

RAISON ZHOU  
**versus**  
MIMOSA MINING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE  
TAKUVA AND MABHIKWA JJ  
BULAWAYO 23 JULY 2018 AND 1 NOVEMBER 2018

### **Civil Appeal**

*A Sibanda* for the appellant  
*Adv L Nkomo* for the respondent

**MABHIKWA J:** On 20 October 2016, a Magistrates sitting at Gweru after a protracted trial, made an order that defendant (now appellant), be evicted from house number 3769 Lot 4 Highlands, Zvishavane and also that he pays arrear rentals of \$50-00 per month from 1 December 2011 to the date of judgment.

Dissatisfied with the trial magistrate's judgment and order, the appellant filed with this court a notice of appeal on 25 October 2016. For the reason that respondent has raised preliminary points in respect of the notice of appeal, I will repeat herein verbatim, the grounds of appeal as shown on the document titled "Appellant's Notice and Grounds of Appeal". It reads:

The court *a quo* erred in making the following findings:

- 1) That there is no evidence that the appellant paid the purchase price of the house in full, when in fact evidence put before the court clearly demonstrated that the purchase price for the house was Z\$105 000 000.00 and that the appellant paid a sum, which is in excess of the purchase price on conversion of the United States dollar to the Zimbabwean dollar, alternatively that the appellant did not fail to pay the balance of the purchase price but the respondent stopped deducting the instalments in order to delay statement.
- 2) That there was no formula to convert the Zimbabwe dollars to United States dollars when in fact at the time the appellant paid the Zimbabwean dollar was not demonitised but was still currency and could be converted using available rates.

- 3) That the purchase price of the house was at one point pegged at Z\$105 000 000.00 as if it was fluctuating, whereas it was a fixed price and there was no provision of either interests or inflation in the agreement of sale.
- 4) That the appellant was offered a refund of the purchase price, by the respondent, whereas such an offer was not acceptable for the following reasons:
  - 4.1 The offer was not for the value of the house but just an arbitrary figure.
  - 4.2 The offer was only made by a letter well after closure of pleadings.
  - 4.3 The offer was not pleaded in court as tendered.
- 5) That the appellant is bound by the caveat *subscripto* rule without regard to exceptions to the caveat *subscripto* rule as dictated by statutory and common law.
- 6) That the appellant is bound by the caveat *subscripto* rule without taking due cognizance of the fact that the contract of sale between the appellant and the respondent was subject to intervention of the Contractual Penalties Act [Chapter 8:07] and in particular section 8.
- 7) That the appellant was given 10 days notice to remedy the breach, when in fact he was given 10 days notice to vacate the house in contravention of section 8 of the Contractual Penalties Act [Chapter 8:07] which stipulates that he should have been given 30 days written notice to remedy the breach.

The court *a quo* erred in failing to make the following findings and or appreciate the following factual and legal aspects of the matter:

- 8) That the contract of sale of the house signed by the appellant and the respondent is subject to the Contractual Penalties Act [Chapter 8:07] particularly section 8 thereof:
- 9) That the provisions of section 8 of the Contractual Penalties Act [Chapter 8:07] are mandatory and do not allow for departure.
- 10) That the respondent failed to give the appellant the requisite notice to remedy the breach in terms of thereof.
- 11) That the respondent in compliance with section 8 of the Contractual Penalties Act [Chapter 8:07] was obliged to forewarn the appellant of the consequences of resignation as part of notice to remedy the breach likely to occur.

- 12) That public policy is a principle of law which is applicable in this matter and that it is embodied in the spirit of the Contractual Penalties Act [Chapter 8:07].
- 13) That fairness is a principle of law that is applicable in this case and is embodied in the spirit of Contractual Penalties Act [Chapter 8:07]

Respondent opposed the appeal. In its heads of argument, respondent raised a point *in limine* that the notice of appeal was invalid for want of compliance with the mandatory provisions of order 31 Rule 2 (4) (a) of the Magistrate Court Rules, 1980. Respondent then prayed the appeal be dismissed with costs of suit.

Respondent further argued that there was yet an additional ground rendering the whole appeal fatally defective. It was argued that the notice of appeal was a lengthy document consisting of a list of grievances rather than proper grounds of appeal as envisaged by the rules. It was contented that some of the 13 grounds on the lengthy document simply did not make sense.

During the hearing, respondent further argued that the said notice also did not attack the trial court's order and therefore was not directed to the said order as stated in *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pvt) Ltd and Another* 2013 (2) ZLR 309 (S).

Appellant then filed a document which respondent only saw in court on the date of hearing. The document was titled – “Appellant's response to respondent's heads of argument”. In that 8 paged document, appellant purported to respond to the points *in limine* raised and the rest of respondent's heads. Appellant however could not explain in terms of what procedure or rule he had filed such a document. It was eventually agreed that such being alien to the court rules, the document be expunged from the record. Appellant could and should have, if he so wished, filled supplementary heads of argument instead.

