REPORTABLE (11)

(1) JOHN CHIKURA N.O. (2) DEPOSIT PROTECTION CORPORATION
v
AL SHAM'S GLOBAL BVI LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & HLATSHWAYO JA
HARARE, NOVEMBER 15 & FEBRUARY 20, 2017

S Moyo, for the appellants
L Uriri with *T Magwaliba,* for the respondent

PRELIMINARY OBJECTION

ZIYAMBI JA:

[1] After hearing argument on the preliminary objections raised by the respondents we reserved our judgment. The objections raised the issue whether the notice of appeal complied with r 29(1) (d) as read with r 31 of the Rules of this Court.

[2] The notice of appeal was filed on 17 June, 2016. It spanned 11 pages of which 6 pages comprised of 18 grounds of appeal. The judgment appealed against consists of 11 pages.

[3] Upon receipt of the appellants' heads of argument filed on 16 September 2016, the respondent filed and served its heads of argument on 23 September 2016. It raised the point, *in limine*, that the appeal was fatally defective for non-compliance with rr 29 (1) (d) and 32 (1) which, read together, require grounds of appeal to be concise. It alleged that the grounds of

appeal are anything but concise but instead are "unnecessarily long, incoherent and unnecessary prolix". It was prayed that the appeal be struck off the roll with costs.

[4] On the 10 November 2016, the respondent filed a notice of objection in terms of r 41 of the Supreme Court Rules. In this notice the appellants were advised of the respondent's intention to 'take a preliminary objection relating to the validity of the notice of appeal'. The notice was directed to the Registrar and to the appellants' legal practitioners.

[5] On the 14 November 2016, the eve of the hearing of the appeal, the appellants filed supplementary heads of argument in response to the respondent's objection. In these heads, they alleged that the objection was frivolous and vexatious, denied that the grounds were not clearly and concisely framed but conceded they were multiple 'because of the nature of the judgment of the court below'.

They charged the respondent with adopting the wrong procedure by filing a notice instead of proceeding by way of court application. They alleged that prejudice was caused to them because of the procedure adopted by the respondent. Procedure by court application, they contended, would have required the respondent to specify the offending grounds and the manner in which it is alleged they infringed the rules. The appellants would, in the event of the adoption of that procedure, have been given sufficient time to prepare a response in their heads of argument. They submitted that the respondent was not embarrassed by, nor did it point to any ambiguity in, the grounds of appeal. Consequently, the objection amounted to a classical abuse of the procedure on preliminary objections, was devoid of merit and ought to be dismissed with costs on the punitive scale of legal practitioner and client.

[6] In argument presented before us Mr *Moyo,* who appeared for the appellants, remained adamant that the grounds of appeal, though multiple, were clear and concise. He submitted that even if they were inelegantly phrased, which was not conceded, that fact did not render them a nullity.

Whether the grounds of appeal comply with the Rules.

[7] The relevant provisions of rr 29 and 32 are set out below.

> ***"29. Entry of appeal***
>
> (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state —
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> (*a*) the date on which, and the court by which, the judgment appealed against was given;
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> (*b*) if leave to appeal was granted, the date of such grant;
>
> (*c*) whether the whole or part only of the judgment is appealed against;
>
> (*d*) the grounds of appeal in accordance with the provisions of rule 32;
>
> (*e*)…
>
> (*f*)…
>
> ***32. Grounds of appeal***
>
> (1) The grounds of appeal shall be set forth concisely and in separate numbered paragraphs." (My emphasis)

The Rules are made for the proper running of the Court. Failure to comply with its mandatory provisions will render an appeal a nullity. See *Matanhire* v *BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S)

[8] It is not for the Court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of 'grounds of appeal' in order to determine the real issues for determination by the Court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal. That is not so in the instant

matter. The grounds of appeal are multiple, attack every line of reasoning of the learned judge and do not clearly and concisely define the issues which are to be determined by this Court.

In *Sonyongo v Minister of Law and Order* 1996 (4) SA 384, LEACH J was dealing with an application for leave to appeal in terms of the r 49(1) (b) of the Uniform Rules of Court of South Africa. That rule required the grounds of appeal to be set out in the application. The learned Judge at p 385E – 386A of his judgment said the following:

> "I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)*(b)*; however, Rule 49 (3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded.' In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, *inter alia,* to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned, **it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo,* or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet – see, for example, *Harvey v Brown* 1964 (3) SA 381 (E)at 383; *Kilian v Geregsbode, Uitenhange* 1980 (1) SA 808 (A) at 815 and Erasmus *Superior Court Practice* B1-356-357 and the various authorities there cited.**
>
> It seems to me that, by a parity of reasoning, the grounds of appeal required under Rule 49 (1) *(b)* must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49 (3) is peremptory in that regard, Rule 49 (1) *(b)* must also be regarded as being peremptory. **In my view the lengthy and rambling notice of appeal filed *in casu* falls woefully short of what was required. Mr *Bursey* suggested that grounds of appeal could be gleaned from the notice but that is not the point – the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed."**
> (The emphasis is mine)

[9] In my view, the emphasised portions of the above remarks, with which I respectfully agree, are equally applicable in the present matter. Great care should be taken in drafting a notice of

appeal to ensure that the grounds of appeal concisely and clearly set out the issues to be determined by the appeal court and the respondent is properly informed of the case he has to meet on appeal.

[10] For the above reasons, I am constrained to agree with Mr *Uriri* that the notice of appeal does not comply with the Rules of this Court and ought to be struck out.

Procedure in terms of r 41.

[11] With regard to the procedure to be adopted, Rule 41 provides:

> ***"41. Preliminary objections***
> A party to an appeal who intends to rely on a preliminary objection to any proceeding or to the use of any document shall give notice in writing of the objection to the registrar and to the opposite party. If the objection is to be taken at the hearing of an appeal three copies of the notice shall be given to the registrar"

It seems to me that the criticism by the appellants of the procedure adopted by the respondent in taking the preliminary objection is unwarranted. There is no requirement for the party objecting to proceed by way of court application. The respondent duly gave the required notice. That was sufficient compliance with the Rule.

[12] Accordingly, it is ordered as follows:

1. The preliminary objection is upheld.
2. The appeal is struck off the roll with costs.

GOWORA JA: I agree

HLATSHWAYO JA: I agree

Scanlen & Holderness, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners