

TARIRO TOGARA (NEE MUTAPWA)

Versus

BOTHWELL TOGARA

And

DEPUTY SHERIFF – BULAWAYO

IN THE HIGH COURT OF ZIMBABWE

CHIWESHE J

BULAWAYO 26 MARCH 2004 & 17 FEBRUARY 2005

J Ndlovu for applicant

M Dube for 1st respondent

Judgment

CHIWESHE J: The applicant sought and was granted an order rescinding the judgment of this court under case number HC 3264/01. I indicated at the time that my reasons for granting the order would follow. These are they. Under case number HC 3264/01 the respondent issued summons against the applicant seeking an order for divorce, custody of the parties minor children and certain proprietary rights. The summons were served on the applicant on 19 November 2001. The applicant entered an appearance to defend on 23 May 2002 a period of six months after service of summons upon her. She also filed her plea.

There is no doubt that the applicant filed her papers out of time. She did not seek condonation nor did her legal practitioners for the late noting of appearance to defend. The first respondent proceeded to set the matter down on the unopposed roll. The notice of set down was served on the applicant's legal practitioners. The applicant did not appear in court on the appointed date. Judgment was granted in

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Default. When the first respondent informed the applicant of this development the applicant responded by filing the present application.

An application of this nature will succeed if the applicant shows that there is good and sufficient cause to set aside the judgment concerned. In determining whether there is good and sufficient cause to do so the court will be guided by the following factors-

- (a) the reasonableness of the explanation for the default;
- (b) the *bona fides* of the application to rescind the judgment;
- (c) the *bona fides* of the defence on the merits of the case;
- (d) the prospects of success of any such defence; and
- (e) any other fact that may be relevant to the circumstances of the case.

In matrimonial cases the courts have as a matter of policy tended to grant applications to rescind default judgment. An order of divorce often has far reaching consequences not only for the parties themselves but also for minor children born into the annulled marriage. Often there may be grave proprietary consequences. These factors often outweigh the level of consideration given to the applicant's failure to comply with the rules of court or the reasonableness or otherwise of any explanation given for such non-compliance.

In the present application the applicant's explanation for the default is far from convincing given the inordinate delay taken to respond to the summons, the fact that her legal practitioners were not only served with the notice of set down but also advised of the need to seek condonation for late filing of appearance to defend. It appears to me that the applicant flagrantly ignored court process. Were it not for the

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fact that this is a matrimonial matter involving the rights of minor children I would have dismissed this application without hesitation.

The applicant argues that it is in the best interests of the two minor children namely Tony Togara (ten years old) and Nick Togara (six years old) that their custody vests with her in view of their tender ages. Her prospects of success in this application appear reasonable. She should be heard on the merits. She also avers that the order granted does not properly take into account her contribution to the acquisition and development of the two immovable properties forming part of the matrimonial estate. In this regard she has an arguable case and deserves to be heard on the merits. She does not oppose the order for divorce and presumably she does not seek its rescission *per se*.

It was for these reasons that the application was granted in the following terms. It is ordered that:

1. The judgment entered by this honourable court on 17 April 2003 under case number 3264/01 be and is hereby rescinded.
2. Respondent be ordered to pay the costs of this application.

Messrs Jabulani Ndlovu & Associates applicant's legal practitioners
Marondedze, Nyathi, Majome & Partners respondent's legal practitioners