

DISTRIBUTABLE (122)
Judgment No. SC. 137/04
Civil Application Nos. 98/02 & 15/03

FOUNDERS BUILDING SOCIETY v PATRICK DAMBWARA

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 15, 2004 & MAY 10, 2005

H Zhou, for the applicant

A M Gijima, for the respondent

Before: MALABA JA, In Chambers in terms of rule 4 of the Supreme Court of Zimbabwe Rules

This application was presented and argued as an application for an order for reinstatement of the appeals in cases SC 93/02 and SC 15/03, which had been regarded as abandoned and deemed to have been dismissed in terms of subrule (1) of rule 44 of the Rules of the Supreme Court of Zimbabwe ("the Rules"). It became clear to me, however, that the notice of appeal purportedly filed in each case was fatally defective. I have proceeded on the basis that the application in each case is for an extension of time in which to note an appeal.

The respondent ("Dambwara") was employed by the applicant ("Founders") in the mortgage department at its branch in Harare. He was the secretary of the Workers Committee. On 5 November 1998 the *Financial Gazette* newspaper published an article in which it alleged that "50% (of) Founders' staff face retrenchment". The writer of the article quoted the chairman of the Workers Committee as the source of its information. Founders considered the information to be false and damaging to its reputation. The human resources manager contacted the chairman of the Workers Committee about the publication

of the article. The chairman of the Workers Committee referred him to the secretary.

On 12 November 1998 the human resources manager wrote to Dambwara in his capacity as the secretary of the Workers Committee. Dambwara was asked whether the Workers Committee had decided to release information on the retrenchment of workers to the press and if so where they had got that information from. It was clear from the letter that Dambwara was expected to provide a response to the questions asked by the human resources manager and explain the rôle, if any, played by the Workers Committee in the publication of the article in the *Financial Gazette*. On 13 November 1998 Dambwara wrote to the human resources manager acknowledging receipt of the letter and advising that he was still to convene a meeting of all members of the Workers Committee to respond to the letter the following week.

On the day Dambwara wrote acknowledging receipt of the letter written by the human resources manager, some of the members of the Workers Committee wrote to him disassociating themselves from the publication of the article on the retrenchment of workers by Founders. They indicated that the publication of the article was authorised by the chairman without their knowledge and consent.

Despite receipt by him of the letter from the other members of the Workers Committee disassociating themselves from the decision to publish the information on the alleged retrenchment of half of the workforce by Founders, Dambwara did not respond to the letter from the human resources manager.

On 18 November 1998 the human resources manager wrote Dambwara another letter, reminding him of the fact that he was under a duty to

respond to the letter of 12 November 1998. It was made clear to him that the letter contained a lawful order and that failure to respond to the questions raised therein by 12 noon of 19 November 1998 would constitute deliberate disobedience to a lawful order given by a person in authority.

Instead of providing a personal response to the questions raised in the letter of 12 November 1998 as required, Dambwara placed the matter in the hands of the Commercial Workers Union. On the same day the assistant general secretary of the Commercial Workers Union advised the human resources manager in writing that they had been instructed by Dambwara to deal with the question of the involvement of the Workers Committee in the publication of the article in the *Financial Gazette*. He asked that all questions on the matter be directed to the Commercial Workers Union.

On 7 December 1998 Dambwara appeared before an internal Disciplinary Committee charged with wilful disobedience to a lawful order given by a person in authority in contravention of para 4.4.3 of Founders' Code of Conduct. The allegation was that he had wilfully disobeyed the order lawfully given by the human resources manager to respond to the questions raised in the letter of 12 November 1998 on the involvement or otherwise by the Workers Committee in the publication by the *Financial Gazette* of the article on the retrenchment of workers. Dambwara was found guilty of the misconduct charged against him and given a final written warning. His defence to the charge had been that the questions raised in the letter on 12 November 1998 had been responded to when he referred the matter to the Commercial Workers Union.

Although Dambwara's appeal against conviction to the managing director was unsuccessful, it received a favourable hearing before the Labour Relations Tribunal ("the Tribunal"), which held that the order given by the human

resources manager to Dambwara to respond to the questions raised in the letter of 12 November 1998 was unlawful. The Tribunal was of the opinion that Founders, as an employer, had no right to give Dambwara orders on matters relating to the execution of his duties as the secretary of the Workers Committee since he was answerable to the workers only when performing those duties. The appeal was accordingly allowed.

