

OTILIAH ZULU
versus
EZRA MUNYARADZI ZULU

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 3 November 2011 & 31 January 2012

FAMILY LAW COURT

Opposed Application

F. Piki, for the applicant
S. Simango, for the respondent

MAWADZE J: This is an opposed application for rescission of an order of divorce granted by this court on 19 May 2011 in case No. HC 3037/10.

The order sought by the applicant is couched in the following terms;

“IT IS ORDERED

1. That the judgment that was issued in default of filing of a plea by the applicant in case Number 3037/10 on 17 May 2011 (sic) be and is hereby rescinded.
2. That the applicant will file her plea within 48 hours of this order being issued.
3. That there will be no order of costs if this application is not opposed.”

The background facts giving rise to this application can be summarised as follows;

The applicant was married to the respondent in terms of the Marriage Act [*Cap 5:11*] which marriage was solemnised on 8 December 1989. There are now only two minor children born out of that marriage namely Blessing Tawanda Zulu born on 26 January 1996 and Ezra Munyaradzi Zulu born on 9 June 2000. The applicant has been ordinarily resident in the United Kingdom for some time where she is said to be working as a nurse at the same time seeking to regularise her resident status. The applicant is in custody of the two minor children in the United Kingdom and the Magistrates Court in Zimbabwe granted a contributory maintenance order against the respondent in respect of the minor children in case No. M333/11. The respondent is resident in Zimbabwe.

On 7 May 2010 the respondent issued summons out of this court seeking a decree of divorce, an order governing division of matrimonial assets, an order governing custody of the minor children and cost of suit if the matter is defended. The applicant was served personally with the respondent's declaration at the Magistrates Court (civil) Harare on 18 February 2011 where she was attending a court hearing presumably the maintenance case. On 25 February 2011 the applicant filed an appearance to defend and gave her address of service as that of her legal practitioners who had assumed agency, Mujeyi Manokore Attorneys. On 23 March 2011, the respondent filed a notice to plead and intention to bar which was served upon the applicant's legal practitioners on the same day. The applicant did not file the plea and the *dias induciae* expired which meant that the applicant was barred in terms of the Rules of the court and an endorsement to that effect was made by the Registrar on 11 April 2011. The respondent proceeded to set the matter down on the unopposed roll and a notice of set down was served on the applicant's legal practitioners on 4 May 2011 and the set down date was on 12 May 2011. The applicant did not attend court and on 19 May 2011 my brother judge CHITAKUNYE J granted the following order;

"It is ordered that;

1. Divorce Order:- That a decree of divorce be and is hereby granted.
2. Maintenance:- The plaintiff will pay maintenance as per the Magistrates Court order granted at Harare in case No. M333/11.
3. Custody:- Custody of two minor children namely Blessing Tawanda Zulu born on 23 January 1996 and Ezra Munyaradzi Zulu born on 9 June 2000 be and is hereby granted to the defendant. The plaintiff shall enjoy reasonable access.
4. Property :-
 - 4.1. Movable :- It be governed and distributed as per Annexure "B" to this order.
 - 4.2. Immovable: It be governed and distributed as per Annexure B attached to this order.
5. That the defendant pays the costs of suit."

On 13 June the applicant filed this court application seeking the rescission of the order granted in default by CHITAKUNYE J.

Let me comment briefly on the distribution of the matrimonial estate as per Annexure B to the order granted in default. Annexure B is similar to Annexure 'B' also attached to the respondent's declaration in the main action. In terms of Annexure B the respondent was

awarded a total of thirty five (35) movable assets including two motor vehicles Honda Oddysey and Honda Prelude, water bowzer and a trailer. The applicant was awarded a total of forty (40) movable assets including a Mazda B2500 single cab truck and business interests in the Mabvuku Family Clinic and Maternity home. In respect of immovable property the respondent was awarded two movable properties namely the matrimonial home No. 28 Churchill Avenue, Malborough, Harare and a four roomed house in Chipatiko Village in rural Domboshava. The respondent was also awarded business interests in the company known as Germini Medicines Supplies (Pvt) Ltd trading as Pharm Chem. The applicant was awarded also two immovable properties being No. 1034 Shambare Street, Old Mabvuku, Harare and a seven (7) roomed house with several out buildings in Zimbwa Village in rural Domboshava.

