

REPORTABLE (134)

ZIMBABWE NEWSPAPERS (1980) LIMITED

v

TEMBANI KUFA

**SUPREME COURT OF ZIMBABWE
MAKARAU JA, GOWORA JA & MATHONSI JA
HARARE, 26 MARCH 2020 & 15 NOVEMBER 2021**

B. Museba, for the appellant

T. L Mapuranga, for the respondent

MATHONSI JA: The delay in handing down judgment in this matter, especially considering the manner in which the matter will be disposed of, is most sincerely regretted.

The appellant employed the respondent as a security officer. It has appealed against the entire judgment of the Labour Court (“the court *a quo*”) handed down on 14 September 2012. The judgment allowed an appeal by the respondent against the decision of the appellant’s disciplinary committee (“the committee”) which found him guilty of misconduct and dismissed him from employment.

THE FACTS

On a date that is not material, the respondent allegedly gave copies of his payslips to a former employee of the appellant who was involved in a labour dispute with the appellant. The payslips were duly attached as evidence by the former employee to his court papers which were served on the appellant.

Thereafter, the appellant charged the respondent with two counts of misconduct for breaching Clause 8.5 of the Zimbabwe Newspapers Company Code of Conduct. Specifically, the respondent was accused of committing any act, misconduct or omission inconsistent with the express or implied conditions of employment and acting in conflict with the Group Business or Editorial Policies.

I note in passing that the single act gave rise to two separate charges neither of which was preferred in the alternative, a glaring irregularity that was not adverted to by either of the parties at the hearing of the matter, as it offends the rule against the splitting of charges. The issue was not raised with counsel and it cannot be a point on which this appeal may turn.

In his written response to the charges, the respondent denied that he had furnished the former employee with his payslips for personal use. He appeared before a disciplinary committee on 19 November 2010. At the hearing of the matter, the respondent argued that the disclosure of a payslip was not an act of misconduct specifically provided for in the code of conduct. He further argued that the prohibition against disclosure of a payslip was only introduced after he had been charged.

At the end of the hearing, the disciplinary committee found that the copies of the payslips attached to the former employee's application appeared to belong to the respondent, that two witnesses testified that the respondent had admitted to them that he had given his payslips to the former employee and that the respondent, in furnishing his payslips to the former employee, was being disloyal to the employer. On the basis of these findings, the committee duly found the respondent guilty and dismissed him from employment.

I also note at this stage that there was no specific finding by the disciplinary committee that the respondent knew at the time he allegedly gave his payslips to the former employee of the appellant that his conduct was prohibited. It was the finding of the disciplinary committee that, by giving his payslips to the former employee, the respondent acted disloyally.

Aggrieved by that decision, the respondent appealed to the Group Chief Executive Officer. He raised a number of grounds of appeal. The first was that the "offence involving payslips" was not provided for in his contract of employment or the code of conduct and that the endorsement on all payslips that they are "private and confidential" only appeared after his conviction and not before.

Secondly, the respondent argued that there was no evidence of any wrongdoing on his part and that the charges preferred against him were contrary to public policy as the appellant wanted to further its illegal practice of underpaying workers and, as such, the respondent was not obliged to protect such an interest.

The respondent also alleged that the verdict of guilty went against the weight of evidence in that the former employee testified that he had not received the payslips from the respondent and no evidence was led to controvert such testimony. He also attacked the procedure adopted in sentencing him alleging that he was not called upon to mitigate before the penalty was imposed on him.

Finding no merit, the appellant's Group Chief Executive Officer dismissed the appeal. He found that the offence was provided for in the appellant's code of conduct and that the disclosure of payslips or copies of payslips to any third party is inconsistent with the implied conditions of the employment contracts of all the appellant's employees and in direct conflict with the interests of the Group.

He found that the burden of proof was on the respondent to prove that he did not give his payslips to the former employee. It was his finding that the respondent had failed to discredit the evidence that his payslips were found attached to the former employee's court papers.

The Group Chief Executive Officer relied on the minutes of the disciplinary committee hearing in holding that the respondent had made an admission to the two witnesses called by the appellant.

PROCEEDINGS A QUO

Still dissatisfied, the respondent noted an appeal to the court *a quo* on a multiplicity of grounds, nine in total. Only three of those grounds of appeal raised issues of law. In essence,

they raised the issue whether the respondent's conduct, if proved, amounted to an act inconsistent with the express or implied conditions of his contract of employment. This is so because the respondent's conduct complained of occurred immediately before the condition that payslips were private and confidential was introduced. This, in addition to the other issues, was a live issue that had to be determined.

Using somewhat different language, the court *a quo* also identified the issue of whether the conduct of giving a payslip to a third party prior to their being endorsed "private and confidential" constituted a misconduct. The court *a quo* regarded it as the sole issue for determination.

