

REPORTABLE ZLR (49)

Judgment No. SC 55/06
Civil Appeal No. 244/05

LEWIS MURIDZO CHITENGWA

v

WILSON TATENDA MANASE

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 1, 2006 & JANUARY 16, 2007

J C Andersen SC, for the applicant

A M Gijima, for the respondent

CHEDA JA: In Chambers, in terms of r 39(4) of the Supreme Court Rules.

This is an application for leave to lead further evidence on appeal.

The High Court granted an order for summary judgment against the applicant in case number HC 6289/02 ordering that he should vacate the premises that the respondent purchased, or be evicted.

The applicant has noted an appeal against that judgment.

In his application for leave to lead further evidence on appeal the applicant says he will argue that the price at which the house was purchased was too

low, and he has since got evidence which will show that his house was valued by the Central African Building Society at \$35 000 000,00.

Applications for leave to lead further evidence on appeal are governed by r 39(4) of the Supreme Court Rules (“the Rules”).

Rule 39(4) reads as follows:

“An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit, and also by an affidavit, or a statement from a legal practitioner, showing why the evidence was not led at the trial, as also a copy of the judgment appealed from and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matters at issue.”

In this case the evidence that applicant seeks to lead is not there. There is no affidavit from the legal practitioner. All there is, is an affidavit from the applicant in which he alleges that he discovered that the Central African Building Society valued the house at \$35 000 000,00 when they issued a mortgage bond to the respondent. He claims that when the matter was heard at the High Court he was away out of the country and was not able to lead that evidence.

The provisions of the rule are very clear. They require that there be an affidavit from the legal practitioner. There is none. Even if one accepted the affidavit of the applicant in place of that of the legal practitioner, the evidence is not there. There is only the claim of it by the applicant. When I asked for it, Mr *Andersen* who appeared for the applicant could only say that this was not disputed by

the respondent. That is not enough. The Rules require that the evidence be filed in the form of an affidavit and not just be alleged to be in existence.

In *S v De Jager* 1965 (2) SA 612 it was stated, among other requirements, that there should be a *prima facie* likelihood of the truth of the evidence, and the evidence should be materially relevant to the outcome of the trial.

Clearly the Court can only make such an assessment of the evidence if it is placed before it and not just alleged by the applicant.

There is no explanation why such evidence was not obtained from Central Africa Building Society in affidavit form. There is nothing to show when the valuation was done and how such value was arrived at or what considerations were taken into account by the evaluator.

This failure by the applicant to comply with the Rules is fatal to the application and it cannot succeed.

In the result the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Manase & Manase, respondent's legal practitioners