At the commencement of the hearing Mr *Simango* for the respondent took a point *in limine* to the effect that the applicant's answering affidavit was improperly before the court and should therefore be disregarded. This was opposed by Mr *Piki* for the applicant. I upheld the *point in limine* raised by Mr *Simango*. The reason for this is simple. As already said the applicant is ordinarily resident in the United Kingdom. The answering affidavit in question was filed with the court on 2 November 2011 but was commissioned in Harare, Zimbabwe on 2 July 2011 which date was cancelled in ink and changed to 2 November 2011. The cancellation in ink is not counter signed hence it is not clear as to who made the cancellations. Mr *Piki* added further confusion in his submissions when he said the answering affidavit was commissioned on 2 July 2011 when the applicant was in Zimbabwe and not as reflected on 2 November 2011. My view is that the applicant's answering affidavit was not properly commissioned. Consequently it cannot be said to be properly before the court.

I now turn to the merits of the application.

THE LAW

In terms of order 9 r 63 of the High Court Rules 1971 (hereinafter the Rules) this court may set aside judgment given in default. The relevant provision r 63 (2) is couched as follows;

“ 63 Court may set aside judgment given in default.

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2. If the court is satisfied on application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.” (underlining is mine).

In terms of the rules therefore the applicant has to prove on a balance of probability that there is good and sufficient cause to rescind the divorce order granted in default.

Mr *Piki* in argument also placed reliance in s 9 of the Matrimonial Causes Act [*Cap 5: 13*] which provides as follows;

“9 Variation, etc of orders

Without prejudice to the Maintenance Act [*Cap 5:05*] an appropriate court may *on good cause shown* vary suspend or rescind an order made in terms of s 7 and subsections (2), (3) and (4) of that section shall apply *mutatis mutandis*, in respect of any such variation, suspension or rescission.” Underlining is mine.

The above cited provision became more relevant in view of the applicant’s position that she has no qualms with parts of the order granted in default by CHITAKUNYE J in relation to decree of divorce in terms of s 5 of the Matrimonial Causes Act [*Cap 5:13*] and the order in relation to custody of the two minor children. Mr *Piki* for the applicant argued that the rescission sought is partial rescission of the order granted in default in relation to the division of the matrimonial estates in terms of s 7 of the Matrimonial Causes Act [*Cap 5:13*]. In my view this argument can only be relevant if this court satisfied that there is good and sufficient cause or that good cause has been shown justifying the rescission of the default judgment.

It is now trite law that the court in setting aside or rescinding a default judgment considers the following factors;

- i) the explanation for the default. In this regard the court considers the reasonableness and the acceptability of the explanation given.
- ii) the *bona fides* of the applicant or application.
- iii) the *bona fides* of applicant’s defence on the merits as well as prospects of success or the *prima facie* strength of the applicant’s case.

See : *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (1) ZLR 368 (S); *Beitbridge Rural District Council v Russel Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (S) at 192 E.

I now proceed to apply these principles to the facts of this case.

1. Applicant’s explanation for the default.

It is common cause that the applicant was served with the notice to plead and intention to bar in terms of Order 35 r 272 (1) (b) of the Rules and that after the *dias induciae*

the respondent proceed to seek a final order in terms of Order 35 r 272 (2) (b) of the Rules. It is common cause that the applicant even after being served with the notice of set down in terms of r 272 (2) (b) did not attend court. The probability is that even if the applicant had attended court on the date of set down the applicant could still not be heard on the merits without seeking the upliftment of the bar in terms of the Rules. I have to consider whether there is a reasonable and acceptable explanation given by the applicant for failure to comply with Order 35 r 272 (1) (b) and to some extent r 272 (2) (b) of the Rules.

