

ZIMBABWE REVENUE AUTHORITY
and
REGIONAL MANAGER
(ZIMRA FORBES ENVIRONS REGIONS)
and
THE COMMISSIONER GENERAL (ZIMRA)
and
versus
EZEKIEL MASAMVU
and
ENOCK CHIBATI

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 25 March 2020 and 2 July 2020

Civil Appeal

J Zviuya, for the appellants
H. B. R. T Tanaya, for the respondents

MUZENDA J: This is an appeal filed by the appellants against the judgment of the magistrate sitting at Mutasa on 30 April 2019 and the appellants outlined the grounds of appeal as follows:

GROUNDINGS OF APPEAL

1. The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that the appellants had been properly cited and that the Notice of Intention to sue was properly served in this matter and in purporting to condone the improper citation and the purported service *mero motu*.
2. The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that the respondents had exhausted domestic remedies prior to approaching the Magistrates Court for relief.
3. The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that there were no material disputes of facts in the matter.

4. The Learned Magistrate grossly erred and misdirected himself on facts and the law in concluding that respondents did not smuggle the goods/sugar when there was overwhelming evidence which proved that the goods/sugar were smuggled.
5. The Learned Magistrate grossly erred and misdirected himself on facts and the law in ordering the release of the seized sugar in circumstances where the notice of seizure was never challenged in terms of the requisite tax legislation and the respondents failed to discharge the onus upon them by the law to the satisfaction of the appellants.
6. The Learned Magistrate grossly erred and misdirected himself on the law in failing to appreciate that he is at law not empowered to determine the validity or review of the Notice of seizure.

BACKGROUND FACTS

The first respondent, Ezekiel Masamvu, had his sugar packaged in Portuguese inscribed satchels seized by first appellant's officers. Both respondents appeared at Mutasa Magistrates Court for criminal charges of being found with goods not duly accounted for, the state had abandoned the original charge of smuggling in respect of first respondent, the state also charged first respondent herein with s 4 (1) (b) (ii) as read with s 5 of the Food and Food Standards Act [*Chapter 15:04*], for false description of goods.

The respondents were acquitted on the charge in terms of the Act, however first respondent pleaded guilty to the charge involving false description of goods. The criminal court at Mutasa ordered the state to immediately release the sugar to the respondents, on condition that the sugar would not be sold in the offensive Portuguese packaging. The appellants refused to release the sugar. Having been acquitted of violating the Act, the respondents approached the court *a quo* for the release of the sugar in terms of s 193 (9) of the Customs and excise Act. The magistrates court made a finding that the appellants release the sugar to the respondents. It is that order which the appellants seek to be set aside on appeal. The appeal is opposed.

Mr *HBRT Tanaya* for the respondents raised points *in limine* relating to the defective grounds of appeal and submitted that if these points are upheld by us the unavoidable consequence will be to strike off the appeal from the roll.

The first ground of appeal requires quoting *verbatim*:

"The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that the appellants had been properly cited and that the Notice of Intention to sue

was properly served in this matter and in purporting to condone the improper citation and the purported service mero motu”

The respondents submitted that this is not a valid ground of appeal as it is not precise nor concise but comes across as a rumbling statement of several complaints bundled into one statement purporting to be a ground of appeal. The ground of appeal is so crude that it raises several arguments or points of arguments in one sentence. The respondents further contended that the so called ground alleges that the magistrate erred and misdirected himself “on facts and law” without stating any single finding of fact by the magistrate nor does it indicate why each finding of fact or ruling of law that is to be criticised as wrong is said to be wrong. The ground attacks the magistrate’s conclusions and his exercise of discretion without showing why such deserve to be attacked or impugned. The statement of complaints does not comply with the rules, it was submitted. The respondents condemn same as not being a ground of appeal and moved that it be abandoned or struck off.

The second ground of appeal reads:

“The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that the respondents had exhausted domestic remedies prior to approaching the Magistrates Court for relief.”

The respondents’ counsel, submitted that the second ground of appeal is bereft of specificity just as the first one. It is not concise nor is it clear. It also attacks the Honourable Magistrate’s decision without stating why that conclusion is wrong. The ground of appeal does not disclose whether there were any available domestic remedies that were not exhausted. It also does not originate from the judgment that is being appealed against but from a distinct judgment. Respondents further submitted that the court *a quo* ruled that the proviso to s 193 of Act gave it jurisdiction to entertain the application and that the respondents had a constitutional right to approach the magistrates court if aggrieved.

The court *a quo* never decided that the respondents had exhausted local remedies or that there were local remedies to be exhausted. In any case the respondents added that the second ground of appeal was frivolous, the course of action open to the respondents was to institute civil proceedings against the appellants once the goods were not released¹.

The Third Grounds Of Appeal Reads:

“The Learned Magistrate grossly erred and misdirected himself on facts and law in concluding that there were no material disputes of facts in the matter.”

¹ QINGSHAM INVESTMENTS (PRIVATE) LIMITED V ZIMBABWE REVENUE AUTHORITY HH 207/17.

