HH 12-2002
HC 10599/00
CAROLE PATRICIA WILLIAMS
and
DR PAUL WILLIAMS
versus
MALCOLM SYDNEY WILLIAMS
and
JEWELLERY CENTRE (PRIVATE) LIMITED
and
ZEAL ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
GUVAVA J,
HARARE, 20 September, 2001 and 23 January, 2002

Ms *Nagar*for applicant
Mr *L Mazonde*for respondent

GUVAVA J: The first and second applicants are husband and wife. They are British citizens and resident in Zimbabwe. The second and third respondents are both duly registered companies operating according to the laws of Zimbabwe. The first respondent is a director in both companies.

The applicants have sought an order from this court, that the respondents pay to the applicants the sums of £10 000 and $650 000 and interest on the said sums at the prescribed rates until date of final payment and costs of suit.

At the hearing, before making any submissions on the merits of this matter, the applicants made an oral application that the matter be referred to trial on the basis that disputes of facts which they had not anticipated at the time that they made the application have arisen and thus the matter can only be properly dealt with by way of action.

The facts of this matter are set out in the applicants' and respondents' affidavits. The applicants averred in their founding affidavit that sometime in November, 1997 the first respondent had approached the applicants and invited them to invest in an existing Jewellery Business, being the second respondent. The applicants then invested £10 000 and $650 000 in the second respondent on the understanding that they would be issued a 42% shareholding in the second respondent. The applicants said that they have since been advised that the purported agreement between them and the first and second respondents is null and void, as it fails to comply with legal requirements such as obtaining approval from the Zimbabwe Investment Centre. The applicants also claim that the respondents have breached the agreement as they have failed to issue the applicants with a share certificate and have refused the applicants participation in the conduct of the business of the second respondent.

The first respondent, on his own behalf and on behalf of the second and third respondents, filed an opposing affidavit accepting that, although they had entered into an agreement with the applicants, the money paid by the applicants had been paid directly to

the seller of the Jewellery Centre as part of the purchase price, with the applicants' full knowledge and approval. The respondents said that the applicants were not happy with the business and it was agreed that it be sold, but the sale did not go through. The respondents further denied that they had refused to issue the applicants with a share certificate but allege that they could not legally issue the certificate until the applicants had regularized their residents permits in Zimbabwe. They also state that the business of the second respondent has been conducted with the full knowledge, participation and approval of the applicants, to the extent that the applicants' son was employed by the second respondent. In addition, in June, 2000 the applicants withdrew the sum of $10 000,00 as an advance, in anticipation of the profits of the business, as they wished to go on holiday. The respondents also question the need for the third respondent to be joined to the proceedings as it is not a party to the Agreement between the applicants and the first and second respondents.

Ms *Nagar*, argued that this matter should be referred to trial because, at the time of instituting the proceedings, it was not apparent that there would be any dispute of facts and this only came to light when the respondents filed their opposing affidavit. As far as the applicants were concerned, it was merely an application to obtain a refund of their money, which amount was undisputed by the respondents. This application was opposed by the respondents who urged the court to dismiss it.

That there are disputes of fact which cannot be resolved on the papers in this matter has not been disputed by the parties. What I have understood Mr *Mazonde*to be saying in his submissions is that, where an applicant has chosen to proceed by way of application in a matter where there are obvious disputes of fact, then the Court should dismiss the application. His submissions are supported by the case of *Tamarillo (Pty) Ltd*v *B N Aitken (Pty) Ltd*1982 (1) SA 398 AD at 430 where MILLAR JA stated:

> "A litigant is entitled to seek relief by way of Notice of Motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application".

It is clear that the court has a discretion as to whether or not to dismiss an application where there are disputes of fact which cannot be resolved on the papers. In exercising its discretion, the Court must take into account when the applicants became aware that there were disputes of fact in the matter. If the applicants only became aware of the disputes at a late stage in the proceedings, then the court will lean in favour of a referral to trial. However, where the applicants were quite aware of the disputes the court must dismiss the application (see *Masukusa*v *National Foods Ltd & Anor*1983 (1) ZLR 232).

In this case the applicants must have known that there were disputes of fact as they had initially issued out summons in case No HC 15403/98 relating to the same parties and on similar issues. The respondents' opposing affidavit has raised the same disputed issues as they had pleaded in the earlier case. This case was subsequently withdrawn by the plaintiffs (applicant in this case). Although the applicants sought to deal with them in the replying affidavit, these are issues which can only be properly dealt with by adducing evidence. In the case of *Masukusa*v *National Foods Ltd & Another*(*supra)*the court, in dealing

with this very question, said at page 236F -

> "Now in the present case I have not the slightest doubt that the applicant should have realized that a serious dispute of fact was to develop as between himself and both respondents. Should I nevertheless, in the interest of saving costs and generally getting on with the matter, condone the wrong procedural approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong case of procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant's affidavit. In the second place the claim for damages was clearly illiquid and would patently need examination by way of evidence".

In my view the situation in this matter is similar to the one cited above. The applicants must have known that disputes of fact would arise in this matter. The parties had sought to resolve the issues raised in case No HC 15403/98 and failed. That is how this application came into being.

Accordingly the application is dismissed with costs.

Dube Manikai and Hwacha applicants legal practitioners
Wickwar and Chitiyo respondents legal practitioners