Judgment in case no. SC 93/02 was given by the Tribunal on 18 February 2002. On 20 March 2002 Founders purported to file a notice of appeal against the judgment of the Tribunal. The time within which the appeal ought to have been instituted had expired. The document did not state the date when the judgment appealed against had been given.

On 29 December 1998 Dambwara had appeared before the Disciplinary Hearing Committee charged with two offences under Founders' Code of Conduct, that is to say, "deliberately giving untrue, erroneous, misleading information or testimony whether verbally or in writing". The first count alleged that he had given false information to the *Financial Gazette*, which was published on 5 November 1998. The second count alleged that when confronted by the human resources manager about the publication of the false information in the *Financial Gazette*, Dambwara had deliberately misled the human resources manager and falsely stated that he had acted on instructions from members of the Workers Committee in giving the information to the press. It was alleged that members of the Workers Committee disassociated themselves from Dambwara's statement.

Dambwara was found not guilty on the first count. He was convicted of the second count and dismissed from employment. He appealed unsuccessfully to the managing director. On 4 February 2002 his appeal to the

Tribunal was heard. There was no appearance for Founders. The Tribunal heard brief submissions from Dambwara, at the end of which it allowed the appeal and set aside his dismissal.

An application for rescission of judgment was made to the Tribunal on 31 December 2002 without success. Founders then purported to file a notice of appeal in case no. SC 15/03 against the judgment of the Tribunal on 21 January 2003. The document made no mention of the date when the judgment appealed against was given.

It is clear that the notice of appeal filed in each case was fatally defective and a nullity. The document filed in each case was not a notice of appeal, in that it did not state the date on which the judgment appealed against had been given. In case no. SC 93/02 the notice of appeal was filed out of time. Rule 7 of the Supreme Court (Miscellaneous Appeals and Offences) Rules provides that a notice of appeal against a judgment of the Labour Court or tribunal other than the High Court shall state the "date on which the decision was given". The rule is couched in peremptory terms.

In *Matanhire v BP Shell* SC-113-04 it was held that a notice of appeal that fails to state the date when the decision appealed against was given is fatally defective and a nullity. There was therefore no valid appeal instituted in each case. I am, however, prepared to accept the fact that, as the failure to comply with the mandatory provisions of rule 7 of the Supreme Court (Miscellaneous Appeals and Offences) Rules preceded the decision in *Matanhire's* case *supra*, such failure was due to the genuine belief on the part of Founders' legal practitioners, apparently shared by Dambwara's legal practitioners, that proper notices of appeal had been filed. Both parties approached the matter on the basis that an appeal had been noted in each case and later regarded as

abandoned and deemed to have been dismissed for failure by Founders to timeously file heads of argument.

The success of the application for an extension of time in which to note an appeal in each case depends on whether there are good prospects of success.

My view of the facts is that there are no good prospects of success on appeal in case no. SC 15/03. Having found Dambwara not guilty of having given false information on the retrenchment of workers by Founders to the *Financial Gazette*, there was no basis on which the Disciplinary Hearing Committee could find him guilty of having given false information to the human resources manager to the effect that in doing what he had in fact not done he had the approval of members of the Workers Committee.

The same cannot be said of the prospects of success in case no. SC 93/02. There is no question that the letter of 12 November 1998 contained an order directed at Dambwara personally and as the secretary of the Workers Committee to respond to the questions raised therein on the publication of the article on the retrenchment of workers by Founders in the *Financial Gazette*. The Tribunal's reasoning that the order was not lawful because it required Dambwara to respond on matters relating to the execution of his duties as the secretary of the Workers Committee for which he was accountable to the workers only is, in my view, flawed. The order was based on the assumption of the fact that the Workers Committee, through Dambwara as its secretary, had given the false information on the retrenchment of workers to the *Financial Gazette* with the intention of injuring Founders' reputation. Giving false information to a third party with an intention to injure the employer's reputation cannot be regarded as part of the duties of a secretary of a Workers Committee.

The application for an extension of time in which to note an appeal in case no. SC 93/02 is granted with costs. The applicant is to file a notice of appeal within fifteen days of this order.

Honey & Blanckenberg, applicant's legal practitioners

Manase & Manase, respondent's legal practitioners