FIONA EVELYN TAISEKWA JIRIRA
versus
ZIMCOR TRUSTEES LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 14 May and 9 June 2010.

OPPOSED APPLICATION

Advocate T Mpofu for applicant
Mr F Mutamangira for 1st respondent.

MAKARAU JP: To bring proceedings by way of application or by way of summons is an issue that must be uppermost in the mind of each and every legal practitioner who is given instructions to approach the court for relief. While application procedure is the more expedient manner of resolving disputes, it is not always suitable. Rules and practices of this court have been set up to guide legal practitioners on when application procedure is not suitable. Numerous judgments of this and the Supreme Court have explained these rules and practices in detail and have in some instances gone to great lengths to explain the rationale behind the rules and the practices. Such authorities appear to have gone unheeded in the above matter.

On 16 October 2009, the applicant filed this application, seeking an order canceling the agreement of sale entered into between herself and the first respondent and instead, confirming an agreement of loan between the parties. The applicant also sought an order compelling the first respondent to return to her the deed of transfer in respect of certain immovable property.

In her founding affidavit, the applicant narrates the following story.

Sometime in March 2009, she borrowed the sum of US$15 000-00 from the first respondent. It was a condition of the loan agreement that she would surrender the deed of transfer in respect of her property in Hatfield Harare to the first respondent, which she duly did. She was however made to sign an agreement of sale in terms of which she was selling her property for the sum of US$10 000-00. She was made to sign this agreement by means of deceit. Again through deceit, she was made to sign a power of attorney to pass transfer of the

property and a Stamp Duty Declaration form, presumably declaring that she had sold the property to the first respondent.

She also completed a loan agreement form, copies of which were all retained by the first respondent.

When she heard rumours that the first respondent was in the habit of transferring properties whose deed had been given to him as security for loans, she had a caveat placed against the title to the property, to safeguard her interests. She then approached this court for the relief that I have outlined above.

The above is a summary of the applicant's entire story.

The application was opposed. The first respondent vehemently denied the agreement of loan and averred that the parties concluded an agreement of sale in respect of property described in the agreement. It also denied that the applicant was deceived at any stage into signing the agreement of sale and the various other documents that she signed in preparation of transfer of the property to the first respondent.

At the hearing of the application it was apparent that there is a material dispute of fact arising from the application that cannot be resolved on the basis of the papers filed of record. The applicant alleges that the parties concluded an agreement of loan and not an agreement of sale. She however does not explain in detail why she signed the agreement of sale and all the other documents she has listed in her founding affidavit. She simply deposes to the fact that she was deceived into signing these documents and does not give the details of the deceit.

It must have been apparent to the applicant and her legal practitioners when she approached court for relief that she would have to explain why the agreement of sale had to be set aside as it is the transaction for which contemporaneously made documents can be produced. She knew that the respondent was insisting on upholding the agreement of sale and would allege that this was the only binding agreement between the parties.

Being aware of the nature of the dispute between the parties and that it would necessarily call for the leading of evidence to prove the correct nature of the transaction that unfolded between the parties, it was in my view an abuse of process on the part of the applicant to choose to approach the court by way of application procedure. The choice of application procedure was clearly inappropriate in view of the story that the applicant herself was relying on for relief. It was clear at the filing of the application that the applicant was not

in a position to prove by document made contemporaneously with the transaction, the loan agreement as she did not keep a copy of that agreement and efforts to obtain a copy from the first respondent were fruitless, to use her own words. In such a case, it was apparent that it would be the applicant's word against that of the first respondent on the existence or other wise of the loan agreement as there was no other evidence of the transaction.

In my view, where an applicant t is relying on a disputed fact whose proof lies in the memories of witnesses to the fact, it is utterly incompetent for such an applicant to proceed by way of application.

When the materiality of the dispute of fact was brought to his attention, *Advocate Mpofu* submitted that the court should use its discretion to refer the matter to oral evidence, with the papers filed of record standing as summons and appearance to defend respectively.

As correctly submitted by *Mr Mtamngira*, this is a difficult case for the court to use its discretion in favour of the applicant. Such discretion will fly in the face of the remarks made by MCNALLY J (as he then was) in *Masukusa v National Foods* 1983 (1) ZLR 232 (HC) at page 236 E-F, where when faced with an apparent dispute of fact, he asked himself the question:

"Should I, nevertheless, in the interests of saving costs and generally getting on with the matter condone the wrong procedural approach?"

The learned judge was of the view that it would be wrong to do so.

I am also of the view that it would be wrong for me in the application before me to condone the wrong procedure adopted by the applicant and keep the ball in the court as it were in an effort to save costs. The reasons that present themselves to me are not dissimilar to the reasons that MCNALLY J advanced for taking a similar approach in the *Masukusa* matter.

Firstly, the dispute of fact in this matter did not arise from the nature of the defence proffered by the respondent in the opposing affidavit. It is part of the applicant's case. The applicant deposed to facts in her affidavit that were neither common cause nor capable of proving by way of affidavits. Her allegations needed *viva voce* evidence to explain and she proceeded by way of application notwithstanding but at her own peril. Secondly, the nature of the case that the applicant sought to portray is one that clearly cannot be proved on paper and by way of affidavits. It requires the parties to give oral evidence and to be examined on their evidence to find out where the truth lies. It is a case in my view that will ultimately turn on the

credibility of the witnesses and affidavits have no colour save the colour of the paper on which they are typed. There is no proven way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other.

Before I dispose of this matter, it is pertinent in my view that I advert to one other issue of general concern.

Litigants, unless they have been legally trained, do not frame their instructions to legal practitioners in legal terms. They are not expected to. Thus, they do not instruct their legal practitioners using terms that have any legal import. They invariably tell their stories using language that they are familiar with and language which they use every day. Some are good story tellers, some are not. It should not matter how the story is told for it is the duty of the legal practitioner to then reduce such instructions or stories into questions that demand legal answers and to draft their clients' pleading or applications and affidavits accordingly.

I have been constrained to make these remarks by the manner in which the applicant's legal practitioner, (not *Advocate Mpofu*), drafted the applicant's founding affidavit in this matter. It would appear to me that the legal practitioner simply reproduced the instructions from his or her client as they were given to him or her and thus ended up with a founding affidavit where the applicant alleges that she was "deceived" into signing an agreement of sale after she had obtained a loan from the applicant. While the term "deceit" may have an every-day-use meaning, it is not a cause of action and has no special meaning at law. One can think of a number of legal situations that may loosely be termed as deceitful by lay persons. All frauds are deceits. Some negligent misrepresentations may amount to deceit. Some innocent misrepresentations may amount to deceit. Unilateral mistakes leading to a contract may in some cases be loosely described as being deceits by the party who knew the correct position but did not disclose because they had no duty to do so. The list is endless.

The point I am making is that it is the duty of the legal practitioner to screen from the story told them by their client, the legal issues arising and then to plead such with precision and in accordance with the law. To simply repeat the entire story as told by the client and using the imprecise language that lay people use may amount to incompetence on the part of the legal practitioner.

In view of the vague cause of action that the applicant is relying on, it is my view that it will serve no purpose for me to refer the matter to trial with the papers standing as summons

and appearance to defend respectively. There is in my view no cause of action disclosed in the papers at this stage.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant will bear the respondent's costs.

Muchandibaya & Associates, applicant's legal practitioners.
Mutamangira & Associates, respondent's legal practitioners.