date he came to distribute the money.

ix. It is not true that we were all satisfied with the amount of money we received. In fact on the day the defendant came to give us money, we first asked Mr Kanyenda to tell us how much was received. The defendant did not show us any document to substantiate the amount which was received. The settlement agreement was never shown to us despite the defendant being our lawyer.

x. That out of the claimants, we have it on record that Austin Kawecha, Adwell Manda, Pearson Kanyenda and Chikondi Banda (all of whom are no longer residing in Blantyre) have not received any penny from the defendant because they opposed the whole process and how Mr Kanyenda conducted himself towards us. The defendant got angry every time we tried to push for clarification on how much was received, the documentation to that effect, and the distribution criteria. What Mr Kanyenda expressly told us was that he was coming from a long weekend, tired and was

rushing for another meeting and so we either had to sign and collect the money or leave without collecting any.

xi. On the day, he came with six police officers, three of whom were armed. Mr Kanyenda ordered each one of us to leave immediately after signing and collecting the money. He said that none of us should even look back. It was a scaring situation with the armed police officers present. Wherefore we pray that this Court should not dismiss this case.

9. The defendant made the following arguments in support of the prayer for estoppel.
10. It observed that promissory estoppel is an equitable doctrine. And that promissory estoppel basically prevents a party to a contract from acting in a certain way because they promised not to act in that way, and the other party to the contract relied on that promise and acted upon it. See *Combe v Combe* [1951] 2 KB 215.
11. The defendant stated that in the case of *Hughes v Metropolitan Railways Co.* (1877) 2 App. Cas. 439 HL, Lord Cairns stated the following on the doctrine of promissory estoppel:

> It is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results-certain penalties or legal forfeiture-afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

12. The defendant then submitted that the principles of promissory estoppel above were applied in the case of *London Property Trust v High Trees House Ltd* [1947] 1 KB 130 by Denning J. to found the modern doctrine of promissory estoppel. It added that for an applicant to succeed using the doctrine of promissory estoppel, the following elements must be satisfied:

a) The first requirement is that the promisor must give clear and unambiguous statement that he does not intend to enforce his

legal rights. The promise may be express or implied. *London Property Trust Limited v High Trees House Ltd* [1947] 1 KB 130.

b) The second requirement is that the promisee must have acted on that promise made by the promisor. Promissory estoppel often arises where a promisee in reliance on that promise suffered detriment as in the case of *Ayayi v Briscoe* [1964] 1 WLR 1326, or when he alters his position as a result of relying on the promise even though he suffers no detriment.
c) The third requirement of promissory estoppel is that it would be inequitable for the promisor to renege on his promise and claim his strict legal rights after the promisee has relied on it.
d) The fourth requirement is that it can be enforced against the promisor.

13. The defendant then submitted that the facts as stated clearly in the sworn statement and the evidence of the release and discharge form tendered before this Court through the defendant's list of documents, is that the claimants agreed to release the defendant from any action, claim, demand, suit, or proceeding for damages, loss, debt restitution, equitable specific performance or any other type of claim whatsoever in repeat of the action in the Industrial Relations Court Principal Registry as IRC Matter No. 102 of 2014 between James Banda and others v Mota Engil.
14. The defendant observed that the claimants herein duly signed the said release and discharge forms willfully, knowingly without any duress or any undue influence from the defendant. And that allegations of duress or undue influence are not true. Further, that the claimants herein having read the said form and having fully understood the contents thereof cannot come back and claim the same against the defendant herein.
15. The defendant submitted that the conduct of the claimants herein is inequitable and hence the defendant submits that the claimants' claim be dismissed. Further, that the claimants' conduct is questionable and that the claimants are not entitled to succeed. It added that it was made to act differently from what it otherwise would have done and that for the claimants to renege on their promise would be inequitable.

16. The defendant submitted that all elements constituting promissory estoppel have been made out and that as such the claimants are estopped from bringing the present action.
17. On their part, the claimants submitted as follows. They noted that the defendant who acted as the claimants' lawyers in a claim for compensation against the party cited, and who did not disclose the amount collected and account to the claimants for the same strangely suggests that claimants are estopped from making the claims for, among others, an account and for the sums remaining unremitted. And that the supposed basis for such a suggestion is that claimants signed a release and discharge form and are supposedly now estopped from making the claims.
18. The claimants submitted that, leaving aside the questions of whether the preliminary point is properly before this Court and which rule it is brought under, on the evidence as contained in both the statements of both Bright Theu sworn in in support of an application for disclosures and Steve Banda sworn in opposition to the preliminary point raised, and on the relevant law, the supposed estoppel is untenable, the purported release and discharge forms being void for having been obtained by duress and undue influence, and otherwise being non-binding for want of consideration.
19. The claimants submitted that the purported release and discharge forms are void or should have no effect whatsoever in the present case because the defendant procured the claimants' signatures by duress.
20. They submitted that the wrong of duress has two elements: (a) pressure amounting to compulsion of the will of the victim; and (b) the illegitimacy of the pressure exerted. They referred to *Universe Tank Ships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 400 per Lord Scarman, cited with approval by the Privy Council in *Attorney General v R* [2003] E.M.L.R 24. They added that there must be pressure, the practical effect of which is compulsion or the absence of choice. They also stated that compulsion is variously described as coercion or the vitiation of consent.
21. They then argued that, on the available evidence, the claimants were individually made to sign the purported release and discharge forms under the pain of not receiving some money unilaterally determined by the defendant as compensation for unfair dismissal. They observed that, in the testimony of Steve Banda on oath, those who did not sign the purported release and discharge forms did not receive any money. Further, that this

is good evidence that the threat of withholding money was real and it actually materialized for those that did not succumb to the defendant's undue condition. They noted that, at the time, the claimants had lost their jobs and were hard of means of subsistence and therefore succumbed to the defendant's condition so that they could collect the money.

