

REPORTABLE (20)

DR NOBERT KUNONGA
v
THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA *et* BHUNU JA
HARARE, 12 MAY 2016 & MARCH 17, 2017

T. Magwaliba, for the appellant

T. Mpofu, for the respondent

GARWE JA

[1] In a judgment handed down on 18 November 2015, the High Court of Zimbabwe ordered the appellant, and four other defendants, to pay to the respondent, jointly and severally, the one paying the others to be absolved, the sum of \$427 829.39, together with interest thereon and costs of suit. This appeal is against that judgment.

FACTUAL BACKGROUND

[2] The appellant was, prior to 4 August 2007, the Bishop of the Harare Diocese of the respondent. He was the head of the Board of Trustees, constituted in terms of the Constitution of the respondent. The Board was charged with the responsibility, *inter alia*, of managing the assets of the respondent.

[3] A dispute arose within the church over the issue of homosexuality. The dispute became so heated that the appellant and other trustees (“the trustees”) purported to withdraw the Harare Diocese from the respondent. They then formed their own church, called the Anglican Church of the Province of Zimbabwe, but continued to exercise control over the assets of the Harare Diocese.

[4] The respondent immediately instituted proceedings against the trustees, seeking an order for their removal as trustees of the church and recovery of the church assets. The matter was heard by the High Court which ruled in favour of the trustees. Consequent thereto, they remained as trustees of the Church and continued to exercise control over the assets of the church. The respondent appealed but, for procedural reasons, the appeal was struck off the roll. It was however reinstated by order of CHIDYAUSIKU CJ on 4 August 2011. The order, *inter alia*, provided that the appeal would not have the effect of suspending the operation of the order granted by the High Court in favour of the appellant and the other trustees.

[5] In August 2011, the appellant and the other trustees liquidated a number of share certificates belonging to the respondent. The value at the time of disposal was \$427, 892,39. The trustees sold them for \$270 000.00 and used the proceeds to fund the activities of their new church.

[6] The long running dispute was eventually resolved in November 2012 by this court in the *Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* SC 48/12. In that judgment this court made a number of factual and legal findings. In summary, this court

found that, upon the appellant and other trustees constituting their new church in January 2008, their continued possession and use of the assets of the respondent was illegal.

[7] Consequent upon the above determination made by this Court, the respondent, as plaintiff, instituted an action against the trustees for the recovery of the sum of \$591 818.95 representing the value of the shares. The appellant and the other trustees denied dealing in shares belonging to the respondent and prayed for the dismissal of the claim. However on 9 November 2015, the parties' legal practitioners filed what they termed a joint stated case. The case stated is as follows:

- “1. Prior to the 4th of August 2007, the Bishop of Harare Diocese was the Right Reverend Dr Norbert Kunonga. He headed the Board of nine trustees, known as the Diocese Trustees of the Diocese of Harare. The Trustees had the responsibility of managing, administering, possessing and using the assets of the Diocese of Harare. The defendants are some of the Trustees who were duly appointed.
2. A dispute arose between members of the Anglican Church in respect of the issue of homosexuality which culminated in Bishop Kunonga and the other trustees withdrawing the Diocese of Harare from the Church of the Province of Central Africa. There was a schism in the church arising out of that issue and subsequent withdrawal. One group was led by first defendant and the other by Bishop Bakare and subsequently by Bishop Gandiya.
3. The property of the Diocese of Harare remained under the control, possession, administration and use of the defendants.
4. On or around the 31st of August 2011, the defendants obtained from Imara Asset Management various share certificates of shares which were owned by Plaintiff. They sold the shares reflected in paragraph 5 of Plaintiff's declaration.
5. The defendants sold these shares so that they could run the business of their faction of the church which fell under their leadership.
6. Meanwhile the Church of the Province of Central Africa instituted proceedings against defendants in HC 6544/07 and the defendants also instituted proceedings against the Church of the Province of Central Africa under HC 4327/08. The learned Judge, HLATSHWAYO J (as he then was) heard both matters and dismissed the claim of the church and granted that of the defendants. This was on the 24th of July 2009. The High Court held that 1st Defendant was the rightful leader of the Anglican Church. An appeal was noted against that judgment but was struck off the roll. On the 4th of August 2011 the Chief Justice

reinstated the appeal but in doing so held that the noting of the appeal would not have the effect of suspending the judgment of HLATSHWAYO J (as he then was).

