TENDAI S. MASAMBA
versus
ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIWESHE JP and CHITAKUNYE J
HARARE, 15 April, 2015

Civil appeal

I. Masamba, for appellant
V. Muza, for respondent

CHITAKUNYE J: On 26 March 2015 we dismissed the appellant's appeal with costs on the attorney- client scale. We indicated that full reasons will follow. These are the reasons for the dismissal.

The appellant owns an immovable property namely Flat no. 4 Resdale, 56 Selous Avenue, Harare. The appellant is resident in New Zealand and she was represented in these proceedings by her brother Ignatius Masamba by virtue of a General power of Attorney she granted to him in the year 2011.

In 2011 the appellant, through Ignatius, sued defendant for the sum of $1960-00 broken down as follows:-

> "Their statements are a Nuisance $150- 00
> Professional negligence $1500-00;
> Mental distress/physical inconvenience/time $300-00;
> Transport/stationery/photocopying $10-00"

The summons commencing action was not clear on the cause of action or the legal basis for the various claims. The particulars of claim are to say the least confusing and incoherent. The particulars of claim do not disclose the legal basis for the claims. It is trite that particulars of claim must clearly disclose the cause of action being relied upon. If it is based on contract the nature and extent of the contractual obligations and their breach must be clear. If it is a suit for damages the summons and particulars of claim must clearly spell out whether such damages are being claimed in contract or under an *aquilian* action.

In *casu* the summons and particulars of claim did not disclose whether the damages

being claimed were for breach of contract or for a delict.

If the damages are in delict, the summons did not properly establish the cause of action. No wrongful or unlawful conduct on the part of respondent is alleged, let alone established from the summons and particulars of claim. *Nyaguse* v *Skinners Autobody Specialists &Another* 2007 (1) ZLR 296 (H) and *Border Timbers Limited* v *ZIMRA* 2009(1) ZLR 131(H).

Based on the above there was virtually no case to try.

A trial was, nevertheless, held after which the trial magistrate, after considering each of the claims, dismissed the appellant's claim with each party to pay their own costs.

The appellant being dissatisfied with the magistrate's decision appealed to this court. The respondent opposed the appeal and raised *points in limine* on points of law. Though some of the points of law may not have been clearly raised in the court below, we were of the view that the points pertain to issues that are clear from the pleadings. The consideration of the points will not cause any unfairness as clearly part of the aspects were raised and appellant was aware of them. *Ngani* v *Mbanje &Another*; *Mbanje & Another* v *Ngani* 1987(2) ZLR 111(SC)

Upon perusal of the appeal record it was apparent that appellant's appeal was not in order. On 27 January 2015, we inquired on the authority for Ignatius to act for the appellant when all he had was a general power of attorney which did not specify that he was empowered to institute litigation. We also drew Ignatius' attention to the defective nature of the notice of appeal. Upon noting that he was intent on prosecuting the appeal as it is we advised him to seek legal assistance before we decided the fate of the appeal. On that day he agreed. The appeal hearing was thus postponed to 26 March 2015.

When the matter was heard on 26 March 2015, Ignatius indicated that he had approached a legal practitioner. He however did not know the name of that legal practitioner or the law firm. He further on said that he had not engaged the services of any legal practitioner as he had no financial means to engage one but was ready to argue on his own. Upon further inquiry from him he indicated that his sister (the appellant) had in fact instructed him to withdraw the appeal. He had however on his own accord decided to pursue the appeal despite his principal's instruction.

It is apparent therefore that from Ignatius' own admission he no longer had the mandate to pursue the appeal once his principal instructed him to withdraw the appeal.