It was agreed at the beginning of the hearing that both counsel would deal with the preliminary points and then go to the merits so that the judgment would be made at once.

## Background

The brief history of the matter is on 20 April 2006 to be precise, the two parties entered into an agreement of sale of property valued then at Z\$105 000 000-00. At the very beginning of the agreement was a suspensive clause titled as follows:

1. Condition precedent

It is understood and agreed by both parties that the property is sold to the purchaser by virtue of his status as an employee of the seller and that once such contract is terminated the sale agreement, subject to any contrary provisions herein, shall automatically be cancelled without notice to the purchaser.”

Clause 3:1 of the agreement related to the purchase price. It was to the effect that the purchase price of \$105 000 000-00 would be payable by instalments deducted monthly from the employee’s wages. The instalments would be equal to the prevailing Building Society Mortgage rates, not exceeding 25% of the gross basic monthly salary. The deductions would commence from the first month falling after the date of signing thereof. Whilst the purchase price remained owing the purchaser could not be permitted to accelerate payment by increase instalment or otherwise. The employer was also under no obligation to accept any offer of increased payments as the purchaser may offer nor under any obligation to tender transfer of property to the purchaser against full payment of the purchase price, with interest before the expiry of a period of ten (10) years following the date of signing hereof.”

Clause 4:2 was to the effect that if the employee (purchaser) resigned or was dismissed from the seller’s employment on the expiration of the 10 year period after signing the agreement, then he would be entitled to continue making monthly instalments in terms of the agreement towards the purchase price and at his discretion to settle the outstanding balance of the purchase price even in one instalment and take transfer of the property.

The appellant resigned from the respondent’s employment 5 years into the contract on 28 November 2011, and refused to give vacant possession of the house leading to this litigation. Respondent instituted proceedings and served process by affixing it at the outer door having found only a minor child at the address for service agreed as per the contract (*domicilium cintandit et executandi*). It obtained default judgment. Appellant applied for rescission of judgment which apparently was granted most likely by consent. Appellant defaulted again at PTC stage and again made an application for rescission which again was granted most likely by consent.

Preliminary Points raised

Order 31 Rule 2 (4) (a) and (b) of the Magistrates' Court Rules, 1980 reads as follows:

“A notice of appeal or of cross-appeal shall state:

- (a) Whether the whole or part only of the judgment or order is appealed against and, if part only then what part?
- (b) The grounds of appeal, specifying the findings of fact or rulings of Law appealed against.” (The underlining is mine)

It was argued by *Advocate Nkomo* for the respondent that the rule is clear and peremptory, giving no room for assumption or implication, that the notice of appeal as filed by appellant did not comply with the provisions of the court rules and therefore fatally defective. He directed the court's attention to the case of *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pvt) Ltd and another* 2013 (2) ZLR 309 (S) where the court pointed out per GARWE JA with MALABA DCJ and ZIYAMBI JA concurring that “a notice of appeal must comply with the mandatory provisions of the rules; if it does not, it is a nullity and cannot be condoned or amended. A notice of appeal, which is unnecessarily prolix is not concise.” The court also held that an appeal must be directed at the order made and not the reasons thereof, although it is permissible to challenge the reasoning of the court *a quo* in order to ultimately challenge the order.

*Advocate Nkomo* bemoaned the fact that in spite of having been advised by letter at the time of filing the appeal and having seen the respondent's heads on the issue of non-compliance with the rules, appellant remained intransigent and adamant even at the hearing of the appeal that the notice did not offend the court rules.

For the record, the document is headed “Appellant's Notice and Grounds of Appeal. It then goes on to simply state:

“Be pleased to take notice that the appellant herein appeals the judgment of the Magistrates' Court on the 20<sup>th</sup> October 2016, on the following grounds”

In response to the point *in limine* raised, *Mr Sibanda* for the appellant argued that the rules' provision that a notice must state whether appellant is appealing against the whole or part of the court *a quo*'s judgment, does not entirely mean that a mere notice of appeal against judgment as that of the appellant states, becomes entirely invalid. He (*Mr Sibanda*) argued that if one mentions that he/she appeals against “the judgment” it means that he/she appeals against the whole judgment not a specific portion of it. In *Econet Wireless (Pvt) Ltd v Trustco (Pty) Ltd and another* 2013 (2)

ZLR 309 (S), the court pointed out that rule 32 of the Supreme Court Rules 1964 requires that the Notice of Appeal shall state the grounds of appeal concisely. To the extent of the use of the term “shall”, the rule is peremptory.

It is important to note that order 31 (2) of the Magistrates’ Court Rules, 1980 is also worded in the same fashion and equally peremptory. The position is thus now well settled that a notice of appeal must comply with the mandatory provisions of the rules and that if it does not, it is a nullity and cannot be condoned or amended.