22. The claimants submitted that, secondly, the pressure exerted by the defendant on the claimants was illegitimate. They noted that the defendant had acted as a legal practitioner for the claimants. And that, having collected the claimants' compensation from the party cited, the defendant was under a duty and the claimants had a right to receive both an account of how much was collected, the method of disbursement and to receive their respective portions. They asserted that the defendant's threats to withhold what rightfully already belonged to them was illegitimate.
23. They then submitted that, on the facts, the wrong duress is well made out: illegitimate pressure (to withhold the claimants' moneys) was used to compel the claimants to sign the so-called release and discharge forms. They concluded that the purported release and discharge forms are void and should have no effect to bar the claimants from advancing the claims in the present action.
24. Alternatively, the claimants submitted that the release and discharge forms are void and/or should have no effect because they were procured by undue influence.
25. The claimants asserted that courts will not give effect to a contract procured by undue influence. They referred to *Kaufmann v Gerson* [1904] 1 KB 591; *Williams v Bayley* (1866) LR 1 HL 200 and *Mutual Finance Ltd v Wetton* [1937] 2 KB 389. The claimants also referred to the case of *Royal Bank of Scotland plc v Etridge (No. 2)* [2002] A.C. 773, para [6]-9 where the Court said the following illuminating statement of the law:

> 6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.

> 7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.
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> 8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne* (1881) 18 Ch D 188.
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> 9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired.

26. The claimants then submitted that the defendant is guilty of undue influence by both its overt threat to unlawfully withhold the money if the claimants did not sign the purported release and discharge form; and by abusing the relationship between them and the claimants in which the claimants had entrusted to the defendant their interest in obtaining compensation for unfair dismissal.
27. The claimants asserted that the release and discharge forms are void and ought not to be given any effect to bar the claimants from advancing their claims for an account among others. They added that, it is needless to say that there is much to be said about the conduct of the defendants in procuring the release and discharge forms that they would now seek to rely on to bar the claimants. They asserted that, for example, the idea that an agreement produced by a lawyer on behalf of the client could possibly be

confidential to the client in the sense that the client has no right to know what the lawyer has agreed to on his client's behalf is precisely strange, odd and a mockery of the legal profession. Not least that an agreement could be procured by the method used against the claimants: covering up the part of the document with the so called release and discharge terms and allowing the client to only see the part where they have to sign, or else the client does not get what is already rightfully theirs is clearly fraudulent and scandalous of the legal profession.

28. In the further alternative, the claimants submitted that, assuming the release and discharge forms would be deemed valid despite the preceding arguments, the claimants would not be bound thereby because the defendant did not provide any consideration for the claimants' undertaking not to make claims subsequently.
29. They asserted that it is trite that an undertaking made without the other party furnishing consideration for the undertaking does not contractually bind the party who made the undertaking. Further, that the performance of an already existing legal obligation does not constitute consideration.
30. They then asserted that, on the facts, the defendant having been retained as lawyers for the claimants and having in that capacity recovered money from the party cited it being money held by the defendant on behalf of the and for the benefit of the claimants, the defendant was under a duty to remit the money to the claimants. And that the act of remitting the money to the claimants is a matter of legal duty to remit a client's money. And that therefore remitting the money was performance of a legal duty. Hence, that the defendant cannot be held to have furnished consideration by remitting what it was duty bound to remit to the claimants.
31. They the contended that, in the circumstances, the defendant did not furnish any consideration for the claimants' purported (and invalid) undertakings not to make claims against the defendant. And that there is accordingly no binding release and discharge agreement as the defendant would have this Court believe.
32. This Court agrees with the defendant that a release and discharge form when willfully signed entails that the promisor is barred from doing what he or she has undertaken not to do by the said release and discharge form. This is on account of the doctrine of equitable promissory estoppel as asserted by the defendant. See *London Property Trust v High Trees House Ltd* [1947] 1 KB 130.

33. On the other hand, the claimants state the law correctly that the doctrine of promissory estoppel will not apply where the promise is obtained by duress or undue influence exerted on the promisor by the intended beneficiary of the promise. See *Burco Electronic Systems Ltd v Carvalho* [1992] 15 MLR 36 (HC), *Universe Tank Ships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 400 per Lord Scarman, cited with approval by the Privy Council in *Attorney General v R* [2003] E.M.L.R 24 and *Royal Bank of Scotland plc v Etridge (No. 2)* [2002] A.C. 773.
34. Whether there is duress or undue influence is a matter of fact. This Court took time to reflect on these issues as borne out of the sworn statements herein and concluded that these are matters on which there is serious controversy between the parties as to whether there was indeed duress or undue influence. Such matters cannot conveniently and justly be resolved on sworn statements alone. They beg for a trial where evidence would be verified rigorously.
35. This Court has considered the final submission by the claimants that there cannot be promissory estoppel in this matter because the defendant has not provided any consideration whilst acting as a legal practitioner for the claimants and that that is trite law. The questions raised by the claimants in this regard have wider implications to do with the regulation of the relationship between a legal practitioner and his or her clients. This calls for interrogation at trial to examine whether the ethics of lawyers in this country do allow for such release and discharge as was signed herein and under what circumstances.
36. The conclusion of this Court is therefore that this matter must go to trial considering the factual disputes and the wider implications raised by this matter. The matter shall be scheduled for trial, as originally intended, on a date to be fixed.

Made in chambers at Blantyre this 27th August 2020.

M.A Tembo
JUDGE