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Judgment No. 9/11
Civil Application No. SC 147/10

LEO ZAMBELLIS v (1) VERONICA PICKARD (2) LAWS
ORGANISATION PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 16, 2011

J B Woods, for the applicant

No appearance for the first respondent

S G J Bull, for the second respondent

Before CHEDA AJA: In Chambers.

This is an application for an order reinstating an appeal which is deemed to have lapsed.

A notice of appeal was filed on 2 October 2006. On the same date a letter of undertaking for the preparation of the record was filed. On 11 November 2009 the Registrar's Office called upon the applicant to inspect the record. What happened thereafter is a subject of a dispute between the parties.

On 19 February 2010, the Registrar wrote to the applicant pointing out that the respondents had failed to inspect the record. As a result, the appeal was deemed to have lapsed.

The application to reinstate it is now opposed. The applicant submitted that he is not responsible for what happened because the clerk from the Office of his legal practitioner called at the office of the Registrar of the High Court several times and was told that the record was missing. The respondents challenged this explanation as it was based on hearsay and not supported by any affidavits from the applicant. At the initial hearing of the application, the matter was postponed to enable the parties to file the affidavits that would assist in resolving the delay. In this respect the crucial affidavits would be those for the clerk who went to inspect the record and was allegedly told that it was missing, affidavits of the clerk at the High Court who told him that the record was missing and another senior clerk of the High Court responsible for the records.

From the applicant's side the clerk who went to inspect the record was Jonathan Mbadzo who says he was informed by one Miss Sagwete that the record was missing. Miss Sagwete denies this. Jonathan Mbadzo further alleges that he reported to Miss Sagwete's senior one Raymond Antonio. Mr Antonio denies that. He says the visits by the legal practitioner's clerk, Mr Mbadzo was to persuade him to agree to reinstate the appeal as the clerk had not inspected the record timeously because it was missing. Mr Antonio says he is personally aware that the record was not missing at the material time.

Mr Mbadzo initially made a very short affidavit that did not assist at all. After seeing that the matter was seriously contested he made a further longer affidavit. His two affidavits lack essential details. He does not say when, or what dates he visited

the Registrar's Office. He does not say how many times. He does not say what action was taken at his employer's office about the alleged missing file.

Mr Mbadzo mentions Mr Nyatanga in his affidavits. There is no supporting affidavit from Mr Nyatanga the Registrar. Brian Matombwa says he is the one who drafted the letter to advise that the record was ready for inspection. He could not have done so if the record was missing. He says the record was in his office when he drafted the letter. He says when Mr Mbadzo came to speak to him the record was in Room 59A and he would have told Mr Mbadzo to see Miss Sagwete.

I am therefore not persuaded that Mr Mbadzo is being truthful. He had not inspected the record and needed to find a way out of the situation, hence his attempt to persuade the Registrar's Office to agree to the reinstatement of the appeal.

I find that no satisfactory explanation is given by the applicant for a delay of three (3) years during which nothing was done to make a follow up on the appeal.

There should be finality to the matter. There will be prejudice to the respondents if after all this delay the respondents are called upon once more to defend a matter that had long lapsed after succeeding in the litigation.

It is also clear that the applicant and his legal practitioners are responsible for this delay.

On the prospects of success, I cannot see how a different Court can make a finding that is different from that of the trial court. The figures for the damages clearly exceed the value of the vehicle. The trial court found the witness to be honest and credible. There is no basis to suggest that an appeal Court would arrive at a different conclusion.

The grounds of appeal attack the value of the vehicle at different stages that is before and after the accident. There was no other evidence to contradict the evidence given at the trial.

I am therefore not persuaded that the appeal has prospects of success if leave to appeal is granted.

For the above reasons the application for the reinstatement of the appeal is dismissed with costs.

Venturas & Samkange, applicant's legal practitioners

Atherstone & Cook, second respondent's legal practitioners