EDWIN TAURAYI MUTUSWA

And

ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION COMPANY (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA & DUBE-BANDA JJ
BULAWAYO 13 JULY & 21 OCTOBER 2021

Criminal Appeal

Appellant in person
Ms P. Vangiranayi for the respondent

TAKUVA J: This is an appeal against the whole judgment of the Magistrates' Court sitting at Kwekwe. The court *a quo* granted absolution from the instance at the close of the appellant's case.

Background facts

The appellant issued summons against the respondent claiming the following:

1. Payment of the sum of US$4 600,00.
2. Interest thereon at the prescribed rate from date of summons to date of full and final payment and costs of suit.

Appellant's particulars of claim as amplified by further particulars show that the claim was based on a verbal agreement entered into between the respondent and his representative as well as unjust enrichment by the respondent. The respondent denied the claim challenging the existence of the alleged verbal agreement to refund appellant for the materials purchased and any unjust enrichment on its part. The issue for trial was whether or not the appellant was entitled to a refund from respondent. During the trial the appellant testified in his case and also called one other witness his sister Evelyn Mutuswa after which he closed his case. Following the close of appellant's case, the respondent made an application for absolution from the instance which was granted by the court a quo.

Aggrieved, appellant appealed to this court on the following grounds;

"1. I Edwin Taurayi Mutuswa (Doctor) am appealing against the decision by the magistrate here in Kwekwe because the magistrate is saying things I never said, connections to neighbouring house-holds were not done in 2016 as is written in her letter rather connections were done just after the construction of the line from 2008 up until now connections are still being done.

2.In her "trial" the magistrate did not refer to any Act, Chapter or Section of the Law in Zimbabwe which justifies ZEDTC to instruct anyone in Zimbabwe to buy materials for ZETDC this is the main issue honourable judge.

3. Does the law in Zimbabwe allow ZETDC to exploit people of this country by instructing them to buy material which ZETDC is supposed to buy? Is there any Act, Chapter or Section of the Law in Zimbabwe which allows ZETDC to behave in this way, if not then they should refund me back my money.

4. Rather than quoting and making any references to Act, Chapters and Sections of the Zimbabwean law connected to this particular case the magistrate is quoting other cases as examples why? I don't even understand it.

5. Again and again I said to the magistrate that there was no agreement written or verbal between ZETDC and my sister but rather it was an instruction by ZETDC to my sister that my sister should buy the materials because ZETDC was broke and it had no money to buy the materials itself and then ZETDC would refund the money at some point when ZETDC's financial situation improved, after my sister asked if the money was going to be refunded.

6. Please the basis of the claim, is not the promised refund but rather it is simply wrong for ZETDC to exploit the Zimbabwean people and have them buy materials which then become ZETDC property that is completely wrong.

7. I would definitely not voluntarily buy materials that later become ZETDC property, I even told the magistrate that if I have extra money to spend I have so many relatives whom I can help rather than buy materials for a company ZETDC.

Honourable Judge, I don't even understand the connection made by the magistrate between this particular case and my "parting ways with my

former legal representative, legal representative or not what is important are my facts, points and evidence of this particular case against ZETDC that's all that is important at this point and time.

Relief Sought

TAKE FURTHER NOTICE THAT the appellants *(sic)* seek the following relief:

1. THAT the defendant cannot dispute the cost of materials because I gave the magistrate (4) four independent quotations so I don't understand why the defendant and magistrate are disputing the cost of the materials. It is USD4 600,00 converted at an official Zimbabwe bank rate to be ZW$39 000,00 and Ecobank ZW$38 000,00.
   Dated at Kwekwe on this 9th day of August 2019 …".

The respondent opposed the appeal. It was argued *in limine* that the appeal is invalid for want of compliance with the mandatory provisions of the rules regulating appeals. It was further argued that the appeal is defective because the appellant in his papers does not state the nature of the relief sought as required by the rules of the Magistrates' Court.

The 1st point *in limine* is based on the criticism that the appellant's appeal is a lengthy document constituting of eight (8) grounds of appeal. Order 31 Rule 4 (b) of the magistrates' Court (Civil) Rules 2019 (the rules) provides that a notice of appeal shall state the grounds of appeal concisely and clearly stating the finding of fact or ruling of law appealed against. *In casu* all the grounds do not comply with the peremptory requirement of the rules. It is clear that these grounds of appeal are mere complaints, statements, comments, questions or remarks by the appellant.