7. In December 2012 the Supreme Court resolved the “Anglican Saga”. It found that the defendants had seceded from the Church of the Province of Central Africa and were not entitled to the assets and were thus obliged to return the assets to the Church of the Province of Central Africa. The secession was held to have been with effect from the year 2007.
8. As a consequence of the Supreme Court ruling the defendants returned the Church of the Province of Central Africa’s assets including the remainder of the shares in their possession. Apparently certain shares belonging to the Church of the Province of Central Africa had been sold as indicated above. Plaintiff values the shares sold:
 - i) As at 31st August 2011 at USD 427 892.39
 - ii) The current market value at USD 453 709.10
 - iii) The defendant sold the shares for USD 270 000.
9. Defendants now fellowship under a Christian organisation known as the Anglican Church of Zimbabwe. In the Supreme Court matter that resolved the Anglican saga, this position was adopted by them.

ISSUES FOR DETERMINATION

10. Whether the defendants can be held liable for disposing the shares in question.
11. If they are liable, what the quantum of such liability is.”

PROCEEDINGS IN THE COURT A QUO

[8] At the hearing of the matter before the High Court, the second, third, fourth and fifth defendants, who were the appellant’s co-trustees, did not appear. However the notice of set down had been served on *Venturas and Samkange*, the law firm that had been representing all the trustees. Thereafter Messrs *Venturas and Samkange* renounced agency on behalf of the four trustees and, at the commencement of the hearing before the court *a quo*, stated that the appellant had always been the person in charge and that the trial could proceed in the absence of the other trustees.

[9] In its judgment, the High Court found that from the time that the appellant and “his followers” resolved to secede from the respondent church and formed a new Ministry called the Church of the Province of Harare, they ceased to have any right over the property of the respondent which they had previously controlled or held in trust. The court found further that although the High Court had granted an order declaring the appellant and his co-trustees as the rightful Diocesan Trustees of the Diocese of Harare and allowing them to continue to exercise control over the respondent assets, and although the Supreme Court had further ordered that the appeal noted by the respondent would not have the effect of suspending the order appealed against, the orders did not allow the appellant and his colleagues to dissipate the property for the benefit of their new church. The two judgments granted in favour of the appellant were at all times interim since the order of the High Court was immediately taken on appeal. On the question of the *quantum*, the court reached the conclusion that, in general, delictual damages should be measured as at the date of the delict, because that is when the owner’s patrimony is reduced, unlike in a vindicatory action where the value is determined as at the date of judgment. The court then made the order, the subject of this appeal.

GROUNDS OF APPEAL

[10] The appellant has filed a total of sixteen grounds of appeal. I quote these verbatim.

- “1. The learned judge erred in dismissing the Appellant’s version in its totality.
2. The Appellant, together with the other trustees, purchased the shares and later invested them. The Appellant never lost control of the shares and other assets, both movable and immovable.
3. The court erred in failing to appreciate that the issue which was determined by the Supreme Court was between the Diocesan Trustees for the Diocese of Harare against The Church of the Province of Central Africa and that it was not between the Appellant and the Church of the Province of Central Africa.
4. The court erred in stating that the Appellant had no right to use the assets. Honourable HLATSHWAYO’s order specifically allowed them to use and

dispose of the assets. Alienation of the assets was on the strength of a court order.

5. The court erred in failing to appreciate that whilst the judgment by Honourable Justice HLATSHWAYO was extant the Appellant did not dispose of the property. The Appellant only disposed of the property after Chief Justice CHIDYAUSIKU's judgment which allowed them to use the assets.
6. The court *a quo* erred in holding that the Appellant had established and founded a church of his own.
7. The court *a quo* erred in interpreting that the two (2) judgments of Honourable Justice HLATSHWAYO and Honourable Justice CHIDYAUSIKU did not give the Appellant the right to use the property.
8. The court *a quo* also failed to appreciate that the Appellant used the same premises during the dispute, and met all expenses incurred in doing so.
9. The shares were sold in order to maintain and preserve the rest of the other properties. The court erred in not appreciating that the alienation of the shares was in the interest of the Respondent at the material time.
10. The court erred in concluding that shares were sold because the Appellant must have realised that there is a likelihood of him losing the appeal and that he was trying to make "hay whilst the sun shines". There is no evidence to support this conclusion. It is totally unfounded and unjustified.
11. The court did not take into account the joint stated case to the effect that the Diocese of Harare remained in possession of the Diocese of Harare Trustees which included the Appellant as the Bishop.
12. The court failed to appreciate that the Appellant did not act in his personal capacity but as head of the Diocesan Trustees of the Diocese of Harare. To find the Appellant liable personally is unjustified in the circumstances.
13. The court erred in failing to give any meaningful justification why it dismissed the value of shares at the time they were sold which is US\$270 000.00. The US\$270 000.00 is the actual value and market value at the time of sale of the shares.
14. The Respondent was not an administrator of the shares as it was not involved in the purchase of the shares. There is absolutely no evidence that the shares could have been sold for more than US\$270 000.00. The Respondent did not bring any evidence to prove that the shares could have been sold for more than US\$270 000.00.
15. The court failed to appreciate that the shares were sold through the stock exchange market and were therefore sold in public. No members of the public offered to buy the shares at a higher price. The suggestion that they were sold at a giveaway price is unjustified in the circumstances.
16. The court *a quo* erred in concluding that there was an agreement to the market value of the shares." (*sic*)

APPELLANT'S SUBMISSIONS ON APPEAL

[11] Before this court, the appellant has made the following submissions: -

- That the appellant did not use the proceeds from the sale of the shares for his own personal interest, but rather to run the business of the respondent's church which fell under the control of the appellant at the time.
- That the remarks by the Supreme Court that the appellant and his co-trustees had no right to continue to use the assets once they formed their own church are not applicable in view of the agreed position in the stated case that the proceeds from the shares were not applied in furtherance of the interests of the new church but had been applied for the benefit of the respondent.
- That the finding by the court *a quo* that the appellant had the right to use the property fully and finally disposes of the appeal as property such as shares cannot be used without dissipating them.
- That, on the issue of *quantum*, there was no agreed value of the shares. The court *a quo* was therefore wrong in taking the value ascribed to the shares by the respondent. There was no evidence before the court that the sum of \$270 000.00 for which the shares were sold, was not the open market value of the shares at the time they were sold.

RESPONDENT'S SUBMISSIONS ON APPEAL

[12] In its heads of argument, the respondent church makes the following submissions: -

- The matter before the court was a stated case. In his heads of argument, appellant makes submissions which do not derive from the common cause facts and in some instances tries to put in issue the agreed position.
- There are sixteen grounds of appeal attacking an eight-page judgment. Most are vague and lack meaning. Some of the heads are not even based on those grounds. Even findings made by the Supreme Court are put in issue e.g. whether the appellant founded his own church. Consequently, there is no proper appeal before this court.
- The appellant seeks to appeal against the whole judgment when it is clear that the judgment was made against four other parties who were in default.
- That what the appellant refers to as a faction of the church in paragraph 5 of the stated case was found by the Supreme Court to have been a new church, created upon the occurrence of the schism. The court *a quo* was called to pronounce upon the legal implications of that outfit and was bound by that decision.
- That the court *a quo* was correct in finding that while the appellant and other trustees had the right of use of the assets in terms of the judgment of the High Court, they could not lawfully alienate the property until the dispute had been finalised on appeal.
- On the question of *quantum*, three possible amounts were put forward for consideration by the court. How those sums were arrived at was not in issue. The court *a quo* was being asked to identify the appropriate sum to be awarded in the light of our laws of delict.

ISSUES FOR DETERMINATION

[13] It is clear from the above that a number of issues arise for determination by this court. In the order in which they stand to be determined, the issues may conveniently be stated as follows:

- (a) What is a stated case or a case stated. Can a party to such stated case go outside the facts agreed?
- (b) The grounds of appeal. Are they valid?
- (c) Is the notice of appeal, which seeks to impugn the whole judgment, valid.
- (d) The effect of the Supreme Court judgment on the stated case.
- (e) Whether the appellant was entitled to dispose of the shares belonging to the Respondent once he and his colleagues moved out of the church.
- (f) The effect of the determination by the High Court and Supreme Court allowing the appellant and other trustees, to remain in custody of the church assets.

