REPORTABLE (70)

EDWARD MADYAVANHU
v
(1) REGGIE FRANCIS SARUCHERA (2) GRANT THORNTON CAMELSA CHARTERED ACCOUNTANTS (ZIMBABWE) (3) CAIRNS FOODS LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & ZIYAMBI AJA
HARARE, JULY 6, 2017

Appellant in person

T. Chagudumba, for the respondents

GWAUNZA JA: On 21 July 2016, the High Court dismissed the appellant's chamber application for the reinstatement of his claim on the third respondent's creditors' list. Aggrieved, the appellant filed this appeal, which we dismissed with costs on 6 July 2017. The appellant wrote to the Registrar requesting the reasons for the order. These are they.

The facts of this case are as follows:

The appellant was formerly employed by the third respondent. Sometime in 2004, he obtained judgment in the Labour Court awarding him damages for unlawful termination of employment. The *quantum* of damages that he was granted came to ZW$26 076 252.00 after quantification by the Labour Court.

However, before the third respondent could make any payment, it was placed under judicial management. The first respondent, who works for the second respondent, was appointed the Judicial Manager. The appellant then filed with the Master of the High Court, a claim for his debt to be placed on the list of the third respondent's other creditors. The claim was provisionally accepted but later revoked at the instance of the first respondent. This was because, while the appellant's debt was denominated in Zimbabwean dollars, he had lodged his claim in United States dollars amounting to USD3 057 199.00, without an order of court converting his Zimbabwean dollar claim to United States dollars. He had, it seemed, done the conversion of the amount himself.

The appellant then approached the court *a quo* seeking to be reinstated on the list of creditors. The specific order that he sought read as follows,

> It is ordered that:
>
> "1. Applicant's claim be and is hereby reinstated to the creditors of third respondent.
> 2. Within 48 hours of the issuance of this order, fourth respondent avails to applicant the payment schedule for third respondent's judicial management creditors.
> 3. On a jointly and severally basis (*sic*) and within 21 days of the issuance of this order, first, second and third respondents pay applicant:
> (a) The full amount of his claim in accordance with the schedule of payment of creditors of the same class.
> (b) Interest at the prescribed rate on all overdue payments.
> (c) First, second and third respondent pay costs of suit."

A point in *limine* was raised by the first respondent on behalf of the second respondent to the effect that there was no legal basis for the appellant to sue the latter as this was done solely for the reason that the first respondent worked for the second respondent.

The court *a quo* upheld the point in *limine* and also dismissed the whole application on the merits for the following reasons;

(a) at the time the appellant filed the application before the court *a quo*, the third respondent was no longer under judicial management therefore the relief he sought could no longer bind the first respondent because he ceased to be third respondent's judicial manager the moment it was removed under judicial management, and

(b) the claim lodged by the appellant before the Master of the High Court was an amount which had not been properly converted at law therefore the court could not direct the Master to reinstate the claim.

Aggrieved by the court *a quo's* decision, the appellant approached this Court on appeal seeking the following relief,

It is prayed that;

1. The High Court judgment be set aside.
2. Leave be granted for registration with the High Court in Harare for purposes of enforcement, my claim of USD3 057 199 against third respondent which was proved and admitted in the creditors meeting held on 13 February 2013 pursuant to the company's judicial management and has never been set aside or varied.
3. Interest at the prescribed rate be paid on the claim amount from 3 November 2015, the day following the date of cancellation of the final judicial management order, to the date of final settlement.
4. The respondents pay the whole litigation cost for this matter.

In their heads of argument, the respondents raised three points *in limine* with regards to the relief sought. Firstly, they contended that the appellant failed to pray for the success of his appeal in this court hence the relief sought was incompetent. Secondly, they argued that the relief which the appellant was seeking on appeal before this Court was different from that which he sought in the court *a quo*. Thirdly, the respondents argued that the relief sought was 'fatally defective' in that the appellant sought an order for costs against all the respondents but did not seek any substantive relief against the first and second respondents.

In response to these points *in limine*, the appellant in his heads of argument argued that there is no provision in the Rules which requires a party to expressly state whether or not the appeal should succeed as the judges can themselves simply state that the appeal succeeds or not. He explained that the intention that the appeal succeeds is apparent from the very act of appealing itself. With regards to the allegation that he now seeks what he did not seek in the court *a quo*, the appellant's position was that only the method of enforcement had changed but he still sought the same relief. On the point that he was not seeking any substantive relief against the first two respondents except for costs, the appellant argued that it is clear from his papers that the first two respondents were liable to him under delict for the third respondent's failure to pay his debt.

The Court found there was merit in the respondents' points *in limine*, in particular, that the appellant's notice of appeal did not satisfy the provisions of r 29 of the Supreme Court Rules. This Rule provides that;

> **29. Entry of appeal**
>
> (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state —

> (a) the date on which, and the court by which, the judgment appealed against was given;
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> (b) if leave to appeal was granted, the date of such grant;
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> (c) whether the whole or part only of the judgment is appealed against;
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> (d) the grounds of appeal in accordance with the provisions of r 32;
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> (e) the exact nature of the relief which is sought;
>
> (f) the address for service of the appellant or his attorney.;

The wording of the provision shows that the Rule is mandatory in nature, meaning that any document labelled 'Notice of Appeal' must comply with it in order to be a valid notice of appeal. The information required in terms of this provision must be clearly set out even where it may be obvious or deducible from the given text of the grounds of appeal. The purported notice of appeal *in casu*, in the court's view did not meet the requirements set out in the mandatory provision cited. It also fell short in other respects as indicated below.

The respondents are correct in the submission that the appellant's failure to pray for the success of the appeal in this court before the judgment *a quo* could be set aside and substituted, constitutes a serious defect in the notice of appeal. Rule 29 (1)(e) is specific in its language and requires that the relief sought be exact and competent so that the court is left in no doubt as to what exactly the appellant seeks. In *Ndlovu v Ndlovu and Another*, SC 133-02, MALABA JA, as he then was, dealing with a similarly defective notice of appeal, held that;

> "The exact nature of the relief sought was not stated. What was prayed for in the notice of appeal was that the judgment of the court *a quo* be dismissed with costs. It is the appeal which is dismissed or allowed. If the appeal is allowed the judgment or decision appealed against is then set aside and a new order substituted in its place. In this case it was not known what order the appellants wanted this Court to make in the event the appeal succeeded."

These words are fully applicable to the circumstances of this case. The respondents' point *in limine* in this respect is accordingly upheld.

The second point *in limine* raised by the respondents, concerning new relief being sought on appeal by the appellant, also has merit. As correctly observed, the appellant approached the court *a quo* seeking to reinstate his claim on the third respondent's list of creditors in the office of the Master of the High Court. The application *a quo* having failed, the appellant on appeal now sought an order granting him leave to register his claim for payment of USD3 057 199,00 by the third respondent, for purposes of enforcement. This request presupposes, quite erroneously, that the High Court made an order reinstating his claim on the creditors' list. This not having happened, the relief now sought is not one that is open to this Court to grant.

An appeal court by nature is one that considers and assesses the correctness or otherwise of the decision of a lower court on any particular issue. Where no such issue is considered by an inferior court, it follows generally, that there is nothing for the appeal court to determine. It is in the appellant's interest to fully appreciate this point, which was aptly captured in *Dynamos Football Club (Pvt) Ltd & Anor v ZIFA & Ors* 2006 (1) ZLR 346 (S) 355. MALABA JA (as he then was) in that case held that generally a party cannot seek, on appeal, relief that they did not seek in the lower court. See also *Goto v Goto* 2001 (2) ZLR 519 (S) where the court held that it was not open to the appellant in that case, in the absence of an amendment to her declaration, to claim on appeal something which she did not claim in the court *a quo*.

The exception to this rule was outlined in the Dynamos case (*supra*) where it was held as follows;

> "There are, however, other decisions to the effect that the appellate court has a discretion in appropriate cases to grant relief claimed for the first time on appeal if it is satisfied that all the facts on which the court of first instance would have decided the matter had it been raised with it were available for its consideration and such facts as are essential to the decision are common cause or well-nigh incontrovertible. See Workmen's Compensation Commissioner v Crawford and Anor 1987 (1) SA 290 at 307G; Donelly v Barclays National Bank Ltd 1990 (1) SA 375 at 380I-381A."

When this is applied to the facts of this matter, it is evident that the requirements listed, which would have entitled the appellant to seek the relief in question for the first time on appeal, have not been met.

Related to this issue, this Court finds, as did the court *a quo*, that the amount claimed by the appellant was not converted into US dollars by a court of competent jurisdiction. It was not enough for the appellant to attempt a conversion on his own, using a rate that was not known and coming up with a figure which no court had endorsed. Consequently, the appellant (*a quo)* failed to establish a proper basis for the inclusion of the US dollar amount that he sought, on the third respondent's list of creditors. The judgment of the court *a quo* cannot, in this respect, be faulted.

Finally, and as correctly observed by the respondents, the appellant's claim for costs against parties from whom no substantive relief was sought was incompetent and therefore not to be sustained. In this respect the court notes that the appellant in his draft order did not seek the setting aside and substitution of the High Court's decision upholding the point *in limine* concerning the misjoinder to the proceedings, of the second respondent.

That part of the court *a quo's* decision therefore stands unchallenged, with the result that the second respondent was in reality wrongly cited in this appeal. It follows that the order of costs sought against it is incompetent. In any case, the court finds no merit in the appellant's submission that the second and third respondents were liable to him 'in delict' and are therefore properly sued for costs. The proceedings *a quo* were clearly not delictual in nature and the appellant's claim for costs cannot, by that token, be founded on them.

It is noted that a number of matters have been struck off the roll by this Court on the ground that the relief sought was not exact in nature and that as a result the related notice of appeal was incurably defective. See *Ndlovu & Anor v Ndlovu & Anor* (*supra*). However, in this case, the court found that the appeal was not only incurably defective but wrong and bad in law. The appeal could therefore not properly be struck off the roll because the appellant had no avenue, legally or procedurally, to follow in case he was inclined to bring the same appeal before this Court. It is emphasized in this respect that the appellant could not have secured the relief that he sought in the court below from the first respondent, for the simple reason that he had ceased to be the Judicial Manager of the third respondent, which in its turn had ceased to be a company under judicial management. There was, therefore, no longer a list on which the appellant's claim could be included. In addition to this, the second respondent was improperly sued from the beginning because it was not an interested party in the dispute, it being the first respondent's employer.

Given that the appellant's notice of appeal was, for the reasons stated, fatally defective, that he sought relief that was incompetent and that he sought to sue parties that not only had no interest in the suit but, in the case of the first and third respondents, had ceased to

possess the *status* indicated, the court's unanimous view was that the appeal ought to be dismissed, not struck off the roll.

GUVAVA JA: I agree

ZIYAMBI AJA: I agree

Atherstone & Cook, respondents' legal practitioners