

Xref HC No. 610/05, 1293/08'B'

**NOMSA MUSEKA**

**VERSUS**

**EVERISTO MUSEKA**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 17 OCTOBER 2008 AND 13 NOVEMBER 2008

*Mr G. Nyoni* for the applicant  
*Mr S Mguni* for the respondent

Rescission Judgment

**CHEDA J:** This is an application for a rescission of judgment.

The parties are married to each other and in an attempt to have the matter finalized, respondent set it down as a default judgment on the 16<sup>th</sup> December 2004.

Applicant was unrepresented and when the date of hearing arrived she was already barred, but, she had not applied for the upliftment of the bar. It is common cause that she was unaware of this important procedure. A postponement was applied for by a Mrs T Ngwenya from the Zimbabwean Women lawyers association in order to enable her to comply with the said procedure.

Documents pertaining to this matter were forwarded to her legal practitioners, *Ms Magoge* who unfortunately was away from her office due to malaria. As a result of her failure the matter was heard in her absence on the 17<sup>th</sup> February 2005 and a default judgment was granted.

It is trite law that in order for an applicant in an application for rescission of judgment to succeed he must show that he was not in willful default and that he has a bona fide defence.

Applicant had entrusted her legal practitioner to attend to her matter, but, she failed to do so, not deliberately but because she fell ill at the relevant period. Her evidence in that regard is not challenged. The misfortune of illness which befell her legal practitioner cannot by any stretch of imagination be held to be willful on her part to warrant a default judgment under those circumstances.

I am aware of the decision in *Highline Motors spares (1993) (Pvt) Ltd and others v Zimbabwe Corp. Ltd* 2002 (1) ZLR 514(S) and *Blue Bells Enterprises (Pvt) Ltd* 1998(2)

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ZLR 249(S), that generally, a litigant can not escape the sins of her legal practitioner as the choice of that legal representative is hers. This, however, is the general rule. In every general rule there is an exception.

In the present matter I find that, as applicant's legal practitioner's failure to attend court was not deliberate or negligent it will not be fair and just to punish her in the circumstances. In addition there to this being a matrimonial matter, it is my view that, this court should treat it differently from the ordinary contracts where strict adherence to the rules is normally observed at all costs. Our courts should always be inclined to accommodate unrepresented litigants where possible provided that such relaxation of this practice and procedure will result in the attainment of justice between litigants.

Applicant has argued that the property was not equitably distributed. The court, therefore, should accord her an opportunity to defend this action as it is through that defence that all the points and issues can be ventilated in court thereby enabling the court to make an informed decision.

I find that a good and sufficient cause has been made by applicant in this matter. The following order is therefore made:-

- (1) the default judgment granted in this matter in case number HC 3253/04 on 17<sup>th</sup> of February 2005, be and is hereby rescinded.
- (2) respondent to pay costs.

*Messrs Moyo and Nyoni*, applicant's legal practitioners

*Maronedze, Mukuku, Ndove and partners*, respondent's legal practitioners