I deal with each of the issues in turn.

WHAT IS A STATED CASE

[14] The rules of court of most countries make provision for the reference of a matter as a stated case. But what is a stated case? It is a case that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversarial positions as to the legal ramifications of the facts, thereby requiring a judge to decide the question of law presented (*Legal dictionary. The free dictionary.com*). Put another way, it is a formal written statement of the facts in a case, which is submitted to the court by the parties, jointly, so that a decision may be rendered without trial. The facts being thus ascertained, it is

left for the court to decide the question of law presented. A stated case is also called a special case, an amicable action, a case agreed or a friendly suit (*US Legal, Inc.*)

[15] In the case of *Elizabeth Mambus v Motor Vehicle Accident Fund* Case No. SA 4/2013, a majority decision of the Supreme Court of Namibia, handed down on 11 February 2015, the court noted:

“... the intention is that the stated case will adjudicate the whole of the dispute as stated in the case that exists between the parties and that this is ideally done by setting out the facts agreed to, the questions of law in dispute and the contentions of the parties. The parties may also require a court to decide an issue of law on the basis of alleged facts, *as if agreed.*”

[16] The court further cited with approval remarks made by the Irish Supreme Court in *Simon McGinley v The Deciding Officer – Criminal Assets Bureau* [2001] IESC 49 that:

“The case should set out clearly the judge’s findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.

What is required in the case stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact, it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him deciding as he did. ... This court should not be required to go outside the case to some other document in order to discover them.

The same principle applies to the contention of the parties, the inferences to be drawn from the primary facts, and the Tribunal’s determination. All these must be found within the case, not in documents annexed ...”

[17] Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to

re-open the agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principle or findings of fact made in connection with the same matter by another court. Of course either party has a remedy at common law, to withdraw any concession made in a stated case owing to *justus error*, fraud, mistake, or any other valid ground.

[18] It has become necessary to restate what a stated case is owing to the fact that in some instances, the appellant in this case has made submissions contrary to the stated case brought before the court. The appellant has also ignored in part the decision of this court on which the stated case is predicated. It bears stating that if this happens, a party will be kept strictly to the terms of the agreed facts, as it is on the basis of those facts that the court would have been invited to make a determination on some specific question of law.

I now turn to deal with the next issue requiring determination, namely, the meaning of “clear and concise” within the context of r 29 of the Rules of this court.

GROUNDINGS MUST BE CLEAR AND CONCISE

[19] Rule 32 of the Rules of this court provides that the grounds of appeal contained in a notice of appeal must be clear and concise. Many decisions of this court and the courts in South Africa have, over a long period of time, explained what is meant by the term, but this notwithstanding, many lawyers, including very senior ones, continue to experience considerable difficulty in properly formulating grounds of appeal that comply with the Rule. I think it is necessary to trace the various decisions of the courts on this aspect over the years, both in South Africa and this country.

[20] In *Hendricks v Wilcox* 1962 (1) CPD 304, the appellant had filed a notice of appeal reading as follows: -

“Be pleased to take notice that an appeal is hereby noted against the judgment of absolution from the instance granted by the above honourable court to the defendant ... for the reason that the judgment was against the weight of the evidence ...”

The court ordered that the appeal be struck off the roll for failure to comply with the Rules. In striking out the appeal, the court noted: -

“... it is clear that a notice of appeal which sets out as a ground of appeal merely that the judgment is against the weight of the evidence is, generally speaking, bad The magistrate made a number of findings of fact on the evidence and then made a further finding that neither party had been negligent. It is impossible to deduce from the notice of appeal which of these findings is being challenged.

... I have come to the conclusion that the notice of appeal is bad. There is abundant authority to the effect that such a notice cannot be amended ...”

[21] In *S v McNab* 1986 (2) ZLR 280 (SC), the only ground of appeal before this court was that:

“The learned Trial Magistrate erred in fact and in law in holding that the State had proved the appellant was so drunk as to be incapable of having proper control of his motor vehicle.”

