Judgment No. SC 10/07
Civil Application No. 51/04

JOHANNES MAKONYE v BARCLAYS BANK OF ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, MARCH 15, 2007

E T Matinenga, for the applicant

G V Mamvura, for the respondent

Before: SANDURA JA, In Chambers, in terms of r 31(7) of the Rules of the Supreme Court, 1964

This was an application for an extension of the time in which to appeal. After hearing both counsel, I dismissed the application with costs and gave brief reasons for that decision. The applicant has now requested that the reasons be given in writing, and I now set them out.

The background facts are as follows. At the relevant time the applicant ("Makonye") was employed by the respondent ("the Bank") as the manager of its Gweru Branch, and had been in the service of the Bank for over twenty years.

In July 2001 Makonye was charged with committing an act, conduct or

omission inconsistent with the fulfilment of the express or implied conditions of his contract of employment with the Bank. In support of the charge, the Bank alleged three particulars –

The first particular was that from the beginning of 2000 to June 2001 Makonye operated an unauthorised overdraft facility on his current account with the Bank. It was alleged that on 1 June 2001 the overdraft on his account was $1 291 130.00.

The second particular was that during the relevant period Makonye granted himself seven loans totalling $2 566 392.00 without seeking the authority of his immediate superior. In this connection, it was also alleged that after his transfer from Gweru he continued to abuse his authority and obtained two additional loans from the Gweru Branch without the authority of his immediate superior.

And the third particular was that Makonye authorized the granting of loans to a Mr Dube ("Dube"), who was employed by the Bank at the Gweru Branch, which exceeded the amount Dube could borrow from the Bank in terms of the laid down procedures.

A disciplinary hearing was subsequently held and Makonye was found guilty and dismissed. His appeals to the Appeals Board and to the Labour Court were unsuccessful.

Thereafter, acting through his legal practitioner, he noted an appeal to this Court. However, the legal practitioner later realised that the notice of appeal he had

filed on behalf of his client was fatally defective. He, therefore, filed a Chamber application seeking an extension of time in which to appeal. On 15 March 2007 I dismissed the application with costs.

Before dealing with the fatal defects in the notice of appeal filed on behalf of Makonye, I would like to set out the relevant provisions of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975 ("the Rules") which should have been complied with.

Rules 5, 6 and 7 of the Rules read as follows:

"**5. Time within which notice to be given**

Subject to the provisions of rule 6, a notice shall be delivered and filed in accordance with the provisions of rule 4 within fifteen days of the decision appealed against being given.

6. Condonation of late noting of appeal

Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown, extend the time laid down, whether by rule 5 or by the enactment concerned, for instituting an appeal.

7. Contents of notice of appeal

A notice instituting an appeal shall state –

(a) the tribunal or officer whose decision is appealed against; and

(b) the date on which the decision was given; and

(c) the grounds of appeal; and

(d) the exact nature of the relief sought; and

(e) the address of the appellant or his legal representative."

Makonye's appeal to the Labour Court was heard on 2 October 2003. After hearing the appeal the Labour Court reserved its judgment. The judgment was later handed down or given, either on 16 January 2004 (i.e. the date on which the President of the Labour Court initialed the last page of the judgment), or on 21 January 2004 (i.e. the date on the Labour Court's stamp appearing on the first page of the judgment). However, I shall assume in favour of Makonye that the judgment was handed down or given on 21 January 2004.

After the judgment had been handed down or given, Makonye's legal practitioner filed a notice of appeal on 19 February 2004. The notice of appeal was fatally defective in two respects –

The first fatal defect was that the notice of appeal was not filed within fifteen days of the decision appealed against being given, as required by r 5 of the Rules. And the second fatal defect was that the notice of appeal did not state the date on which the decision appealed against was given, as required by r 7(b) of the Rules.

When Makonye's legal practitioner prepared the application for an extension of time within which to appeal he must have been under the misapprehension that the only defect in the notice of appeal which called for an explanation was the failure to state the date on which the decision appealed against was given. I say so for two reasons –

The first reason is that nowhere in his founding affidavit did the legal practitioner explain the failure to note the appeal timeously, i.e. within the fifteen days

referred to in r 5 of the Rules. And the second reason is that in para 3 of the founding affidavit the legal practitioner made it quite clear that the only defect which had prompted the application was the omission to state the date when the decision appealed against was given. The paragraph reads as follows:

> "This application has been necessitated by the fact that the notice of appeal filed of record does not strictly comply with the Supreme Court Rules in the sense that it did not spell out the date when judgment was delivered."

In the circumstances, no explanation whatsoever was given for the failure to note the appeal timeously, and no special circumstances as envisaged by r 6 were shown in order to justify the extension of the time within which to appeal.

The application could not, therefore, succeed and was dismissed with costs.

Atherstone & Cook, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners