

DISTRIBUTABLE (6)

CHRISTOPHER SAMBAZA
v
AL SHAMS GLOBAL BVI LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, MAVANGIRA JA & UCHENA JA
HARARE, FEBRUARY 23, 2017 and February 5, 2018.

E. Matinenga for appellant

L. Uriri for respondent

UCHENA JA: The appellant is a Zimbabwean who resides in South Africa. He is a former director of Rodstreet Trading (Private) Limited (“Rodstreet”), a Company registered in terms of the laws of Zimbabwe. The respondent is a company registered in the British Virgin Islands but operating from Dubai though engaging in financial transactions in Zimbabwe.

Factual background

The common cause facts on which the dispute arose are as follows:

On 22 August 2011, Rodstreet drew and issued a Bankers Acceptance hereinafter called “the BA” in the sum of US\$117 335.91 in favour of Interfin Bank. Interfin Bank accepted the BA. The BA’s due date was 21 November 2011, that is, 91 days after sight.

Interfin Bank subsequently sold the BA to the respondent on a buyback basis. By letter dated 7 March 2012, Interfin Bank advised Rodstreet that it had sold the BA to the

respondent on a buyback basis but the respondent was demanding immediate payment of the BA. The respondent demanded payment of the BA from both Interfin Bank and Rodstreet. They both failed to pay. The respondent issued a letter of demand to Rodstreet demanding payment in the sum of US\$117 335.91. Rodstreet was not able to make any payment.

On 27 April 2012 the respondent issued summons against Rodstreet in the High Court under case No HC 4556/12. On 18 June 2012 a default judgment was granted against Rodstreet. The respondent instructed the Deputy Sheriff to proceed to Rodstreet's place of business to execute a writ issued in terms of the order granted on 18 June 2012. On 3 August 2012 the Deputy Sheriff filed a return indicating that Rodstreet was no longer operating from its registered premises.

The respondent applied to the court *a quo* for an order in terms of s 318 of the Companies Act [*Chapter 24:05*] declaring the appellant personally liable to pay respondent the sum of US\$ 117 335.91, plus interest at the rate of 30 per cent per annum from 21 November 2011 to the date of full payment plus costs of suit.

The respondent sought the order against the appellant in his capacity as a director of Rodstreet. It alleged that at all material times, the appellant knew or should have known that Rodstreet would not be able to pay the amounts owed in terms of the BA which it issued. The respondent argued that the appellant, being a director of the company, negligently and/or fraudulently misrepresented to Interfin Bank that Rodstreet would liquidate the amount owed on the Bankers Acceptance on its maturity date.

The respondent submitted that, due to his gross negligence and reckless trading, the appellant must be held personally liable in terms of s 318 of the Companies Act for monies owed by Rodstreet to the respondent. In the respondent's view, the appellant owed a duty of care to all parties which conducted business with Rodstreet including the respondent to ensure Rodstreet would be able to meet its financial obligations.

The appellant opposed the respondent's application in the court *a quo* arguing that he was no longer a director of Rodstreet having resigned from its board on 3 November 2011 when he sold his shareholding in the company. He further stated that the BA, which forms the main issue in these proceedings, was issued entirely and signed by his two co-directors Mr Herbert Rinashe and Phillip Jonasi without his knowledge and that to the best of his knowledge no board resolution was ever made in his presence to issue the BA.

The court *a quo* found the appellant personally liable for the amount owed to the respondent by Rodstreet, holding that the directors of Rodstreet including the appellant had acted recklessly, negligently if not fraudulently, in drawing up the BA and accepting money despite their knowledge of the company's precarious financial position.

Aggrieved by the court *a quo*'s decision, the appellant appealed to this court. He filed a 'notice of appeal' against which the respondent raised preliminary issues. The respondent filed a notice of objection in terms of r 41 of the Supreme Court Rules, RGN 380 of 1964, objecting to the appellant's notice of appeal on the basis that it was fatally defective.

On the date of hearing, we decided that the parties address us on the preliminary issues raised by the respondent as well as on the merits of the matter.