This court held that the above ground did not comply with the Rules of court and more specifically that the notice of appeal did not set out clearly and specifically the grounds of appeal. The court remarked at page 282 F-G:-

“... there must be stated in the Notice of Appeal “a precise statement of the points on which the appellant relies.” A statement that the magistrate “erred in fact and in law in holding that the State had proved appellant was so drunk to be incapable of having proper control of his motor vehicle” is not precise enough ... it does not tell the respondent or the magistrate what it is that is being attacked. The respondent is required to prepare his answer to the allegations made in the Notice of Appeal ...”

[22] In *State v Jack* 1990 (2) ZLR 166 (SC), the single ground of appeal on each of the two counts in respect of which the appellant had been convicted read:

“The Magistrate erred in finding the accused guilty despite the fact that the charge was not substantiated.”

The Supreme Court concluded that the above ground was not valid. The court, per McNALLY JA, remarked at page 167 D-G:-

“This amounts to saying he was not guilty because he was not guilty. It is meaningless. A magistrate who receives such a notice of appeal cannot know what to say in response to it ... It is necessary to draw legal practitioners’ attention again to the provisions of this Rule and to the judgment of BEADLE J (as he then was), in *R v Emerson & Ors* 1957 R & N 743; 1958(1) SA 442 (SR) ...

It seems to be widely believed that when a client who has been convicted and sentenced belatedly instructs a legal practitioner, all that is necessary is that a notice of appeal be lodged setting out the most cursory and meaningless grounds with (sometimes) the promise that proper grounds will be substituted when the record is available. This is not so. A notice of appeal without meaningful grounds is not a notice of appeal. Since it is a nullity, it cannot later be amended.”

[23] In *S v Ncube* 1990 (2) ZLR 303 (SC), the only ground of appeal against conviction read as follows: -

“The learned magistrate erred in accepting the complainant’s evidence.”

That ground was held to be unacceptable. McNally ACJ (as he then was) had the following to say at 303 G and 304 C-D:-

“It is not usual to write a judgment in respect of a matter which has been struck from the roll. This judgment is written for the guidance of practitioners and to serve as a warning to those who have not pondered the lesson of *R v Emerson* 1957 R & N 743(SR) ...

... I need only quote one passage from *R v Emerson, supra*, at 748 D-E to show that such a ground is unacceptable. BEADLE J with the concurrence of the full Bench of the High Court of Southern Rhodesia, said this

“I do not consider that such general grounds of appeal as “the conviction is against the weight of the evidence” or “the evidence does not support the conviction” or “the conviction is wrong in law” are a compliance with the rule. It follows that *where the only ground of appeal given in the notice of appeal is a vague one of this description the notice of appeal must be considered to be bad*. The effect would thus be the same as if no notice of appeal had been given at all ...” (emphasis my own).

[24] In *Songono v Minister of Law and Order* 1996(4) SA 384 (Eastern Cape Division) the learned judge (Leach J) commenting on the requirement that grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms to enable the court and the respondent to be fully and properly informed of the case which the appellant seeks to make out and which the respondent is to meet, stated at p 385 G-H that: -

“... 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 ...”

and further at 386 A-B that: -

“... the lengthy and rambling notice of appeal filed *in casu* falls woefully short of what was required. Mr *Burse* 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. ...*” (emphasis my own)

[25] In *Arnold Cephas Kwanai v The State*, SC 12/97, the only ground of appeal against conviction read as follows: -

“The learned Magistrate erred in convicting the accused person in the absence of any concrete evidence showing beyond a reasonable doubt ..., that he committed the offence.”

This court turned down a request to amend the notice of appeal on the ground that it was a nullity. It was a nullity because it did not set out “clearly and specifically the grounds of appeal.”

[26] In *Van de Walt v Abreu* 1994(4) SA 85 (W) Stegmann J made an exhaustive review of case law relating to notices of appeal from the Magistrates Court in South Africa. That case is

authority for the proposition, based on the Magistrates Court Rules of South Africa, that there are two distinct requirements, both of which have to be satisfied, for a proper notice of appeal disclosing a valid ground of appeal. Firstly, the notice must specify details of what is appealed against (i.e. the particular findings of fact and rulings of law that are to be criticized on appeal as being wrong) and secondly, the grounds of appeal (i.e. it must indicate why each finding of fact or ruling of law that is to be criticised as wrong is said to be wrong. For example, because the finding of fact appealed against is inconsistent with some documentary evidence that shows to the contrary; or because it is inconsistent with the oral evidence of one or more witnesses; or because it is against the probabilities.

[27] In *Fraderick Chimaiwache v The State* SC 18/2013, GOWORA JA, made the following pertinent remarks at page 7 of the cyclostyled judgment: -

“It seems that the rider contained in those authorities is still not being heeded by those who practice law in this jurisdiction. A notice of appeal must contain grounds that are clear and specific. If a ground of appeal is general, then it cannot be a valid ground of appeal ...”

[28] In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd (2) Trusto Group International (Proprietary) Ltd*, SC 43, I had occasion to cite, with approval, the remarks of Korsah JA in *The Master of the High Court v Lilian Grace Turner* SC 77/93 that:

“... by concise is meant brief, but comprehensive in expression ...”

[29] In *John Chikura N.O. & Anor v Al Shams Global BVI Limited*, SC 17/2017, the notice of appeal filed with this court spanned eleven pages. Of those pages, six comprised eighteen grounds of appeal. The judgment appealed against consisted of eleven pages. In holding that

the grounds of appeal were unnecessarily long, incoherent and prolix, this court, after quoting the remarks of Leach J in *Songono v Minister of Law and Order (supra)*, struck the matter of the roll, remarking at pages 3-4 of the cyclostyled judgment:

“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 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 ...”

[30] I have quoted the above remarks made by eminent judges both in this jurisdiction and South Africa in order to stress, once again, the need for legal practitioners to pay due regard to the requirement that grounds of appeal must be clear and concise and what the term “clear and concise” signifies. Sadly, as the facts of this case, and many others, show, most legal practitioners still do not know how to properly formulate grounds of appeal that comply with the Rules of this court. I now turn to the grounds of appeal noted in the present case.

THE GROUNDS OF APPEAL

[31] There can be little doubt that, in general, the grounds of appeal noted in this case, are vague in nature and cannot be said to be clear and concise. In some instances, the grounds purport to go outside the stated case and in other instances attempt to impugn the final decision made by this court in terms of which the appellant was ordered to return all the church assets to the respondent.

[32] A short examination of each of the grounds is called for. Ground 1 is couched “The learned judge erred in dismissing the appellant’s version in its totality.” This is obviously meaningless. Neither this court, nor the respondent, would have any idea what it is that the appellant is attacking. Ground 2 is also meaningless. It states: - “The appellant, together with the other trustees, purchased the shares and later invested them. The appellant never lost control of the shares and other, assets, both movable and immovable”. This ground is more of a statement of fact and its meaning is anybody’s guess. It begs the question: so what? The third ground is equally vague. One does not know what point the appellant seeks to make. That ground reads:

“The court erred in failing to appreciate that the issue which was determined by the Supreme Court was between the Diocesan Trustees for the Diocese of Harare against the Church of the Province of Central Africa and that it was not between the appellant and the Church of the Province of Central Africa.”

Grounds 4, 5, 7, 8 and 9 & 11 all raise the same issue, namely that, pursuant to the order by HLATSHWAYO J and CHIDYAUSIKU CJ, the appellant had the right to use the church assets and that in doing so, he sold some of the assets in order to maintain and preserve the remaining assets. Ground 10 is vague, especially when one has regard to the remarks by the court *a quo* at page 8 of the cyclostyled judgment that: -

“the timing of the sale of the shares after August 2011 may point to a design to make something out of the property of the plaintiff before the definitive Supreme Court determination of the dispute, that is the furthest I am prepared to go. I am not persuaded that it is enough to attract the application of the value at the time of judgment.”

Grounds 13, 14 and 15 all deal with the same aspect, namely that the court *a quo* was wrong in failing to find that the value of the shares was US\$270 000.00 i.e. the price at which they were sold. Ground 16 seeks to attack the interpretation of paragraph 8 of the Stated Case, and in particular, whether the parties were agreed on the three values itemised therein.

[33] Having found that some of the grounds are lacking in precision, it becomes necessary to determine the fate of the other grounds that sufficiently identify the basis upon which the judgment of the court *a quo* is impugned. The approach adopted by this court in *S v Ncube (supra)* and other cases is that where a court is faced by some grounds of appeal that are not clear and concise and by others that are, the court should proceed to determine the appeal on the basis of the valid grounds of appeal. In that case this court cited with approval remarks in *R v Emerson (supra)* that where the only ground in the notice of appeal is vague, then the appeal is a nullity.

