REPORTABLE ZLR(22)

Judgment No. SC 34/10
Civil Appeal No. 35/10

SOBUSA GULA NDEBELE v CHINEMBIRI ENERGY BHUNU

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GARWE JA
HARARE, SEPTEMBER 6 & FEBRUARY 7, 2011

H Zhou, for the appellant
W R Chingeya, for the respondent

ZIYAMBI JA: At the hearing before us the point arose *in limine* as to the validity of the notice of appeal filed in this matter and, if it is invalid, the consequences that should flow therefrom. It was considered that the question raised an important question of procedure which required further reflection. Accordingly, judgment in the preliminary matter was reserved pending a judgment of this Court determining the matter.

The background to the appeal is as follows:

The appellant, formerly the Attorney-General of Zimbabwe, was removed from his post upon the advice of a Tribunal appointed by the President in terms of s 110 of the Constitution of Zimbabwe ("the Constitution") to enquire into the issue of his removal from office.

The relevant section of the Constitution of Zimbabwe authorizing this action on the part of the President reads as follows:

> "(3) Such person shall be removed from office by the President if the question of his removal from office has been referred to a tribunal appointed under subsection (5) and that tribunal has advised the President that he ought to be removed from office for inability to discharge his functions or for misbehaviour."

The removal from office was communicated to the appellant by letter from the Secretary to the President dated 23 May 2008. Dissatisfied with the finding and advice of the Tribunal, the appellant took the matter to the High Court on review alleging that the decision of the Tribunal was so grossly unreasonable that no reasonable Tribunal on the evidence before it would have arrived at such a decision. It was accordingly prayed that the decision of the Tribunal should be set aside.

The High Court took the view that the advice of the Tribunal and the removal from office by the President was one juristic act and that accordingly the two were inseparable. The President, it determined, was a necessary party in the review proceedings and ought therefore to have been cited. Accordingly the application could not be decided for this reason and it was dismissed with costs.

The appellant appealed before us on the following grounds:

"1. The court *a quo* misdirected itself by determining that it was not possible in the circumstances to set aside the impugned proceedings chaired by the respondent without necessarily setting aside the President's act of removing the appellant from the post of Attorney-General.

2. The court *a quo* erred by failing to address its mind to the argument advanced that the recommendation was voidable, and not void. As a result of that error the court came to the incorrect conclusion that the process by which the recommendation was reached was inseparable from the

implementation of the recommendation by the President of the Republic of Zimbabwe.

3. The court *a quo* erred in its conclusion that once the recommendation was set aside then the implementation by the President became unconstitutional.

4. The court *a quo* erred in its conclusion that the non-citation of the President was fatal to the application.

WHEREFORE the appellant prays that the appeal be allowed with costs, and for the judgment of the court *a quo* to be set aside and the following substituted:

'The application be and is hereby granted in terms of the draft'."

In its heads of argument the respondent took the point that the relief sought was one which the court could not grant, it being one which necessitated a decision on the merits of the application when the merits had neither been determined in the court *a quo* nor made the subject of the grounds of appeal. It was submitted that the notice of appeal was invalid by reason of the fact that it sought a remedy which this Court is not competent to grant. No application was filed for amendment but in his heads of argument Mr *Zhou* indicated that the relief now being sought was a remittal of the matter to the High Court, before a different Judge, for a decision on the merits of the matter. He proceeded to move, at the hearing of the appeal, for an amendment of the prayer to that effect should this Court find in the appellant's favour.

The respondent, in response, contended that it was procedurally incorrect for the appellant to pray for a different relief in his heads of argument from the one in the notice of appeal and that this constituted a fatal non- compliance with the Rules of this Court.

It is common cause that the relief sought in the notice of appeal could not be granted by this Court since a decision on the merits had not been made by the court *a quo*. The question is whether this fact renders the notice of appeal fatally defective because if it does, the notice of appeal is null and void and cannot be saved by an amendment.

Rule 29 (1) of the Supreme Court Rules which sets out the requirements for a valid notice of appeal from the High Court, states as follows:

> "**29. Entry of appeal**
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> (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 -
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> (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 ground of appeal in accordance with the provisions of rule 32;
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> (e) the exact nature of the relief sought;
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> (f) the address for service of the appellant or his legal practitioner."

The Rule requires simply that the exact nature of the relief sought be stated in the notice of appeal. Thus, in so far as the prayer is for the appeal to be allowed and the application to be dismissed with costs, there is *prima facie* compliance with the Rule. However, it was submitted on behalf of the respondent that the relief sought must be one which the Court can grant and that a prayer which the Court cannot competently grant renders the notice of appeal null and void. I do not agree.

In my view, once the prayer clearly sets out the nature of the relief sought, as it does in this case, r 29(1)(e) has been complied with. This being so, the Court can and may amend the Notice of appeal upon application being made before the hearing subject to the rules governing applications of this nature.

Accordingly, the point *in limine* is dismissed. The notice of appeal is valid.

I have shown this judgment to the Chief Justice who has authorized me to say that he agrees with it.

MALABA DCJ: I agree

GARWE JA: I agree

Gula, Ndebele & Partners, appellant's legal practitioners
Chingeya Mandizira Legal Practitioners, respondent's legal practitioners