In any case a general power of attorney is inadequate for litigation. There was need for a specific power of attorney to litigate. In *Ashley* v *S.A. Prudential Ltd* 1929(1) TPD283at 285 Tindall J had this to say on the issue of general power of attorney:

> "But in my opinion, where the authority is stated to be 'to demand and receive the title deeds relating to such transfer' it cannot be said that bringing legal proceedings to obtain the title deeds is a necessary or usual means of executing the authority to 'demand and receive'. The institution and prosecution of legal proceedings is an important step which may involve the principal in great expense and I see no justification for holding that where a principal authorises an agent to 'demand and receive' a thing, the principal must be taken to have intended to include the authority to bring and prosecute proceedings. There is no reason for construing the word 'demand' in a sense other than its ordinary sense which is well understood and means 'claim' in other words an extrajudicial demand"

Equally in *Mutemererwa &Another* v *Tavarwisa & Another* HH 160-2004 Kamocha J opined that:

> "In *casu*, the power of attorney nominated and appointed the agent for managing and transacting all the principal's affairs involving the purchase of the property. There would be no justification for construing it to have authorised him to bring and prosecute legal proceedings. He had no authority to do that."

In *casu*, the general power of attorney, issued on the 14th April 2011, related to the management of 4 Resdale, 56 Selous Avenue, Harare. The second paragraph of that power of attorney clearly states its purpose as:

> "General management of the property. This is to include rental management inclusive of any issues arising from that, maintenance and general keeping of the property."

I am of the view that the purpose did not authorise the agent to institute and prosecute litigation. He therefore had no authority to institute ligation without the principal's specific or special mandate as at the date of instituting the action.

It was only on 12 March 2013 that a power of attorney to litigate was granted, well after the judgment by the court *a quo*. This special power of attorney had no retrospective effect. Paragraph 2 thereof states that-

> "The areas of authorisation are regarding the litigation over water, electricity and rent issues. The appointed party shall have the rights and powers to make decisions on my behalf as above effective from 1/3/13 and shall act accordingly until resolved with the exception if notice of termination is requested."

The power of attorney is specific on the area of authorisation and those stated areas do not include actions for nuisance, negligence mental distress/physical inconvenience/time and other claims stated in appellant's summons. The power of attorney specifically states that it is

with effect from 1 March 2013 and so it had no retrospective effect.

It may also be noted that as the principal had instructed her agent to withdraw the appeal in no uncertain terms the agent no longer had the mandate to proceed with the appeal.

I am of the view that from whichever angle one analyses the issue, Ignatius had no authority to prosecute the case and even to pursue the appeal. He is clearly on a frolic of his own for his own ingratiation. He cannot succeed in such pursuit.

The next aspect to consider is that of the Notice of Appeal. Order 31 r 2(4) of the Magistrates Court (Civil) Rules, 1980 states that:-

> "A notice of appeal or cross appeal shall state-
> (a) Whether the whole or part only of the judgment or order is appealed against and, if part only, then what part; and
> (b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against."

The grounds of appeal must be set out concisely and in separate numbered paragraphs. In *Chidyausiku* v *Nyakabambo* 1987(2) ZLR 119(SC) court held that in order to be valid, a notice of appeal must be directed against the whole or part of the substantive order of the court below and not to its reasons for making the order.

In *casu*, the grounds of appeal contain evidence and do not allege in concise terms the alleged misdirection on the part of the trial magistrate. The grounds of appeal are in fact appellant's arguments. Not only are the grounds long and winded but they are argumentative and not pointing to where appellant believed the trial magistrate erred. It is more of restating his case.

On the 30 January 2015 Ignatius filed a notice of amendment in which he purported to be amending the Notice of Appeal and the heads of argument. The amendment of the notice of appeal was the deletion of the entire notice of of appeal and the insertion of a new notice of appeal. Unfortunately this was to no avail as even the purported amendment is as defective as the first. The first notice of appeal having been a nullity, the amendment was of no effect as one cannot amend a notice of appeal that is a nullity. There is nothing to amend.

The respondent sought for the dismissal of the appeal with costs on the attorney client scale.

Upon a careful analysis of the submissions and noting in particular Ignatius' insistence even when the anomalies with his appeal were pointed out we were persuaded to award costs on the higher scale. The appellant's agent was simply stubbornly refusing to see reason and in the process put respondent to unnecessary expense. This is a case which should not have seen the corridors of this court or should at least not have been persisted with especially after the

principal had instructed the agent to withdraw the appeal.

The appeal was thus dismissed with the appellant to pay costs on the attorney- client scale.

Muza and Nyapadi, respondent's legal practitioners