[34] The case of *Songono v Minister of Law & order (supra)*, cited with approval by this court in the recent decision in *John Chikura N.O. & Anor v Al Shams Global BVI Limited (supra)*, is authority for the proposition that grounds of appeal that are prolix do not comply with the Rules of this court. The word prolix derives from the Latin word “prolixus”, which means extended or copious. A speech or writing is said to be prolix if it contains too many words or is tediously lengthy. It connotes unreasonable and tedious dwelling on detail. It also means long winded, verbose, rambling. It follows from this definition that grounds of appeal that are prolix cannot be clear or concise and are therefore a nullity. I agree with the remarks in the *John Chikura* case (*supra*) that where grounds of appeal are prolix, it is not for this court to sift through numerous words in search of a possible valid ground.

[35] In my view however, where, in the same notice of appeal, there are grounds that are prolix and there are others that are clear and concise, then such appeal cannot be said to be fatally defective in its entirety. In these circumstances, the appeal would fall to be determined

on the grounds that are found to comply with the Rules. Consequently grounds 1, 2, 3, 4, 5, 10, 14, 15 and 16 must be struck out.

THE NOTICE OF APPEAL SEEKS TO IMPUGN THE WHOLE JUDGMENT

[36] In his prayer, the appellant seeks an order, *inter alia*, that the judgment of the court *a quo* be set aside and in its place, an order made dismissing with costs the plaintiff's claim.

[37] The respondent has taken the point that the prayer cannot be correct as the appellant was only one of five persons against whom judgment was entered in the court *a quo*. The judgment entered against the other four defendants was a default judgment, all of them having failed to attend the trial proceedings.

[38] I agree with the respondent that the appellant cannot competently appeal against the whole judgment as he purported to do. He could only appeal against that part of the judgment that affected him.

[39] The question however arises. Does the intimation that the appeal is against the whole judgment when in fact it is only against part of the judgment invalidate the appeal? My view is that, in the particular circumstances of this case, it does not. The clear intention by the appellant appears to have been that, once it is found on the merits that he is not liable, by extension, his co-trustees would, *ipso facto*, also not be liable. In my view the notice and grounds of appeal call upon this court to determine whether or not the trustees, inclusive of the appellant, were liable in their official capacity. The fact that the appellant, in his prayer, did

not confine the relief he was seeking to himself only, does not breach Rule 29 of the Rules of this court.

EFFECT OF THE SUPREME COURT DECISION ON THE STATED CASE

[40] The judgment of this court that resolved the dispute within the Anglican Church was the *Church of the Province of Central Africa v Diocesan Trustees, Harare Province* SC 48/12, now reported in 2012 (2) ZLR 392 (S). In that judgment, this court made a number of factual findings. Amongst others, it made the following findings: -

- the appellant and the other trustees formed a new Church in January 2008 in which the appellant was consecrated and enthroned as the Archbishop.
- that they continued to use the assets of the respondent without the approval of the Provincial Synod.
- that they used the assets in furtherance of the interest of their new church.
- In short, that they had no right, once they seceded from the church in 2007, to continue to hold onto the church assets or to use them for any reason whatsoever.

[41] The respondent has submitted that the High Court was bound by these findings. I agree. By command of the law, the decisions of this court are final and binding on all other subordinate courts. *Commercial Farmers' Union v Mhuriro & Ors* 2002 (2) ZLR 405 (SC).

[42] It is therefore not permissible for the appellant to argue, as he has done, that the assets were used to maintain and preserve the assets of the respondent. Nor can the appellant and respondent, in a stated case, agree that “the defendants sold these shares so that they could run the business of their faction of the church which fell under their leadership.” This court did not find that there were factions. It found that the appellant and his co-trustees formed a new church.

THE EFFECT OF THE DECISIONS OF THE HIGH COURT AND THE SUPREME COURT

[43] The two orders made by HLATSHWAYO J (as he then was) and CHIDYAUSIKU CJ, allowed the appellant and his co-trustees the right to retain custody of the church assets pending determination of the dispute in this court. I agree that these orders were interim, in the sense that they did not permit the appellant and his co-trustees to dissipate church property. In any event, when the Supreme Court made the findings to which reference has been made, it was aware that these two orders had been made. That notwithstanding, this court ruled that once they moved out of the respondent church in 2007, they should have left all the property in the custody of the respondent. At the end of the day therefore, these two orders had no significance on the final assessment made by this court.

