

DISTRIBUTABLE (52)Judgment No. SC 61/03
Civil Appeal No. 374/02

FREEZEWELL	REFRIGERATION LIMITED	SERVICES	(PRIVATE)
v	BARD	REAL ESTATE	(PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
 CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
 BULAWAYO, DECEMBER 1, 2003 & MARCH 2, 2004

N Ndlovu, for the appellant

K Ncube, for the respondent

MALABA JA: On dates undisclosed in the papers, but in January and February 2002, the appellant (“Freezewell Refrigeration”), a private company, repaired air conditioners and doors in a building complex owned by the Forestry Commission, in terms of a contract entered into with the respondent (“Bard Real Estate”), an estate agent which managed the property. When Freezewell Refrigeration presented invoices for the work done and materials supplied, Bard Real Estate objected to the charges alleging that they were unreasonably high. It, however, paid a sum of \$153 624.00 on the invoices and refused to pay the outstanding balance of \$403 156.00.

On 14 March 2002 Freezewell Refrigeration instituted action in which it claimed the payment of the outstanding amount and costs of suit. Bard Real

Estate entered an appearance to defend, followed by a plea in which it alleged that the amount the payment of which was claimed represented unreasonably high charges for the work done and materials supplied. Instead of seeking further particulars of the plea, Freezewell Refrigeration made an application to the High Court for summary judgment which was opposed.

In dismissing the application with costs on the legal practitioner and client scale on 17 October 2002 the learned judge said:

“The respondent denied liability for the present charges on the grounds that they were exorbitant. Notwithstanding this plea which clearly discloses a defence on the part of the respondent, the applicant proceeded to apply for summary judgment. It cannot be said that the applicant has established a clear and unanswerable case upon which an application of that nature can be granted. The respondent is entitled to query the reasonableness of the charges levied against it. This applicant alleges that an officer of the respondent had verbally agreed to meet the charges. This is denied by the respondent, thereby giving rise to a factual dispute which cannot be resolved without hearing *viva voce* evidence. Further it is obvious that in the circumstances the sum claimed cannot be regarded as liquid as it is subject to proof. Accordingly there is absolutely no merit in this application. The application is hereby dismissed with costs on the higher scale.”

On 31 October 2002 Freezewell Refrigeration filed a document purporting to be a notice of appeal against the part of the judgment awarding costs on the legal practitioner and client scale. The document as a notice of appeal was fatally defective as it did not state the exact nature of the relief which was sought on appeal, thereby contravening the mandatory provisions of Rule 29(1)(e) of the Rules of the Supreme Court.

In *Talbert v Yeoman Products (Private) Limited* S-111-99 MUCHECHETERE JA held that a notice of appeal which suffered from defects arising from non-compliance with the provisions of Rule 29(1) was null and void. The learned JUDGE OF APPEAL quoted with approval at p 3 of the cyclostyled judgment from a judgment of KORSAH JA in *Jensen v Acavalos* 1993 ZLR 216 (S) where it was stated at p 220:

“The reason is that a notice of appeal which does not comply with the rules (in that case the notice did not have a prayer for relief) is fatally defective and invalid. That is to say, it is a nullity. It is not only bad, but incurably bad, and, unless the Court is prepared to grant an application for condonation of the defect and allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 574 C–D.

In *Hattingh v Piennar* 1977 (2) SA 182 (0) at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule.”

There was no amended notice of appeal accompanied by an application for an extension of time within which to file it and condonation for non compliance with the Rules.

The appeal is therefore struck off the roll with costs.

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Lazarus & Sarif, appellant's legal practitioners

Job Sibanda & Associates, respondent's legal practitioners