The respondents contend that this ground of appeal is equally fatally defective for the reasons advanced already whilst addressing grounds one and two above. The alleged material disputes of facts were not itemised even up to the time the appellants prepared their heads.

The fourth ground of appeal was crafted by the appellants as follows:

“The Learned Magistrate grossly erred and misdirected himself on facts and the law in concluding that respondents did not smuggle the goods sugar when there was overwhelming evidence which proved that the goods/sugar were smuggled.”

It is the contention of the respondents that the fourth ground of appeal is not valid. It is equally not succinct concise or clear. It does not specify why the appellant says there was overwhelming evidence which the court below did not see. Such evidence is not identified within the body of the ground of appeal².

The fifth ground of appeal was presented by the appellants as follows:

“The Learned Magistrate grossly erred and misdirected himself on facts and the law in ordering the release of the seized sugar in circumstances where the notice of seizure was never challenged in terms of the requisite tax legislation and the respondents failed to discharge the onus upon them by the law to the satisfaction of the appellants.”

The respondents submitted that the fifth ground is similarly imprecise and unclear as the first to fourth grounds of appeal. The fifth ground lacked particularity that could enable the magistrate to meaningfully respond.

The last ground of appeal by the appellants reads:

“The Learned Magistrate grossly erred and misdirected himself on the law in failing to appreciate that he is at law not empowered to determine the validity or review of the Notice of Seizure.”

The respondents argue that this is not a valid ground of appeal. An alleged failure to appreciate the law cannot be a ground of appeal as it does not amount to an attack of the court’s judgment. Respondents added that it will be infeasible for one to fail to appreciate an aspect of law and not still deliver a legally sound judgment on the matter before that court. In any case the respondents, submitted the validity of the notice of seizure was never an issue before the court *a quo*, no court application for review was ever brought before the court *a quo*.

Finally the respondents submitted that the whole set of grounds of appeal filed by the appellants is a complete nullity and must be struck off the roll with costs on legal practitioner – client scale.

² See DZINOREVA V THE STATE HH 780/15

The preliminary points relating to the grounds of appeal were raised in respondent's heads of argument, the appellants did not apply to this court to file supplementary heads addressing the quality or appropriateness of the grounds of appeal. Having closely examined and analysed the six grounds of appeal filed on behalf of the appellants the preliminary points raised by the respondents have a basis.

In terms of Order 31 (i) (4) (b) of the Magistrates Court (Civil) Rules, 2019, 2019, a valid ground of appeal shall state:

“(b) in the grounds of appeal concisely and clearly the findings of fact or ruling of law appealed against.”

For a ground of appeal to be acceptably valid, it must be specific and hence if it is impressive that ground is not a valid one at law.³ In the matter of *Kodzwa v Yambuka Holdings and Others*⁴ the court remarked dealing with the Old Magistrates Court Rules:

“At the hearing of the matter I asked the appellant's legal practitioner whether the notice of appeal complied with Order 31 r 2 (4). *Mr Muchineripi* vigorously defended the notice of appeal. He states that the grounds of appeal are clearly set out in the Notice of Appeal Rule 2 (4) provides:

***‘(4) A notice of appeal or cross-appeal shall state (a)
(b) the grounds of appeal specifying the findings of fact or rulings of law appealed against.***

The word ‘specify’ was defined in the *Oxford English Dictionary* as “to state explicitly”. In other words the appellant is expected to clearly define and outline his or her grounds of appeal. The above issue was dealt in *s. v Mc Nab*⁵. The above decision was followed in *s. v Jack*⁶ where it was held that rule 22 contained in SI 504 of 1979, requires a notice “setting out clearly and specifically the grounds of appeal”.

Although this was a criminal matter, the same can be said of a notice of appeal in civil matters⁷ *in casu*, the appellant's grounds of appeal are far from being concise and specific. The notice of appeal is four typed pages in a simple matter of rescission of judgement. They are long, winding and rumbling. From a mere reading of the grounds of appeal, it is difficult to decipher what the appellant is attacking in the judgement of the court *a quo*. The court is left in a situation where it has to attempt to make out the grounds of appeal. This the court cannot do, as it amounts to drafting grounds of appeal on behalf of the appellant⁸.

³ KODZWA V YAMBUKA & ORS HH 389/16

⁴ (*supra*)

⁵ 1986 (2) 280 (SC at 282 B-E)

⁶ 1990 (2) ZLR 166 (SC)

⁷ S v Sibanda 2001 (2) ZLR 514 (H)

⁸ See also the matter of *Jonga v Minister of Lands* HH 243/17

In the case of *Kunonga v The Church of the Province of Central Africa*⁹ the Supreme Court dealing with the issue relating to the fact that “grounds must be clear and concise” stated:

“ [21] in *S v McNab*¹⁰ the only ground of appeal before this court was that: ‘ The learned Trial Magistrate erred in fact and law in holding that the state has proved the appellant was so drunk as to be incapable of having proper control of his motor vehicle’ this court held that the above ground did not comply with the rules of court and more specifically that the notice of appeal did not set out clearly and specifically the grounds of appeal. The court remarked at page 282 F-G:

‘... there must be stated in the Notice of Appeal’ a precise statement of the points on which the applicant relies’. A statement that the magistrate erred in fact and in law in holding that the state had proved appellant was so drunk to be incapable of having proper control of his motor vehicle’ is not precise enough ... it does not tell the respondent or the magistrate what is it that is being attacked. The respondent is, required to prepare his answer to the allegations made in the Notice of Appeal’

In *Songono v Minister of Law and Order* it was held:

“it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law by the court a quo, or if they specify the findings of facts or ruling of law appealed against so vaguely as to be of no value either to the court or to the respondents, or if they, in general fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet...

The lengthy and rambling notice of appeal filed in case falls woefully short of what was required, Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not for the court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out ...”

It is not adequate for the appellant to prepare documents and inscribe on it that it is a notice of appeal and then write a list of complaints against a judicial officer’s ruling or decision or conclusion and take it to a court of appeal for that court to randomly rummage what it can discern to be the complaint of the appellant against the lower court. Dealing with the similar provision of the *Magistrates Court Rules of South Africa*, STEGMANN J¹¹ spelt out distinct requirements, both of which have to be satisfied for a proper notice of appeal for it to qualify as a valid one: the notice must specify details of what is appealed against (i.e. the particular findings of facts and ruling of law that are to be criticised on appeal as being wrong or misdirection) and secondly; the grounds of appeal (that is it must indicate why each finding of fact or ruling of law that is to be criticised as wrong is said to be wrong, for example that the finding of fact appealed against is inconsistent with some documentary

⁹ SC 25/17

¹⁰ Supra

¹¹ In *Van de Walt v Abreu* 1994 (4) SA 85 (w)

evidence that shows to the contrary or because it is inconsistent with the oral evidence of one or more witnesses, or because it was against the probabilities peculiar to the matter under consideration. Such comparative analysis would then be ratified in detail in the heads of argument by referring to particular pages of the record of proceedings and evidence adduced by the parties during the hearing. The trial officer and the respondent will be availed with enough and clear grounds for them to respond meaningfully. Such grounds of appeal however have to be concise and brief but albeit comprehensive in expression¹²

In *Dzinoreva v The State*¹³ the court defined the nullity of the defectiveness of grounds of appeal:

“The third grounds of appeal attacks conviction on the vague averments that the state failed to prove its case beyond a reasonable doubt. It is trite that such a ground is too vague a ground to constitute a ground of appeal. It is the same as saying the appellant is not guilty because he is not guilty. The magistrate who is seized with such a notice and grounds of appeal is entitled not to respond to it at all. He cannot possibly know what it is which is being attacked in his judgement. A notice of appeal without meaningful grounds is not a notice of appeal. As such it is a nullity which cannot be amended”

In the matter of *Kunonga (supra)* the supreme court summarised almost all the previously decided cases relating to the grounds of appeal, such as that “**the judgement was against the weight of evidence**” that a court’s finding is wrong because of “**the fact that the charge was not substantiated**” or that “**the learned magistrate erred in accepting the complainant’s evidence**” “**the conviction is against the weight of the evidence**” “**the evidence does not support the conviction**” “**the conviction is wrong in law**” or that “**the learned magistrate erred in convicting the accused person in the absence of any concrete evidence showing beyond a reasonable doubt ... that he committed the offence**” were held to be all incurably bad. They do not tell anyone what is it that is being attacked. Such grounds were held to be “**meaningless**”

In casu the appellants ground of appeal aver that “**the learned magistrate grossly erred and misdirected himself on facts and law “in concluding” or “in ordering” or “in putting to appropriate**”, the use of all the words attacks the judgement of court or order granted as a result of a judgement or a ruling. All the grounds spelt by the appellants do not disclose what is it the appellants are complaining about, no wonder why the trial magistrate in his response to the grounds of appeal, properly in our view wrote that he stood by the reasons

¹² Chikura No. & Another AL Sham Global BVI Ltd SC 17/2017

¹³ HH 780/15

for his judgement filed of record, because he failed to appreciate what it was that he had failed or erred in his judgement. The points *in limine* filed by the respondents are upheld.

There is need for this court to express its displeasure towards this business as usual by legal practitioners in the drafting of the grounds of appeal before a legal practitioner embarks to draft his or her client's notice of appeal in order at least to comply with the rules of the court. Failure to do so would lead to an order of costs *de bonis propriis* on attorney client scale. The appellants having received the respondents' heads did not take any steps at least to apply for the amendment of the notice of appeal nor did the appellants engage the respondents and withdraw the defective notice from the court. Appellants nonchalantly proceeded to indicate and agree with the respondents to have the matter be decided on paper. That was not the proper attitude by the appellants.

Accordingly it is ordered as follows:

The appeal is struck of the roll with costs on attorney and client scale.

MWAYERA J agrees _____