WHETHER THE APPELLANT'S SUBMISSIONS ON APPEAL HAVE MERIT

[44] The appellant, in attacking the judgment of the court *a quo*, has made several submissions. Firstly, the shares in question were sold in order to run the affairs of the respondent church and therefore he cannot be held personally liable. Secondly, the two parties to the stated case had agreed that the proceeds from the sale of shares had been applied to further the interests of the respondent church. Thirdly, the acknowledgment by the court *a quo*

that the appellant had the right to use the property, fully and finally disposed of the appeal. Lastly, there was no agreed value of the shares.

[45] I deal firstly with the submission that the shares were sold in order to run the affairs of the respondent's church. Clearly that submission has no merit. In a well-considered judgment, this court, as the final court of appeal, found that the assets had been used, not for the benefit of the respondent church but rather in furtherance of the interests of the new church that the appellant and his colleagues had formed. In the light of that clear and unambiguous finding, it is disingenuous and even dishonest, on the part of the appellant, to make the above submission. The two parties to the stated case agreed that the appellant and his co-trustees had sold these shares so that "they could run the business of their faction of the church which fell under their leadership." Whilst there may well be a dispute on what this paragraph means, quite clearly the parties could not, in a stated case, make a factual statement contradicting the finding already made by this court on the same issue. One has to interpret that paragraph in the light of the finding made by this court that the shares were used to advance the interests of the new church that they had formed.

[46] It is submitted by the appellant that the court *a quo* acknowledged that the appellant had the right to use the property in terms of the two judgments of HLATSHWAYO J and CHIDYAUSIKU CJ and that such acknowledgment fully and finally disposes of the appeal.

[47] I do not agree with this submission. The Supreme Court was aware of these two orders when it made the ultimate finding that the appellant and his co-trustees had no right to continue to possess the church assets and to dispose of them once they had moved out of the respondent

church. The submission, in my view, is intended to circumvent the decision of this court. That is not proper and cannot be done. The submission must therefore fail.

[48] On the submission that there was no agreement on the value of the shares, I hold the view that this too must fail. The stated case gives three valuations of the shares. These are (a) plaintiff's valuation as at the time of their disposal, (b) market value as at the time of the trial and (c) the price at which they were sold/purchased on the open market.

[49] Given these three valuations, the court was entitled to take these as the accepted values. Why else would one put these valuations in a stated case unless the amounts are not in dispute? How the computations were arrived at, was not at issue. The court *a quo* assumed and, I agree, correctly so, that it was being asked to determine, on the basis of legal principle, which of the three valuations was applicable. The court *a quo* determined that, consistent with general principle in our law of delict, it would award the value of the shares as at the time of the delict. I find nothing untoward about that.

THAT RESPONDENT HAD NO CAUSE OF ACTION IN DELICT

[50] The submission was made by the appellant that the plaintiff's cause of action, based as it was on the Aquilian Action, had not been proved. In particular, it was suggested that the essential elements for delictual liability were absent from the stated case.

[51] I do not agree with this submission, which clearly ignores what a stated case is. Whether the facts as agreed disclosed a cause of action was not an issue. Only two issues were

referred for determination. These were whether the appellant and his co-trustees were liable to pay for the shares and, if they were, what the *quantum* thereof was. It is unfair and improper, in my view, for the appellant to complain that the cause of action was not proved, when the attention of the court *a quo* was not directed to the need to determine that aspect. In any event, the entirety of the facts disclose wrongful conduct on the part of the trustees, which conduct resulted in financial loss, such loss having been caused by the deliberate sale of the share certificates.

DISPOSITION

[52] I am satisfied that no proper basis has been given to impugn the judgment of the court *a quo*. The appeal must therefore fail.

[53] It is accordingly ordered as follows: -

“The appeal be and is hereby dismissed with costs.”

ZIYAMBI JA:

I agree

BHUNU JA:

I agree

Venturas & Samkange, appellant’s legal practitioners

Gill, Godlonton & Gerrans, respondent’s legal practitioners