In a rather terse judgment, the court *a quo* upheld the appeal on essentially three premises namely:

1. That the respondent and all other employees of the appellant were not aware that furnishing their payslips to another was conduct inconsistent with the terms of their employment.
2. That there was no evidence on record to prove that the respondent had given his payslips to the former employee.
3. That the failure to allow the respondent the opportunity to mitigate before the pronouncement of a penalty was incurably bad and vitiated the entire proceedings.

PROCEEDINGS BEFORE THIS COURT

The roles were immediately reversed. Dissatisfied with the decision of the court *a quo*, it became the appellant's turn to appeal to this court. It attacked the decision *a quo* on several bases. First, that the court *a quo* erred in finding that the respondent was not properly charged.

Second, that it erred in finding that the respondent was not aware that the confidential nature of the payslips did not have to be spelt out. Third, that it erred in finding that there was no adequate evidence before the disciplinary committee that the respondent had given his payslips to the former employee. Lastly, that the court *a quo* erred in finding that the failure to mitigate vitiated the proceedings as dismissal was the only appropriate penalty in terms of the code of conduct.

At the commencement of the hearing of the appeal, Mr *Museba*, who appeared for the appellant, made an oral application to amend the prayer in the notice of appeal. Counsel desired to insert words to provide for an order that the appeal be allowed. He did so upon a realization that this was omitted in the prayer contained in the notice of appeal.

Mr *Museba*, submitted that no prejudice will be suffered by the respondent if the amendment is granted especially as the respondent's counsel had not even picked up the defect in the prayer. In fact, the respondent had prepared to meet the appeal without regard to the defect.

While acknowledging that he had not even noticed the defect, Mr *Mapuranga* for the respondent opposed the application for the amendment. He submitted that the notice of appeal

must clearly set out the relief sought. If it fails to do so, it is null and void and cannot be amended for the reason that one cannot amend a nullity.

For his part, Mr *Museba* was quick to concede that the prayer is defective as it does not meet the requirements of r 37 (1) (e) of the Supreme Court Rules, 2018. He however refuted that the defect is one which renders the appeal a nullity. In his view, the court is empowered by r 41 to allow an amendment to the grounds of appeal or to any pleadings filed before it, presumably including a prayer.

ANALYSIS

It has been stated repeatedly by the courts that a failure to comply with the mandatory provisions of the rules when lodging an appeal renders the appeal a nullity. See *Matanhire v BP Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S). Generally, where a notice of appeal does not comply with the rules, the matter ought to be struck off the roll. This is because a nullity cannot be amended. See *Chikura N.O & Anor v Al Shams Global BVI Ltd SC* 40/17.

The belated application for an amendment is meant to bring the appeal within the remit of r 37 (1) which requires that every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his or her legal practitioner which shall state *inter alia* “the exact relief sought.”

The relief sought by the appellant in this case is couched in the following words:

“WHEREFORE appellant prays that the judgment of the court *a quo* be altered to read as follows – ‘The appeal be and is hereby dismissed.’”

If the proposed amendment, is granted, the prayer will read:

“WHEREFORE the appellant prays that the appeal be allowed with the judgment of the court *a quo* altered to read as follows- ‘The appeal be and is hereby dismissed.’”

The concession made by Mr *Museba* that the prayer is defective is properly made.

The question however is whether the application should be granted. Put in another way: can the defective prayer be amended?

This Court was confronted with a similar situation in the case of *Ndlovu & Anor v Ndlovu & Anor* SC 133/02. In that case the prayer in the notice of appeal was couched in the following terms:

“... that the judgment of the court *a quo* be dismissed with costs.”

Writing for the court, MALABA JA (as he then was) followed the reasoning in *Jensen v Acavalos* 1993 (1) ZLR 216 (S) at 220B-D. He observed that the notice of appeal was clearly defective as there was no mention whether the whole or only part of the judgment was being appealed against and the exact nature of the relief sought. At p 2 of the cyclostyled judgment, he stated:

“In this case there was no mention of whether the whole or part only of the judgment was being appealed against. 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 concluded that the notice of appeal which purported to institute the appeal “was incurably defective.” As there was no appeal before the court, the matter was struck off the roll with costs.

The case of *Ndlovu & Anor v Ndlovu & Anor* is on all fours with the present matter. It has not been suggested that a departure from the case is called for. It settles this matter because the prayer is incurably defective. It cannot be amended.

DISPOSITION

A notice of appeal which does not meet the requirements of the rules of court is fatally defective and invalid. A fatally defective compliance with the rules on the filing of an appeal cannot be condoned or amended.

The appellant’s notice of appeal suffers the fate of all fatally defective appeals. Having come to the conclusion that there is no valid appeal before the court, there is no basis for relating to the merits.

In the result, it be and is hereby ordered as follows:

1. The matter is struck off the roll.
2. The appellant shall bear the costs.

MAKARAU JA : I agree

GOWORA JA : I agree

Messrs Muzangaza Mandaza & Tomana, appellant's legal practitioners

Messrs Manyangadze Law Practice, respondent's legal practitioners