REPORTABLE (96)

Judgment No. SC 113/04

Civil Appeal No. 64/04

PASSMORE MATANHIRE v

BP SHELL MARKETING SERVICES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 21, 2004

K Muskwe, for the appellant

W Ncube, for the respondent

MALABA JA: At the end of argument *in limine* on a point taken on behalf of the respondent, to the effect that there was no valid appeal before the Court, we upheld the submission and ordered that the matter be struck off the roll with costs *de bonis propriis*.

It is not usual to write a judgment on a matter that has been struck off the roll – see *S v Ncube* 1990 (2) ZLR 303 (S). This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.

Rule 7 of the Supreme Court (Miscellaneous Appeals and Offences) Rules ("the Rules") provides that a notice of appeal against a judgment of the Labour Court or tribunal other than the High Court shall state:

"(a) the tribunal or officer whose decision is appealed against; and

(b) the date on which the decision was given; and

(c) the grounds of appeal; and

(d) the exact nature of the relief sought; and

(e) the address of the appellant or his legal representative."

On 15 January 2004 the Labour Court gave a judgment against which the appellant ("Matanhire") sought to institute an appeal on 25 February 2004. Rule 5 of the Rules provides that an appeal against a decision of the Labour Court shall be instituted within fifteen days of the decision being given. The notice of appeal, stating all the matters required by Rule 7 of the Rules to be stated, must also be delivered to all interested parties and filed with the registrar of the Supreme Court within fifteen days of the decision appealed against being given.

The document delivered and filed by Matanhire's legal representative as a notice of appeal did not state the date on which the decision appealed against was given. The respondent's heads of argument drew the attention of Matanhire's legal representative to the fact that failure to state the date when the decision was given rendered the notice of appeal fatally defective and a nullity. It was indicated that what was needed to be done was to draw up a new notice of appeal complying with the requirements under Rule 7 of the Rules and make an application for an extension of time within which to deliver and file the notice of appeal and for condonation for non-compliance with the Rules of Court.

Mr *Muskwe*, who was Matanhire's legal representative, believed that failure to state the date when the decision appealed against was given did not have an invalidating effect on a notice of appeal as would failure to state the other matters, such as grounds of appeal or the exact nature of the relief sought. He did not even bother to read the cases referred to in the respondent's heads of argument on what should be done when a fatally defective notice of appeal has been delivered and filed. He asked the Court to simply amend the notice of appeal by inserting the date when the decision of the Labour Court appealed against was given.

A nullity cannot be amended. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) KORSAH JA at 220B said that the reason why a fatally defective notice of appeal could not be amended was that:

"… it is not only bad but incurably bad".

Citing *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 for authority, the learned JUDGE OF APPEAL said that what should actually be applied for is an extension of time within which to comply with the relevant Rule and condonation of non-compliance.

In *BEC v BIG* S-78-02 a notice of appeal which did not state the date on which the judgment appealed against was given, in contravention of s 29(1)(a) of the Rules of the Supreme Court, was held to be fatally defective and the procedure stated in *Jensen's* case *supra* was approved as the appropriate remedy in having a proper notice of appeal placed before the Court. See also *Talbert v Yeoman Products (Pvt) Ltd* S-111-99.

The purpose of requiring the date when the decision appealed against to be stated in a notice of appeal is to enable the respondent and the Court to determine *ex facie* the notice of appeal whether the provisions of Rule 5 of the Rules, prescribing the time limit in which the appeal should be instituted and the notice of appeal delivered and filed, were complied with.

As no valid notice of appeal was delivered and filed within fifteen days of the date when the decision of the Labour Court was given, there was no appeal before the Court and to merely insert the relevant date in the defective notice of appeal, as suggested by Mr *Muskwe*, without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with the Rules of Court, would be grossly irregular. The matter had to be struck off the roll.

The costs were awarded *de bonis propriis* to register disapproval of the manner in which Mr *Muskwe* conducted the case. He was to blame for drawing up a defective notice of appeal. The existence of the defect was drawn to his attention through the respondent's heads of argument and the appropriate remedy for rectifying the situation pointed out to him about two months before the hearing. It became apparent during the argument he presented to the Court that Mr *Muskwe* had not bothered to read the cases cited for his benefit on the law relating to defective notices of appeal in the respondent's heads of argument.

In *Omarshah v Karasa* 1996 (1) ZLR 584 (H) at 591F GILLESPIE J stated that:

> "Costs *de bonis propriis* will be awarded against a lawyer as an exceptional measure and in order to penalise him for the conduct of the case where it has been conducted in a manner involving neglect or impropriety by himself."

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Muskwe & Associates, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners