ELTON HAKATA
versus
EDIAS GONDO

HIGH COURT OF ZIMBABWE
DUBE JP & FOROMA J
HARARE; 23 January & 9 June 2025

Ruling on a Point in Limine

Advocate J Chirambwe, for the appellant
F Nyamayaro, for the respondent

FOROMA J:

At the commencement of the hearing of this appeal Mr *F Nyamayaro* representing the respondent took a point *in limine* in terms of which he submitted that there was no valid notice of appeal before the court by reason of the fact that the appellant did not pay the security for respondent's costs in breach of Order 31 Rule 1(2)(b)(i) and (b) of the Magistrates Court (Civil) Rules, 2019. The point *in limine* was strenuously opposed by *Advocate C. Chirambwe* who contended that the failure to pay security for costs did not invalidate the notice of appeal.

Order 31 Rule 1(2)(a) and (b)(i) and (ii) reads as follows – An appeal shall be noted by:

(a) the delivery of notice and

(b) unless the court of appeal otherwise directs giving security for

(i) the respondent's costs of appeal to the amount of one hundred dollars,

(ii) the costs of the preparation of a copy of the record to the amount estimated by the Clerk of the court.

Provided that a clerk of the court may in his or her discretion accept a written undertaking from the appellant to pay for the preparation for the record. (The underlining is for purpose of highlighting that the provision is peremptory.)

Mr *Chirambwe* cited the case of *Lee John Waverly* v *Principal Immigration Officer & Another* HH 36/15 reported in 2015 (1) ZLR p72 and also the case of *Jonga* vs *Minister of Lands*

and Rural Resettlement HH 243/17 as authority for the submission that failure to give respondent's security for costs of appeal in the sum of one hundred dollars did not invalidate the appeal. He further argued that on the authority of *Breytenbach* vs *Commet Engineering (Pty) Ltd* 1996 (1) SA 465 an undertaking suffices for compliance where security is required and that the undertaking in the notice of appeal was in *casu* therefore a compliance with Order 31 aforesaid. Counsel clearly misunderstood the ratio of *Jonga's case* (*supra*), a decision of the High Court Appeal Court. It suffices to quote extenso from page 3 of the cyclostyled judgment of MWAYERA and MANONGWA JJ where the court said –

> "As if that was not enough anomaly the appellant clearly from the nature of appeal further demonstrates none compliance with the rules by failure to give security for costs and costs for preparation of the record as outlined in the rules of the Magistrate Court Civil Rules 1980 which regulate appeals to the High Court, Order 31 rule 2(b)(i) and (ii) of the Magistrates Court rules is instructive. It reads "An appeal shall be noted by (a) _ _ _ (b)"
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> In the absence of security being tendered it follows that the notice of appeal on its own does not activate the appeal. There is demonstrable non-compliance with rules in this case rendering the appeal defective. GARWE JA in *Econet Wireless (Private) Limited* vs *Trust Mobile (Proprietary) Limited and Another* SC 43/13 at p10 of the cyclostyled judgment remarked as follows;
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> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the rules and that if it does not, it is a nullity and cannot be condoned or amended. See Jensen v Acavalos 1993 (1) ZLR 216"
>
> In the instant case the appellant in addition to filing grounds of appeal which are not specific but are winding and argumentative did not tender security for costs thereby dealing the appeal a heavy blow for being defective. Clearly therefore the non-compliance renders the appeal a nullity."

Although *Jonga's case* was determined before the current Magistrate Court (Civil) Rules 2019 was introduced, our view is not affected as the provision is exactly the same as Order 31 under discussion word for word – See also *Samuel Stavros* vs *Kwanayi Kashangura* HH 17/25. It was also Mr *Chirambwe's* submission in argument that Order 34 saves an appeal that is non-compliant with the rules from nullity. In our respectful view, this is a misconstruction of the statute. Order 34 relates to matters pending before the Magistrates' Court and not those which are already subject of a judgment sought to be impugned or pending in the appeal court. In fact counsel's argument leads to an absurdity as it directly removes a litigants' right of appeal on any appealable failure to comply with the court's rules governing the noting of an appeal.

It was Mr *Chirambwe*'s alternative submission that an undertaking to pay security of costs is good enough and constitutes compliance with the rule in question. Order 31 requires full and proper compliance for a notice of appeal to be validly noted. This means that there can be nothing short of payment of security of respondent's costs in the sum of $100.00 that would constitute proper compliance that brings into existence a validly noted appeal. The Clerk of Court cannot waive an appellant's obligation to deposit US$100,00 contemporaneously with the filing of the notice of appeal. Only the Court of appeal can waive such payment but even then such waivers must be in existence at the time of noting an appeal for a valid appeal to be noted. Although the Clerk of Court can accept a litigant's written undertaking to pay for the costs of preparation of the record he/she on a later date cannot authorise deferment of payment of security for respondent's costs to beyond the time of filing the notice of appeal. In our view although the Clerk of Court has a discretion to defer payment of the costs of preparing the record to some date after beyond the date of noting an appeal he has no authority to delay the time when payment of security of respondent's costs must be made which time is that of noting the appeal. Clearly therefore reliance on the case of *Breytenbach* vs *Commet Engineering supra* is misplaced quite apart from it not binding on this court.

In the circumstances, it is our view that respondent's objection *in limine* is well taken. The appellant's appeal is accordingly struck off with costs.

FOROMA J: ……..

DUBE JP: …….. **Agrees**

Chatsama & Partners, appellant's legal practitioners
Farai Nyamayaro Law Chambers, respondent's legal practitioners