

GLADYS DEKWE
versus
BERN-WIN DEVELOPMENT COMPANY
and
UNTU CAPITAL LIMITED

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 3 & 10 March 12 May 2022

Civil Appeal

Mr E Mubaiwa, for appellant
Mr Chatereza, for second respondent
No appearance for first respondent

MUCHAWA J: This is an appeal against the decision rendered by the Magistrates' Court in which the following order was granted,

“IT IS ORDERED THAT:

- 1) Application for summary judgment is hereby granted.
- 2) The first and second defendants and those claiming occupation through them to vacate stand number 2860 Pleasant Street, Chadcombe Harare.
- 3) The second defendants to pay holding over damages in the sum of ZWL \$300 per month from the first of September 2019 to date of ejection.
- 4) Defendants to meet the costs on an ordinary scale.”

The second respondent issued summons seeking the eviction of the first respondent from stand number 2860 Pleasant Street, Chadcombe Harare (the property). The appellant applied for joinder and was joined to the proceedings as second defendant. The above order was therefore given in favour of the second respondent against the appellant and first respondent.

The second respondent averred it was the holder of title to the property and could vindicate it against the whole world. This property was said to have been purchased through a Sheriff's sale and transferred under deed of transfer number 3317/2019. Despite a notice of eviction, the appellant and first respondent were alleged not to have vacated the property by 30th August 2019,

nor were they paying rent. Ejectment was therefore sought and payment of holding over damages at the rate of RTGS \$300 per month with effect from first September 2019, to date of ejectment plus costs of suit at the legal practitioner and client scale.

In opposition to this action, the appellant pleaded that there was a matter pending before the High Court in which the appellant was challenging the sale of the property in issue. It was also denied that the second respondent was the owner of the property in issue.

The second respondent denied that there was any pending case before the High Court as the appellant had failed to meet the 10 day deadline given in an application for condonation in which to file the application for the setting aside of the confirmed sale.

The second defendant then applied for summary judgment. A point of law was raised as to the jurisdiction of the magistrates' court and that of *lis pendens* by the appellant and the application for summary judgment was also opposed on the merits. The court still proceeded to grant the summary judgment in terms of the order above.

Disgruntled, the appellant has lodged this appeal on the following grounds;

- 1) The court *a quo* erred or misdirected itself in law and in fact in finding that it had jurisdiction to preside over a common law application.
- 2) The court *a quo* erred or misdirected itself in finding that the appellant had no bona fide defence to the claim.
- 3) The court *a quo* erred or misdirected itself in law by finding that the defence of *res litigiosa* did not constitute a *bona fide* defence.

The prayer is couched as follows:

“Wherefore, the appellant prays for the setting aside of the decision of the court *a quo* in granting the application for summary judgment under case number com 947/19 and substituted with the following;

“1. The application for summary judgment under case number COM 947/19 be and is hereby dismissed.

2. The costs shall be in the cause.”

The second respondent has raised a point in *limine* before us. It is that the notice of appeal is fatally defective for failure to pray for the success of the appeal. I will deal with this first

Point in *limine*

Mr *Chatereza* submitted that the notice of appeal does not comply with r 95 (10) (d) of the High Court Rules, 2021. The failure to pray for the success of the appeal before the setting aside of the judgment *a quo* is said to be a fatal defect. Reliance is placed on the cases of *Mudyavanhu v Saruchera & 2 Ors* SC 75/17 and *Ndlovu v Ndlovu & Anor* SC 133/02. It was prayed that the appeal should be struck off the roll with costs.

Per contra, Mr *Mubaiwa* resisted the point in *limine*. He submitted that appeals from the Magistrates' Court are regulated by Order 31 of the Magistrates Court Rules, 2019 which provides for what should be done in an appeal to the High Court. It was further argued that r 95 (2) excludes certain appeals from the operation of the rule particularly in para(s) (c) and (d).

Whilst conceding that the prayer does not say that the appeal should be upheld, Mr *Mubaiwa* contended that this is not fatal as the prayer can be extracted from what is prayed for as the intentions of the appellant are clear. It was further argued that the court can only set aside the decision appealed against after the appeal succeeds. Reference was made to the cases of *Zimre Property Investments v Saintcor Pvt Ltd t/a V Track & Anor* SC 59/16 and *Sobusa Gula Ndebele v Bhunu N.O* SC 34/10 to argue that the prayer is competent and the point in *limine* should be dismissed. The court was urged to consider that the interests of justice override technicalities as the issue before the court is that of residential premises and appellant may lose her accommodation.

In his reply, Mr *Chatereza* submitted that Order 31 of the Magistrates Court Rules only governs the time within which to appeal and the procedure but does not include the form of the notice of appeal which aspect is covered by the High Court Rules as they govern the processes within the court. It was contended that the appellant is obliged therefore to comply with r 95 (10).

Order 31 of the Magistrates Court Rules generally provides for the time within which to appeal and the procedure to be followed. All it says about the relief is found in r (4) para (c), wherein it is stated that an appeal shall state the nature of relief sought. In regulating its internal procedures, r 95 (10) (d) provides that a notice of appeal shall state the exact nature of the relief sought.

Mr *Mubaiwa* did not back up his assertion that this appeal falls within the class of those appeals which are excluded from the operation of r 95 in r 4 (c) and (d). It is provided therein that the rules are not applicable to;

“(c) An appeal or review in relation to which the enactment concerned itself expressly-

- (i) Specifies that it shall be by notice of motion or other special procedure; or
- (ii) provides for the making of rules or regulations governing procedure;
- (d) An appeal or review in relation to which special rules made in terms of the Act are in force;”

Clearly, without distinguishing this appeal and showing the particular enactment which provides for a special procedure or special rules applicable, *Mr Mubaiwa* cannot wriggle his way out of the application of r 95 (10) of the High Court Rules. The notice of appeal should state the exact nature of the relief sought. Luckily, this issue has already exercised the minds of the Supreme Court. In the case of *Mudyavanhu v Saruchera & Others supra* the following clear position was stated;

“The respondents are correct in the submission that the appellant’s failure to pray for the success of the appeal in this court before the judgment *a quo* could be set aside and substituted, constitutes a serious defect in the notice of appeal. Rule 29 (1)(e) is specific in its language and requires that the relief sought be exact and competent so that the court is left in no doubt as to what exactly the appellant seeks. In *Ndlovu v Ndlovu and Another*, SC 133-02, MALABA JA, as he then was, dealing with a similarly defective notice of appeal, held that;

“The exact nature of the relief sought was not stated. What was prayed for in the notice of appeal was that the judgment of the court *a quo* be dismissed with costs. It is the appeal which is dismissed or allowed. If the appeal is allowed the judgment or decision appealed against is then set aside and a new order substituted in its place. In this case it was not known what order the appellants wanted this Court to make in the event the appeal succeeded.”

The court had earlier on observed that;

“The wording of the provision shows that the Rule is mandatory in nature, meaning that any document labelled ‘Notice of Appeal’ must comply with it in order to be a valid notice of appeal. The information required in terms of this provision must be clearly set out even where it may be obvious or deducible from the given text of the grounds of appeal.”

The above position was reached despite the appellant’s argument that there is no provision in the Rules which requires a party to expressly state whether or not the appeal should succeed as the judges can themselves simply state that the appeal succeeds or not. He explained that the intention that the appeal succeeds is apparent from the very act of appealing itself.

Though the Supreme Court was dealing with the Supreme Court Rules, the wording interpreted is exactly the same as that of r 95 (10) (d).

The case of *Zimre Property Investments v Saintcor Pvt Ltd supra*, referred to by the appellant had a completely different defect in the relief sought. The appellant had properly prayed for the success of the appeal but had mistakenly prayed that in the event that the appeal succeeds,

the appellant sought an order that the matter be referred for trial on the merits. The suggestion in the prayer that the matter be referred for trial before the High Court was found to be an obvious mistake, one which did not, invalidate the entire appeal. That case is therefore clearly distinguishable. Similarly, in the case of *Sobusa Gula Ndebele v Bhunu NO supra*, the prayer clearly set out the nature of the relief sought, and it was found that , r 29(1)(e) has been complied with. This case does not assist the appellant's case at all.

In the circumstances, this court is bound by the clear findings in *Mudyavanhu v Saruchera supra* whose facts fell squarely within this case. It is my finding therefore that the appellant failed to comply with the peremptory provisions of r 95 (4) (d) by not setting out the exact nature of the relief sought. It is not for the court to deduce what it is that the appellant wants to happen to his appeal. This is a fatal irregularity.

Consequently, the point in *limine* is upheld and the appeal be and is hereby struck off the roll with costs

WAMAMBO J----- I agree

Danziger & Partners, plaintiff's legal practitioners
Bherebhende Law Chambers, second defendant's legal practitioners