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OSWALD TAGWIREI t/a TAGWIREI TRANSPORT
v
TRIANGLE ESTATE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE: 26 MAY 2022 & 20 FEBRUARY 2023

V. Masaiti, for the applicant

E. T. Moyo, for the respondent

CHAMBER APPLICATION

BHUNU JA:

[1] This is an application for condonation of late noting of appeal and extension of time within which to appeal. The application is brought in terms of r 43 (3) of the Supreme Court Rules 2018. The application is opposed.

BRIEF SUMMARY OF THE CASE

[2] The applicant is in the transport business trading as Tagwireyi Transport. He is the owner of a commuter Iveco Minibus whose registration number is not apparent from the record

of proceedings before me. On the other hand the respondent is a company incorporated according to the laws of Zimbabwe. It is the owner of a motorcycle whose registration number is also not apparent from the record of proceedings before me.

[3] On 24 December 2014 the two vehicles had a violent collision at the 114 km peg along the Roy-Buffalo Range Road. The motor vehicles were being driven by the parties' respective employees. Esau Mutekede was driving the applicant's minibus whereas Tawana Tarumirira the now deceased who perished in the accident was riding the respondent's motorcycle.

[4] The applicant subsequently sued the respondent for damages in the sum of US$64 544.45 comprising damage to the minibus and loss of earnings during the period the bus was off road awaiting repairs. The applicant's claim was based on vicarious liability arising from the alleged negligence of the respondent's employee.

[5] The respondent denied liability as alleged or at all. It admitted that the deceased was its employee but denied that he was negligent and that he was riding the motorcycle in the course of duty.

ISSUE FOR DETERMINATION

[5] At the joint pre-trial conference the sole issue for determination was whether or not the respondent was liable to the applicant in the sum of US$64 544.45 or any other amount at all.

FINDINGS OF THE COURT *A QUO*

[6] The learned judge *a quo* found that the respondent's deceased employee negligently caused the accident but absolved the respondent from liability on the basis that its employee was on a frolic of his own. On the basis of such finding the learned Judge *a quo* dismissed the applicant's claim with costs.

[8] Aggrieved, the appellant sought to appeal to this Court challenging the court *a quo's* finding of fact that the respondent was not vicariously liable because the deceased was not riding the motorcycle in the course of duty when the accident occurred.

[9] The appeal is premised on the followings grounds of appeal:

1. The court *a quo* erred in finding that the respondent's employee was on a frolic of his own and yet, on a balance of probabilities, it had been proved that the respondent allowed use of its vehicle outside of the company premises and therefore was liable for the employee's conduct in using the vehicle.

2. The court *a quo* grossly erred in finding that a distance of 50 km was far off respondent employee's area of operation such that no vicarious liability attached to respondent and yet it was proved that the employee was 20km from the boundary of respondent's estate and 30km from the garage, which distance was not too great to do away with employer's liability.

THE LAW

[10] The law on applications of this nature is settled. The applicant is bound to convince the court that he has a reasonable explanation for the delay and that he has good prospects of success on appeal. In *Kombayi v Berkout*[1] KORSAH JA aptly summarised the requirements when he said:

> "The broad principles the court will follow in determining whether to condone the late noting of an appeal are; the extent of the delay; the reasonableness of the explanation for the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal."

APPLYING THE LAW TO THE FACTS

[11] Upon receipt of the court *a quo's* order dated 14 March 2018, dismissing his claim with costs, the applicant timeously noted a defective appeal to this Court. The defective appeal was consequently struck off the roll with costs at the higher scale on 25 February 2020. As a result the applicant is now out of time and is seeking condonation and extension of time to enable him to relaunch his aborted appeal. In terms of the rules he ought to have lodged his appeal within 15 days of the court's order. He however only made the application for condonation about two years later on 22 April 2022 The delay of 2 years is inordinate considering that the ordinary *dies induciae* is 15 days. I therefore hold that the delay was inordinate by any standards.

[1] 1988 (1) ZLR 53 (SC)

[12] The applicant's explanation is that after the striking off of his defective appeal it took him some time to instruct his legal practitioners because he did not have sufficient funds. That explanation is unreasonable without elaboration. It is the sort of excuse that anyone can make without verification. Generally speaking lack of funds cannot be an excuse for non-compliance with the rules of court because our law gives the right of audience to self-actors. The applicant has given no explanation as to why he did not take that route. I accordingly hold that his explanation for the inordinate delay is unreasonable.

PROSPECTS OF SUCCESS

[13] The applicant seeks to challenge on appeal the court *a quo's* factual finding that the respondent's deceased employee was on a frolic of his own when the accident occurred. The court *a quo* made a specific factual finding that the now deceased was not engaged in the applicant's affairs when the accident occurred. What this means is that the deceased was not riding his employer's motorcycle in the course of duty when the accident occurred.

[14] His complaint is that the court *a quo* made that finding of fact contrary to the evidence placed before it. That argument goes against the grain of evidence. The respondent denied that the deceased was riding the motor cycle in the course of duty when the accident occurred. It produced uncontroverted evidence that the deceased was on leave when the accident occurred. The respondent also produced its company policy which allows its employees to use its motorcycles for their own purposes while off duty.

[15] The applicant proffered no meaningful counter argument rebutting the incontrovertible evidence laid before the learned judge *a quo.* It is plain from a reading of the record of proceedings that the respondent adduced satisfactory evidence to the effect that the deceased was on leave and on a frolic of his own when the accident occurred. It is therefore not surprising that the learned judge *a quo* relied on the respondent's evidence to the detriment of the applicant.

[16] Generally speaking, appellate courts are loath to interfere with factual findings of the trial courts. The law in this regard was set out by KORSAH JA in *Hama v National Railways of Zimbabwe* [2] where the learned Judge of appeal had this to say:

> "… an appeal court will not interfere with the decision of a trial court based purely on a finding of fact unless it is satisfied that having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or acceptable moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at such a conclusion."

[17] The learned judge *a quo* did not misdirect himself in any way his findings of fact resonate well with the evidence adduced before him. The mere fact that the respondent allowed the now deceased to ride its motorcycle while on leave for personal errands cannot be the basis of vicarious liability.

[18] The test for vicarious liability was laid down in the familiar case of *Fawcett Security operations v Omar Enterprises*[3] where the court said:

[2] 1996 (1) ZLR 664 at 667D
[3] 1991 (2) SA 441

> *"*The test for vicarious liability is whether, in all the circumstances, it is a fact that the employee acted in the course of his employment and within the scope of his employment."

[19] In the instant case the learned Judge *a quo* concluded that the now deceased was not acting in the course and within the scope of his employment because there was ample evidence that he was on leave and was riding the respondent's motorcycle on a frolic of his own. That finding of fact is beyond reproach and unimpeachable on appeal. I accordingly hold that there is no merit in this application as the applicant has not been able to satisfy any of the requirements for an indulgence to be extended to him.

COSTS

[20] The respondent has asked for costs at the punitive scale. There is however nothing outrageous in this case to warrant penalizing the applicant with punitive costs. There is therefore no reason to depart from the general rule that costs follow the result.

[21] In the final analysis the following order will ensue:

The application for condonation of late noting of appeal and extension of time within which to note an appeal to the Supreme Court **be and is hereby dismissed with costs**.

Saidi Law Firm, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners