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Judgment No. SC 133/02
Civil Appeal No. 282/99

(1) SARAH NDLOVU (2) COM-LOC (PRIVATE) LIMITED v

(1) MOFFAT NDLOVU (2) SIPHOSETHU MAGONYA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA AJA
BULAWAYO, NOVEMBER 25, 2002 & MARCH 28, 2003

*W Sansole*, for the appellants

*P Dube*, for the respondents

MALABA JA: On 9 September 1999 the High Court granted judgment against the appellants in an action in which the respondents claimed an order that the appellants jointly and severally pay to them the sum of $66 632.59, to the first respondent only the sum of $1 500, interest on each amount at the prescribed rate from 2 April 1993 and costs of suit.

On 14 October 1999 the appellants purported to file a notice of "appeal against the decision of the High Court sitting at Bulawayo in the matter between the parties in case no. HC 3624/95". After setting out the grounds of appeal the appellants prayed for the following relief:

> " … that the judgment of the court *a quo* be dismissed with costs".

When the appeal was called up for hearing, Ms *Dube*, for the respondents, took as a point *in limine* the fact that the notice of appeal was fatally defective, in that it did not set out the exact nature of the relief sought and omitted to state whether the appeal was against the whole or part only of the judgment.

The notice of appeal was clearly defective for non-compliance with the mandatory provisions of rule 29, subrules (c) and (e), which require the appellant or his legal representative to state (i) whether the whole or part only of the judgment is appealed against and (ii) the exact nature of the relief which is sought.

In this case there was no mention of whether the whole or part only of the judgment was being appealed against. 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.

In *Jensen v Acavalos* 1993 (1) ZLR 216 (S), KORSAH JA said at 220 B-D:

> " … a notice of appeal which does not comply with the rules 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 to 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 Pienaar* 1977 (2) SA 182 (O) 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. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, 'every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'"

As the notice of appeal which purported to institute this appeal was incurably defective, there was no appeal before the Court.

The matter is struck off the roll with costs.

SANDURA JA: I agree.

GWAUNZA AJA: I agree.

*Sansole & Senda*, appellants' legal practitioners

*Coghlan & Welsh*, respondents' legal practitioners