

JAMESON ZOWA

Versus

SUSAN ZOWA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 9 JUNE 2010

L Nkomo for applicant
L Mcijo for respondent

Application for Condonation

KAMOCHA J: The background information which is largely common cause is this:

The parties were married to each other on 1 May 1996. The marriage was going through a turbulent period resulting in the wife instituting divorce proceedings by issuing divorce summons against the husband on 7 July 2006. The husband entered appearance to defend and filed his plea.

The husband started developing problems when notice to make discovery was served on his erstwhile legal practitioners on 4 April 2008. For some reasons he was unable to make discovery for two months prompting the wife to file an application to compel discovery. The application was granted on 25 June 2008. In it the husband was required to file discovery documents within 5 days of service of the order upon his legal practitioners. Failing which his defence would be struck out and his wife would be granted leave to set down the matter on the unopposed roll without notice to him.

When an attempt to serve the application to compel discovery was made on Mabhikwa, Hikwa and Nyathi legal practitioners, the legal practitioners refused to accept service stating that their records did not show that they were ever engaged by the defendant. They also did not recall instructing Advocate Nkiwane to act on their behalf in this particular matter. They concluded by suggesting that the application to compel discovery should be served on the defendant personally. There is nothing on record to show that the said legal practitioners renounced agency nor is there any assumption of agency by them.

What is clear is that S Nkiwane when he entered appearance to defend on behalf of the defendant on 31 August 2006 he gave out that the defendant's address for service was Messrs

Mabhikwa, Hikwa and Nyathi, legal practitioners. He went on to state that those legal practitioners, in particular M. Nyathi, had in fact instructed him. He repeated that on 30 January 2007 when he filed the defendant's plea. What all that means is that Advocate Nkiwane was in fact not being instructed by the legal practitioners. He was dealing directly with the defendant. Hence, serving the court order on the said legal practitioners served no useful purpose.

An attempt to serve the order on defendant personally at house number 29 Heythrop Road, Montrose was fruitless as he was said to be in the Cement Siding area. Finally substituted service had to be used to serve the court order by publishing it once in the Chronicle newspaper on 7 November 2008. Defendant says he did not read that day's paper.

The real cause of all the confusion in this matter emanates from Advocate Nkiwane who without making adequate arrangements for this matter went to Namibia on business. He referred to Mabhikwa, Hikwa and Nyathi, legal practitioners as his instructing legal practitioners when they did not retain him. His client who was in fact his friend must have been led to believe that there were other lawyers who would handle his case in Nkiwane's absence. At one stage Nkiwane referred him to Munjanja & Associates. There is no assumption of agency by those legal practitioners and yet they were to negotiate a consent paper with the plaintiff. In the circumstances applicant can be forgiven for believing that his matter was being handled by some legal practitioners. In result I hold that he was not in willful default.

He has good prospects of success in the light of the fact that Nkiwane could not effect discovery due to other commitments in Namibia. He failed to make adequate arrangements.

The respondent argued that applicant was bent on frustrating the finalization of this matter without giving specific incidents showing such conduct.

It was further argued that applicant's degree of non-compliance with the rules was gross. That is untenable in the light of the fact that applicant only learnt about the order on 14 May 2009 and filed his application for rescission on 21 May 2009.

In the light of the foregoing I hold the view that this is a proper case to condone the late filing of an application for rescission.

Lazarus & Sarif, respondent's legal practitioners