I am not persuaded by Mr *Piki's* belated submission that I should grant the order sought on the basis of Order 49 r 449 which relates to correction, variation and rescission of judgments and orders. The order granted by CHITAKUNYE J on 19 May 2011 was not issued in error but in terms of the Order 35 r 272 (2) (b).

The explanation given for the default by the applicant is not clear in her founding affidavit. In fact in her founding affidavit the applicant did not see it fit and proper to give any reason as to why the order granted by CHITAKUNYE J should be rescinded. The applicant had only this to say:

“The exact details of the order I seek will be expressed in the affidavit that has been disposed to by my attorney Bruce Mujeyi. I incorporate the contents of his affidavit as is specifically traversed herein.”

The applicant in her wisdom decided to shy away from proffering any explanation to her default in her founding which is crucial to her case. In other words the applicant gave no explanation as to what she did about this case after she instructed her attorneys to enter an appearance to defend on 25 February 2011 until four months later on 13 June 2011 when she filed an application for rescission of the order granted in default. It is not clear whether she was during that period in Zimbabwe or not. She does not explain again if she communicated with her attorneys and if so how she did that. The applicant does not explain if indeed she gave her attorneys any instructions to file a plea to plaintiff's claim. All these questions are not answered in Mr Mujeyi's supporting affidavit which applicant seeks to rely upon. It is therefore clear to my mind that applicant had not in her founding affidavit given any explanation for the default save to leave matters in the hands of her erstwhile legal practitioners.

It may be worthy to consider what explanation is given by the applicant's erstwhile legal practitioners Bruce Mujeyi (hereafter Mujeyi). It is pertinent to note that after deposing

to the supporting affidavit on 10 June 2011 and filing this application on 13 June 2011 Mujeyi renounced agency barely two days later on 15 June 2011.

The thrust of Mujeyi supporting affidavit is to try and explain the failure by the applicant in particular Mujeyi himself to file a plea after being served with the notice to plead and intention to bar in terms of O 35 r 272 (I) (b). Mujeyi's explanation is that after he entered an appearance to defend on 25 February 2011 he left the country. He does not explain as to when he left the country or where he went or for how long he was out of the country. There is no explanation as to what instructions he left in relation to the applicant's file at his law firm and with whom. Was it prudent for Mujeyi to simply enter an appearance to defend and leave the country for an unspecified period without ensuring that other legal practitioners in his firm would attend to his matters in his absence? That conduct in my view is not only unreasonable but unacceptable. It is not clear as to whether Mujeyi had been given instructions or taken instructions to file the applicant's plea. All he says is that the notice to plead and intention to bar was served when he was out of the country. Again it is worthwhile to quote his own words:

“The notice to plead and intention to bar was dealt with in a matter (sic) that decries sheer incompetence by a member of my staff. The document was simply filed away in the file instead of being referred to one of the several legal practitioners in my firm who were there during the time I was away. The matter was subsequently heard as an unopposed matter and judgment was granted on 17 May 2011.” (sic)

As already said there is no explanation as to when Mujeyi left the country and for how long he was away. In fact the respondent challenged this averment and said that on the day he served the notice to plead and intention to bar on Mujeyi's legal firm Mujeyi was present at the firm. In fact the respondent said soon after effecting service of this notice to plead he was called by Mujeyi who was in his office and as persons known to each other they had a discussion on social issues unrelated to the matter. I am constrained to find that respondent would lie on this aspect and fabricate such evidence. In any case this has not been refuted by Mujeyi who has not offered any proof to show that he was indeed out of the country, for example through his passport. He said he only became aware of the default judgment when an unnamed legal practitioner in his firm sent him an e-mail indicating that applicant was being evicted from the matrimonial house on account of the default judgment. It is again unclear if by then the applicant was in Zimbabwe. No proof of such an e-mail is provided. It is also important to note that there is no supporting affidavit from the receptionist in Mujeyi's legal firm who received the notice to plead and the notice for set down to confirm the

averments by Mujeyi on what happened when Mujeyi was ostensibly out of the country. No explanation for that omission is made. The receptionist would indeed confirm why she would act in the manner alleged and indeed take the blame if it is true that it is what she did.

The explanation given by Mujeyi is that the applicant was not at fault for the default as she was not alerted to the fact that the respondent had filed a notice to plead and intention to bar and subsequently a notice of set down. He further avers that the level of delinquency exhibited by his law firm in the matter is deplorable, which blame he shifts to the receptionist, and that this should not be held against the applicant who is not to blame for this fiasco.

I am not persuaded by this argument not only because it had not been shown that what Mujeyi says is indeed correct but also on account of the fact that our courts have long pronounced loudly and clearly to all and sundry that where legal practitioners fail to take appropriate action to protect their clients' interest such conduct besides being treated as wilful non-compliance with the rules would be treated as wilful disdain by the clients themselves.

It is not good enough for the applicant to shift the blame to Mujeyi's law firm and for Mujeyi to run away from the blame by shifting blame to unnamed secretary in the law firm and by renouncing agency in this matter. Mujeyi was the legal representative of the applicant whom the applicant chose herself. I therefore find no reason why in relation to failure to comply with r 271 (1) (b) of the rules by not entering a plea, the applicant should be absolved from the normal consequences of such a relationship and choice, no matter what the circumstances of the failure are. The wise words by McNALLY JA in the case of *Ndebele v Ncube* 1992 (1) ZLR 288 (b) at 290 C – E apply with equal force in this case;

“the time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subvenient* - roughly translated, the law will help the vigilant but not the sluggard”

It is therefore my finding that the applicant has dismally failed to proffer a reasonable and acceptable explanation for her default to enter a plea.

2. The bona fides of the applicant

The applicant's sincerity in the matter is very doubtful. As already explained besides, instructing attorney to file or enter an appearance to defend the applicant does not explain if she took any further action in this matter like instructing her attorney to file a plea or to make

any follow ups on such a matter of importance to her. After filing the application for rescission of judgment in June 2011 and after her erstwhile legal practitioner renounced agency, the applicant simply did nothing in ensuring that the matter is prosecuted. In fact it is common cause that it is the respondent who had to push for the matter to be heard by setting the matter down. The applicant just filed an application for rescission and abandoned as it were. Even after the matter had been set down on 1 November 2011 it had to be postponed on account of the applicant who engaged her current legal practitioner of record who was not available. It is therefore doubtful if this application is made in good faith. This point is more pertinent when one considers the next aspect which relates to the *prima facie* strength of applicant's case.

3. Prospects of success as *prima facie* strength of this case

The applicant in para 4 of her founding affidavit objects to the award made in respect of the matrimonial house No. 28 Churchill Drive, Malborough, Harare and the family businesses that is, the clinic in Mabvuku and the medical supply companies. The applicant avers that this property was jointly acquired by the parties and the respondent cannot unilaterally determine how the property should be shared. The applicant's view is that the court should revisit this issue so as to take into account her own contribution to the matrimonial estate. The applicant also indicates that she would want the issue of maintenance of the two minor children to be revisited without explaining in what regard. In my view the applicant does not explain why the order granted in default should be deemed unfair. The applicant does not explain how the matrimonial estate should have been distributed.

The complaint raised by the applicant in relation to the maintenance order granted by the Magistrates Court being incorporated in the divorce order is difficult to appreciate as the applicant does not explain why she did not appeal against the maintenance order at the time it was granted or seek an upward variation of the order. The applicant does also not explain at all why she has not enforced her rights in terms of the Maintenance Act [Cap 5:09] if respondent is not complying with the maintenance order. I am surprised that Mujeyi in his supporting affidavit would also raise this issue of non-compliance with the maintenance order by the respondent! One would expect him to be better informed on how to enforce compliance with such an order rather than to seek a rescission of the relevant order.

