Judgment No. HB 45/2003
Case No. HC 1689/2001

JANE PHIRI

Versus

BASIL CYPRIAN PHIRI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 DECEMBER 2002, 16 JANUARY & 20 MARCH 2003

Ms H M Moyo for the plaintiff
Defendant in person

Civil Application

NDOU J: In this matter the plaintiff seeks a divorce with ancillary relief. The plaintiff issued summons on 6 June 2001. The summons were served on the defendant by the Deputy Sheriff on 13 June 2001. The defendant entered appearance to defend on 27 June 2001. On 1 August 2001 he filed a notice of Request for Further particulars. The plaintiff responded to the request on 12 November 2001. The defendant did not file his plea and as a result on 14 December 2001 a Notice of Intention to Bar was served on him. He did nothing about it. The plaintiff set down the matter for 19 December 2002 as unopposed in the motion court. The notice of set down was apparently served on the defendant. On 19 December 2002 he pitched and when the matter was called he sought to make submissions. The plaintiff's counsel strongly objected on the basis that the defendant had been barred and, as such, could not be heard without condonation by the court. I granted the defendant instant condonation and briefly heard his side of the story only in connection with failure to file the plea. As the defendant is a self actor I did this purely on the basis of policy which dictates that the married status should as far as possible, as long as possible and whenever possible be maintained – see *Fender* v *St John-Mildmay* [1938] AC I at 32-

3 and *The South African Law of Husband and Wife* – 5th Ed by HR Hahlo at page 418. The task of a party who seeks to have a marriage dissolved is not a light one. In *Kanatopsky* v *Kanatopsky* 1935 EDL 308 at 309 GUTSCHE J remarked:

> "Because of its far reaching consequences to the contracting parties themselves, because it creates for them a status, and because for that and other reasons, the state is an interested third party, not only at the making but also at the breaking, *inter vivos*, of the union, and has an interest therein throughout its subsistence, the marriage contract of all personal contracts, is the least revocable or reversible."

The court will not insist upon strict observance of the formalities but will seek to ascertain the truth regardless of technicalities. In *Exley* v *Exley* 1952(1) SA 644(O) at 646 HORWITZ J stated –

> "… and, secondly because I bear in mind that the point is, after all, related to a matrimonial dispute when the court does not always insist upon strict formalities."

The same learned judge dealt with the issue in *Coertzen* v *Coertzen* 1954(2) SA 69 (OPD). In this case there was an irregularity which is more or else similar to the one *in casu*. The defendant, in divorce proceedings, pitched up on the day of hearing of an undefended action asking for leave to defend. Postponement was granted to enable defendant to apply on petition for condonation of late entry of appearance. The defendant did not do so, but instead merely filed an affidavit in breach of the court order. The court held that the plaintiff was not prejudiced thereby and granted the condonation but imposed a sanction by way of a special order as to costs. The rationale for doing so is discernible from page 71C-G where the learned judge stated –

> "It is abundantly clear that at one stage the defendant, although he had ample opportunity to enter appearance to defend, did not do so, but, for some unexplained, or inadequately explained reason, refrained from entering appearance until the last moment when he appeared in this court and applied orally to be allowed to defend. Had this been an ordinary civil case it would

> have been advisable, if not necessary for the court to take this delay into very serious consideration in the present application for condonation. But I am bearing in mind that this is a divorce case in whom the status of the parties is involved and that, therefore, in view of the fact that the defendant has a defence – and from the papers we must assume that it is a *bona fide* defence – the court should not by its order prevent him placing that defence before it …
>
> In the case of *Fillis* v *Fillis*, 1908 CTR 357 BUCHANAN ACJ, said that – "in all matrimonial cases the court will hear the defendant if he is present.
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> If that statement be correct, then it would mean that if the court could have heard him when he was present on 17 December last, the court can also now grant him opportunity to place his defence formally before the court. The other case to which I wish to refer is *Edwards* v *Edwards*, 1912 WLD 80 … the learned judge who presided pointed out that this was a case affecting the status of the parties, and, even though at that stage there was already an order against the wife, leave to defend would be granted."

See also *Haddow* v *Haddow* 1974(2) SA 181 (R)

Another issue relevant to the facts is whether the court can deal with the decree of divorce and the custody first and refer the after issues for trial. This approach would be consistent with a request by the defendant as he is consenting to these two. I go along the view that it is desirable that the marital problems be adjudicated upon in one and the same action – Henderson Tuder 1965(4) SA 227 (SR) and *Eorfino* v *De Pretto (Eorfino Intervening*) 1959(3) SA WLD 787. Although the facts of these cases dealt with slightly different scenarios, I think the rationale of the approach applies to this case. I therefore hold that all the matrimonial issues should be within the same trial.

In line with the principle of the sanctity of the marriage status in the above-mentioned cases, I am prepared to condone the behaviour of the self-acting

defendant and allow him to have his case heard. I will not insist upon strict observance of the formalities but seek to ascertain the truth regardless of technicalities. To prevent the possible prejudice being suffered by the plaintiff, I will order that the defendant bears the costs for this application instead of committal for contempt as suggested in *Haddow* v *Haddow (supra*). In this case, it is beyond dispute that the defendant was out of the country. But when he went to live in Zambia he was aware that this matter had commenced. He had already participated in the litigation. He should have taken steps to ensure that his wife is not affected by the departure.

In order to cut down on costs and prevent prejudice to the plaintiff I direct that the defendant's opposing papers be regarded as his plea and subsequent pleadings will proceed from that stage.

I accordingly, refer this matter for trial with the defendant's opposing affidavit being regarded as his plea. The defendant will bear the costs of this application.

Joel Pincus, Konson & Wolhuter plaintiff's legal practitioners