ELIZABETH NYATHI (nee SIDALAKI NGOZO)

Versus

MORGAN NYATHI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 FEBRUARY 2007 AND 15 MAY 2008

J Mudenda for the applicant
R Ndlovu for the respondent

Opposed Application

NDOU J: This is an application for condonation for late filing of an application for rescission of judgment. The salient facts of the matter are the following. The parties were married to each other at Bulawayo on 11 November 2000. The marriage relationship developed material challenges hardly a year later resulting in the respondent suing for divorce. The summons were issued out on 31 August 2001 under case number HC 2594/01. The return of service by the Deputy Sheriff, Bulawayo evinces that the summons and the declaration were served on the applicant "Mrs Nyathi personally" on 18 September 2001. On 19 October 2001 the respondent filed of record a notice of amendment. The notice of amendment was, on 5 December 2001 served on the applicant personally by the Deputy Sheriff who, *inter alia*, stated …

> "(1) By handing a copy to the defendant Elizabeth Nyathi, PERSONALLY at 4282 Nkulumane, Bulawayo. At the same time I explained the exigencies thereof.
>
> NB:- An earlier attempt was made at 3274 Nkulumane, Bulawayo where I interviewed Mr Ngonzo, the father of the said defendant who advised me that the said defendant is now residing at 4282 and service was effected as above."

The divorce was granted by this court on 7 February 2002 by virtue of consent paper signed by both parties witnessed by four persons who attested their signatures

as well. The applicant also filed an affidavit of waiver which she deposed to before a legal practitioner. It is beyond dispute that she became aware of the judgment in March 2002 when she received it by registered mail.. She had the judgment in her possession for close to three (3) years and nine(9) months. This is an inordinate delay.

Explanation for delay

The delay was entirely caused by the applicant. The reason given by the applicant for the delay is that she was made to believe by the respondent that he would made up his mind and reconcile with her. In those three years she believed that dialogue would result in reconciliation. This is not a candid and comprehensible explanation for the flagrant breach of the Rules of this court. This kind of explanation is an insult to the intelligence of the court – *Songare* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210 (S) at 212G-H and *Khumalo* v *Mafurirano* HB-11-04. It must be borne in mind that a defendant who admits that he or she was negligent in his or her tardiness may nonetheless be found to merit the court's indulgence if he or she shows *bona fides*. But by putting a reason of the kind proffered by the applicant, the latter has a difficulty in satisfying me of her good faith. The applicant has to be condemned for her delay and because of the inadequancy of her explanation. The approach in such applications for indulgencies was ably stated by McNALLY JA in *Ndebele* v *Ncube* 1992(1) ZLR 288 (S) at 290E as follows:

> "It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time and for other relief arising out of delays either by the individual or his lawyers have rocketed in number. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than justice. Incompetence is becoming a growth industry.
>
> Petty disputes are argued and then re-argued until the costs far exceed the capital amount of dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveium* - roughly

translated "the law will help the vigilant but not the sluggard." "

The applicant has failed to give an acceptable explanation for the delay. There is no good and sufficient explanation for the delay – *G D Haulage (Pty) Ltd* v *Mununguwi Bus Service (Pvt) Ltd* 1980 (1) SA 729 (ZRAD); *Stevenson* v *Broadly NO* 1972(2) RLR 467 and *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC) at 243G-244F.

***Bona fides* of applicant's defence on the merits as well as its prospects of success**

I have already alluded to the fact that the applicant was personally served with the summons and later notice of amendment. She did not enter appearance to defend. Instead, she signed a consent paper and affidavit of waiver. As far as the return of service are concerned her explanations are clearly false. The Deputy Sheriff served the summons on "Mrs Nyathi" so whether she shared the same initial with her late sister is neither here nor there. They did not share the same marital surname. As far as the service of notice of amendment is concerned, it is clear she had moved houses at time of service but the Deputy Sheriff managed to track her down courtesy of her late father. There is no room for error here.

On the question of the consent paper and the affidavit of waiver, the applicant conveniently wants to use her late sister. She said she might have "unwittingly" signed these documents at the time she was ill. She is now using her sister's name because she is no longer there. The court strongly condemns such brazen untruthfulness in trying to obtain an indulgency. Such disapproval must be shown by awarding costs at an enhanced scale.

Accordingly, the application for condonation is dismissed with costs on the legal practitioner and client scale.

Messrs T Hara & Partners, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni, respondent's legal practitioners