I have already alluded to how the matrimonial estate was distributed as per Annexure B to the divorce order. The applicant would have no qualms with the decree of divorce, the custody of minor children and distribution of most of the movable property. The division of the matrimonial estate at divorce is in accordance with s 7 of the Matrimonial Causes Act [*Cap 5:13*].

The factors which the court has to consider are listed on s 7 4 (a) – (g) of the Matrimonial Causes Act [*Cap 5:13*]. The only factor the applicant has alluded to is her alleged contribution to the matrimonial estate. The applicant does not explain how the order granted did not take this into account in view of what was awarded to both parties. The applicant only made a bold and unsubstantiated ascertainment that the division of the matrimonial estate was unfair and unjust without explaining how with specific reference to annexure B. These omissions in the applicant's founding affidavit are fatal as such averments are crucial as her application is premised within the four corners of the founding affidavit.

There is therefore nothing in the applicant's founding affidavit to show that the matrimonial estate was not justly and equitably shared taking into account the provisions of s 7 of the Matrimonial Causes Act [*Cap 5:13*]. All in all the applicant did not address her mind to the fairness or otherwise of the distribution of the matrimonial estate as per Annexure B. In my view both the movable and immovable property was shared in almost equal proportions between the parties. The applicant admits that the marriage has irretrievably broken down and that the decree of divorce is in order. The applicant accepts that it was proper for her to be awarded custody of the two minor children. The issue pertaining to the current maintenance order can be dealt in the context of other domestic remedies available. The applicant raises no issue with the respondent's rights to reasonable access to the minor children. No wonder why Mr *Piki* conceded that he was now seeking a partial rescission of the order contrary to the order initially prayed for. I am therefore of the view that the applicant has not shown on a balance of probability any prospects that the matrimonial estate maybe distributed in a different manner if the default judgment is rescinded. The applicant did not even explain why it would be unfair to award the matrimonial house to the respondent who is residing in Zimbabwe while she is resident in the United Kingdom with the children.

Lastly Mr *Piki* raised the issue that I should rescind the divorce order granted in default on account of the fact that there was no personal service effected upon the applicant in terms of r 272 (2) (b) of the Rules in relation to the notice of set down. Reference was made to the case of *Le Roux v Le Roux* 1957 R &N 831 (SR) at 832 in which BEADLE J as he then

was discusses the effect of the non-compliance with the provision of a similar provision to r 272 (2) (b) of the Rules. See also *Butler v Butler* 1951 SR 122.

It is considered view that r 272 (2) (b) of the rules requires that the notice of set down shall be saved upon the defendant and that the court can only proceed if it is satisfied that personal notice of the defendant has been drawn to the fact that the matter had been set down for trial or that for good and sufficient reason the giving of personal notice is impracticable. In *casu* default judgment was granted on account of non – compliance with r 272 (1) (b) – failure to enter a plea. In addition to that the respondent complied with r 272 (2) (b) by serving notice of set down on the applicant’s legal practitioners of record. It would be absurd in my view where like in this case the applicant was represented and had given her address of service as that of her legal practitioners to expect the respondent to serve the notice of set down upon both the applicant and also on her legal practitioners of record. In *casu* the applicant who is resident in United Kingdom had given an address of service in Zimbabwe which is of her legal practitioners of record. One may therefore ask where in United Kingdom would the respondent have been expected to serve the notice of set down and would such notice be proper when it is not given at the applicant’s address of service. I am satisfied that the court which granted the default judgment was properly satisfied that the notice of set down had been drawn to the personal notice of the applicant as it was served upon her legal practitioners of record at her instance. The manner in which r 272 (2) (b) is drafted in my view is different from r 39 (1) of the Rules.

I am therefore satisfied that the judgment was granted in compliance with r 272 (2) (b) of the Rules.

It is my finding that the applicant has failed to establish good and sufficient cause to warrant the rescission of this default judgment granted on 19 May 2011.

Accordingly, the application is dismissed with costs.