Also in *Jensen v Acavalos* 1993 (1) ZLR 216 (S) also reported in *Jacob Jansen v Aleck Acavos* S- 64-93 where an application was made for condonation of the late noting of an appeal and for an order that the original defective notice of appeal be amended by the substitution there of a new notice of appeal. Just as in the current case, the original notice simply read;

“Take notice that appellant hereby notes an appeal against the judgment of the High Court sitting at Harare on 6 December 1989 dismissing appellant’s claim.” (The underlining is mine).

It was held that the notice of appeal was defective for non-compliance with the mandatory provisions of the then Rule 29, sub rules (c), (d), and (e) which required the appellant or his legal practitioner to state

- (i) Whether the whole or only part of the judgment is appealed against.
- (ii) The grounds of appeal to be set fourth concisely and in separate numbered paragraphs;
- (iii) The exact nature of the relief which is sought

In *Jansens (supra)* it was held that the Notice of appeal being bad for non-compliance with the rules, could not be cured by the subsequent filing of other grounds of appeal on 3 January 1990 without a prayer and that even if the subsequent grounds filed had contained a prayer for relief, this would not have been effectual in validating the defective notice of appeal. It was held that the reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. It is a nullity. It is not only bad but incurably bad.

It follows therefore that *Mr Sibanda’s* argument in *casu*, that when an appellant states that he appeals “the judgment” he means “the whole judgment,” falls away. It was rejected in *Jensen’s* case. It is unfortunate that apparently, even after numerous attempts were made to alert the

appellant's legal practitioner of the defective nature of the notice of appeal, he insisted on bringing the matter to court and argue it as it stands.

I am satisfied that the appeal fails for non-compliance with the court rules, and having found that the appeal fails by reason of non-compliance, the court had no obligation or reason to go on to deal with the merits but for good reason, I will in brief, show that even on the merits, appellant cannot succeed.

It is very clear from the nature of the agreement of sale between the parties, particularly clause 1 (condition precedent), clause 3 and clause 4 cited above that the whole purpose of the agreement was to empower the respondent company's workers and to incentivize them so that it retains them in order to benefit from their skills whilst they in turn benefit from the housing scheme. The company thus went out of its way to acquire land and build houses which an individual employee, for various reasons and constraints, could not have done. To that extent therefore, it is a contract *sui generis*.

The court finds that there was nothing punitive about the agreement of sale and the Contractual Penalties Act does not apply in this case. It was clear from the agreement especially the cited clauses that the contract started running from the time of signing (which is only logical anyway) up to the expiry of ten (10) years thereafter. *Mr Sibanda's* implication in his argument, that the 10 year period started running from the time appellant was employed was a deliberate attempt to mislead the court.

Section 8 of the Contractual Penalties is meant to curb contracts entered into in an uneven contractual field and where one party is then punished for certain breach, usually unjustly enriching the stronger party in the contract. It however clearly contemplates a normal purchase agreement capable of being remedied by notice to make good the breach.

In any event, and inspite of the definition in clause 2 of the Contractual Penalties Act wherein "Land" includes any improvements on land, it is clear that section 8 of that act was meant primarily for parties involved in the sale of "land" in the strict sense and in a normal and ordinary agreement of sale.

It was equally wrong to argue that the sale agreement was against public policy. It is clear that the scheme was introduced and the contract signed not only as an employee empowerment

programme but also as a skills retention strategy. It would therefore be wrong for an employee with ulterior motives to own a house easily, to enter the scheme, sign the contract and thereafter resign, only to argue that the contract itself was against public policy, or that it was against the contractual penalties act. Such an employee would not have entered the contract in good faith and would therefore not be coming to court with clean hands. He cannot be allowed to use his own initial bad intentions to defend himself against the contract that he signed.

In any case, the *Caveat Subscripto* rule was summed up succinctly, by the learned judge in *Total Zimbabwe Ltd v Bakani* HH 2226/16 at page 9.

Further, in *Waste Management Services v City of Harare* 2001 (1) ZLR 172 (H), it was held that

“Public Policy is a vague and elusive concept and the power of the court to decide a contract, or part of a contract to be void as being contrary to public policy should be used sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power.”

Also in *Scotfin (Pvt) Ltd v Bakes* 1989 (1) SA 1 at page 2B it was held that,

“The power to declare contracts contrary to public policy should however be exercised sparingly and only in the clearest of cases ----. Commercial transactions should not be unduly trammelled by restrictions on that freedom.”

Above all, this court would not want to interfere with such clear contracts and in the process make a contract for the parties. Contracts are generally sacrosanct. For the reasons above, this court finds that no misdirection on the part of the trial magistrate was proved even on the merits of the case.

Accordingly the appeal is dismissed with costs of suit on the ordinary scale.

Takuva J .....agrees

*Mhaka Attorneys*, appellant's legal practitioners  
*Danziger and Partners*, respondent's legal practitioners