The preliminary issues

Mr *Uriri* for the respondent contended that the document which was filed by the appellant as its Notice of Appeal does not comply with the Rules of this Court, particularly rr 29 (1) (a), (d) and (e), and 32 (1).

Rule 29 of the Supreme Court Rules provides as follows;

“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** —
 - (a) **the date on which, and the court by which, the judgment appealed against was given;**
 - (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) **the exact nature of the relief which is sought;**
 - (f) the address for service of the appellant or his attorney.” (emphasis added)

It is clear that r 29 (1) (a) to (f) provides the mandatory attributes of a compliant Notice of Appeal. A diligent legal practitioner is expected to use it as a check list in formulating a compliant Notice of Appeal. It clearly and succinctly lays out what must be stated in a notice of appeal.

The use of the words “which shall state” signifies the mandatory nature of r 29 (1). It means if what the rule says must be stated is not stated the notice of appeal will be fatally defective.

In *Freezwell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61-03, this Court in explaining the effect of the mandatory provisions of r 29 (1), quoted the case of *Talbert v Yeoman Products (Private) Limited* SC-111-99 where

MUCHECHETERE JA held that a notice of appeal which does not comply with the provisions of r 29(1) was null and void.

Relying on the mandatory nature of rr 29(1) (a) (d) and (e) and 32 (1), referred to above, Mr *Uriri* for the respondent submitted that the appellant's notice of appeal was fatally defective, in three respects.

Mr *Uriri* submitted that the preamble incorrectly stated the court which handed down the judgment appealed against. The preamble reads;

“TAKE NOTICE THAT the appellant hereby appeals against **the whole judgment by the Honourable Mr Justice TAGU of the High Court** of Harare in Case Number HC 4556/12 which was handed down on 22 June 2016.” (emphasis added)

He submitted that the appellant purports to appeal against the judgment of TAGU J of the High Court Harare. TAGU J is a judge and not a court. Rule 29 (1)(a) requires the appellant to state in his notice of appeal, the court by which the judgment appealed against was given. Therefore the appellant ought to have stated that he was appealing against the judgment of the High Court of Zimbabwe.

Mr *Matinenga* for the appellant submitted that r 29 (1) (a) requires an appellant to state the court whose judgment is appealed against. He submitted that the appellant stated that he was appealing against the judgment by TAGU J of the High Court. He submitted that in spite of the mentioning of the judge the High Court was identified as the court against whose judgment the appeal was noted.

There is a distinction between a “court” and a “judge”. Section 43 (1) of the High Court Act [*Chapter 7.06*] provides as follows:

“(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.”

It is therefore clear that an appeal from the High Court should be against a judgment of the High Court. Order 1 r 3 of the High Court Rules 1971 defines the words “court” and “judge” as follows:

“court” means the general division of the High Court;”

“judge” means a judge of the court, sitting otherwise than in open court;”

The word “judge” only applies when a judge is not sitting in open court. It only applies to a judge sitting in chambers.

Rule 29 (1) (a) requires an applicant to state “the date on which and the court by which, the judgment appealed against; was given. It specifies the court not the judge. Rule 29 (1) also specifies the format in which the appeal should be noted. It states:

“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.
(a) ---.”

It is therefore mandatory in respect of the format and what must be stated. Practice Direction No 1 of 2017 though issued after the hearing of this matter requires an appellant to state the court against whose judgment the appeal is noted. It is informed by s 43 (1) of the High Court Act, and the definitions of “court” and “judge” by the High Court Rules.

I therefore agree with Mr *Uriri* that the appellant's notice of appeal does not comply with r 29 (1) (a).

Mr *Uriri* for the respondent also submitted that the relief sought by the appellant is fatally defective, because the nature of the relief sought is not exact. It reads as follows:

“WHEREFORE the Appellant prays that the judgment of the court *a quo* be set aside and substituted with the following:

‘(a) The appeal be and is hereby allowed with costs.

(b) The judgment of the court *a quo* is set aside and substituted with the following;

The application be and is hereby dismissed with costs on an attorney and client scale.”