It is now settled law in Zimbabwe that a notice of appeal which does not concisely set the grounds of appeal is invalid and incurably bad. In *Econet Wireless (Pvt) Ltd* vs *Trustco Mobile (Pty) Ltd and Anor* 2013 (2) ZLR 309 (S) the Supreme Court stated at page 309F that;

> "Rule 32 of the Rules of the Supreme Court 1964, requires that a notice of appeal concisely. "Concise" means brief but comprehensive in expression. A notice of appeal must comply with the mandatory provisions of the rules, if it does not, it is a nullity and cannot be condoned or amended. A notice of appeal which is unnecessarily prolix is not concise …"

In the present matter these grounds of appeal are neither brief nor comprehensive in expression. They are way off the mark. I accordingly agree with the respondent that the grounds of appeal are unnecessarily prolix and that the appeal is invalid for that reason.

As regards the 2nd ground, Order 31 Rule (4) (a) makes it mandatory for an appellant to state the relief that he seeks before the court. Appellant's relief that appears on page 3 of the record is defective and incompetent in that it is not in any way a relief in compliance with the peremptory requirement of the rules. In view of the fact that this is an appeal against the granting of an application for absolution, the only competent relief that appellant could seek was that the judgment of the court a quo be set aside with the matter being remitted to the court *a quo* for continuation to the respondent's case. This he did not do. Instead he introduced a new issue relating to the converted amounts pegged at the official bank rate. There is absolutely no basis or justification of such a claim in the prayer. The second point *in limine* has merit and the matter should end at this stage.

However assuming the court is wrong on this, there is a need to proceed to the merits.

The law applicable to an application for absolution from the instance is now well settled. In *M C Plumbing (Pvt) Ltd* v *Hualong Construction (Pvt) Ltd* 2015 (1) ZLR 138 (H) at p 138D-G it was stated that;

> "The test to be applied to the question whether to grant absolution from the instance to a defendant at the close of the plaintiff's case is as follows:
> (1) Whether there is an evidence at the close of the plaintiff's case, upon which a court, directing its mind reasonably to such evidence could or might find for the plaintiff.
> (2) Whether there is any special consideration or reason why the court should reject the evidence adduced on behalf of the plaintiff for example glaring inconsistencies or unacceptable variance with the pleadings filed of record.
> (3) Whether the plaintiff has failed to adduce any evidence or adduced insufficient evidence to establish an essential element of its claim; and
> (4) Whether an overall assessment of all the evidence adduced on behalf of the plaintiff, the pleadings filed of record, the amendments, the exhibits, all the discovered documents, coupled with the *viva voce*

evidence fall short of establishing the plaintiff's case, on the face of it (prima facie)".
See also *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) at p 343; *Manyangwe* v *Mpofu & Ors* 2011 (2) ZLR 871 (H) at p 88F-H; *Efrolou (Pvt) Ltd* v *Muringan*i 2013 (1) ZLR (H) at p 310E-F.

Applying these principles to the case *in casu*, I find that that the court a quo properly granted absolution from the instance at the close of plaintiff's case for the following reasons;

(a) Appellant adduced insufficient evidence upon which a court directing its mind reasonably to such evidence, could or might find for him.

(b) The appellant abandoned his own pleadings disassociating himself from the pleaded cause of action and the sole basis for his claim going by the appellant's further particulars. Appellant maintained that there was no agreement for the refund and that the respondent was entitled to connect other users to the line as it is a public line.

(c) Appellant dismally failed to adduce sufficient evidence to establish the two causes of action as pleaded in the summons and as amplified by his further particulars. He confirms and insists on this grand departure in this appeal.

(d) The totality of the evidence adduced by appellant falls short of establishing a *prima facie* case.

Coming to the grounds of appeal on the merits, I am of the view that all are devoid of merit for the following reasons;

(1) In respect of the first ground of appeal, the court *a quo* relied on appellant's pleadings on page 27 para 2.1 of the further particulars.

(2) Second and third grounds of appeal are totally baseless. Apart from being imprecise, it is clear from the evidence that the appellant's claim was not based on any provisions in terms of a statute, but rather on an alleged breach of a verbal agreement coupled with unjust enrichment. Clearly the onus was on appellant to establish a *prima facie* case against the respondent.

(3) Ground of appeal number four is a complete demonstration of lack of appreciation by the appellant of the importance of previously decided cases. It is totally hopeless and doomed to failure.

(4) The rest of the grounds of appeal are testimony of appellant's abandonment of his pleaded cause of action before the court *a quo*. This becomes apparent in that he admits that there was no agreement and now argues that it was wrong for respondent to have asked him to purchase the materials yet he did so at his own volition as respondent had no capacity to do installations at that time.

Overally, there is no merit in the appeal.

In the result the appeal is hereby dismissed with costs.

Dube-Banda J …… I agree

Danziger & Partners (Gweru), respondent's legal practitioners