He submitted that the relief sought is fatally defective for two reasons:

Rule 29(1) (e) is mandatory. It requires the appellant or his legal practitioner to state the ‘exact nature of the relief sought’. It follows therefore that the exact nature of the relief sought must be stated to inform the court about the nature of the order sought. The appellant must not leave it to the court to think for him and draft the order for him.

Mr *Uriri* submitted that the nature of the substituting order sought is not exact, because the court *a quo* cannot grant parts (a) and (b) of the relief sought, which respectively pray that the appeal be allowed and the judgment of the court *a quo* be set aside and be substituted. The case before the court *a quo* was not an appeal but an application therefore the appellant ought to have prayed in para (a) of his relief sought that the application *a quo* be granted. With regards para (b), it goes without saying that the court *a quo* cannot set aside its own judgment.

The exact nature of the relief sought referred to in r 29 (1) (e) refers to the type or characteristics of the relief sought. This means the relief sought must be of the type relevant to

the dispute between the parties. Therefore the nature of the relief sought was wrongly framed and is incompetent as it refers to allowing an appeal and setting aside of an order, remedies which could not have been granted by the court *a quo* in a court application. The nature of the relief sought in substituted orders (a) and (b) does not therefore comply with the requirements of r 29 (1)(e).

Mr *Matinenga* conceded that the appellant's notice of appeal does not comply with r 29(1) (e). He however submitted that the defective prayer could be amended. I do not agree. A fatally defective prayer which does not state the exact nature of the relief sought cannot be amended. In *Dabengwa & Anor v ZEC & Others* SC 32-16, this Court held that:

“The rule (29) is mandatory in its terms and has been construed as such in numerous decisions of this Court. The principle emanating from these authorities is that a document which fails to comply with the requirements of the rule is fatally defective and cannot be amended.”

In *Matanhire v BP Shell Marketing* SC 113-04 this Court refused to amend a notice of appeal which was fatally defective. At page 1 of the cyclostyled judgment MALABA JA (as he then was) highlighting the importance of complying with the Rules of court said:

“It is not usual to write a judgment on a matter that has been struck off the roll – see *S v Ncube* 1990 (2) ZLR 303 (S). **This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.**” (emphasis added)

The authorities clearly state that r 29(1)(a) to (f) is mandatory and must be complied with. A notice of appeal which does not comply with this Rule is fatally defective and cannot be amended as there will be nothing to amend. A nullity cannot be amended.

Mr *Uriri* further submitted that, the appellant's grounds of appeal are not concise and are repetitive. They therefore do not comply with the provisions of r 32(1) which require that grounds of appeal "be set forth concisely".

Rule 32(1) provides for Grounds of appeal as follows:

- (1) The grounds of appeal **shall be set forth concisely** and in separate numbered paragraphs.
- (2) ----.
- (3) Application to amend the grounds of appeal may be made before the hearing of the appeal to a judge or at the hearing of the appeal." (emphasis added)

It is apparent from a close reading of r 32(1), that it is mandatory. Grounds of appeal must therefore comply with it.

Mr *Matinenga* agreed that some of the grounds of appeal are not concise and are repetitive. He suggested that they could be amended.

Rule 32(3) provides for the amendment of grounds of appeal by way of a chamber application or at the hearing of an appeal. Mr *Matinenga* did not say which grounds of appeal should be amended and how they could be amended. The court cannot amend unidentified grounds of appeal. It is the duty of the appellant or his counsel to apply for the amendment of specified grounds of appeal suggesting how they should be amended

It is however common cause that the notice of appeal in this case contains some valid grounds of appeal. The court could have considered them if the notice of appeal was not fatally defective in other respects.

A clear and concise ground of appeal in an otherwise valid notice of appeal cannot be disregarded because there are other defective grounds of appeal in the same notice of appeal. It should be considered while the defective grounds of appeal should be struck out.

It is clear that the notice of appeal in this case does not comply with rr 29(1(a)(e) and 32(1). It is fatally defective. It is therefore not necessary to deal with the merits of a fatally defective notice of appeal.

In the result, the matter is struck off the roll with costs.

GARWE JA: I agree

MAVANGIRA JA: I agree

Moyo & Jera, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners