

PHILLIP MOROSSE SAKADZA
AND
JENIFFER CHARUMBIRA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 June & 15 September 2022

Opposed application

N Mutagwi for applicant
M Mugomeza for respondent

TSANGA J: Various paths lead to a divorce order. Some are obtained after a trial whereupon the court decides on those issues that would have led to a full contestation. The vast majority are happily obtained by consent of both parties following settlement agreements and thereafter the defendant agreeing not to oppose the divorce sought by plaintiff. Yet still there are those that are obtained as a result of default by the defendant whether from the onset or at some stage in the proceedings.

This is one such case in which condonation is sought for late noting of an application for rescission of a default judgment pertaining to a divorce order granted in the unopposed motion court on the 8th of April 2019 upon the applicant's failure to attend trial.

Rescission of a default judgment in terms of r27 of the High Court Rules 2021 must generally be pursued within one month of a party getting to know of such judgment. Where a party has not sought rescission within the requisite time frame, then such party must to seek condonation first to be permitted to seek rescission. An application for condonation for late filing an application for rescission of judgment is thus in itself an important procedural avenue for seeking to address what a party perceives as an unjust decision particularly one granted in default. However, condonation is not granted as a matter of mere asking. In deciding whether or

not to grant condonation the court weighs considerations such as the length of time for the delay, the reason for the delay, prospects of success and the balance of convenience. In terms of balance of convenience, the court essentially balances the applicant's right to appear in court against the right of the respondent to finality of judgment.

Surrounding circumstances are paramount. Whilst the principles taken into consideration are fixed, whether condonation will be granted or not is always a question of fact upon which the court exercises its discretion. Evidence is submitted through a sworn founding affidavit. The objective of an application for condonation is to show why the default in question is excusable and hence the onus is on the applicant. Since the ultimate objective of condonation is to seek rescission it follows that the court will generally grant if satisfied on balance that the case is one where condonation ought to be granted.

The factual context

Non-appearance at a divorce trial is at the core of the application. The divorce proceedings commenced in May 2016 when the respondent issued summons against the applicant as defendant. He filed his plea and counterclaim. Following a pre-trial conference where the parties failed to agree, the trial was initially set down for 3- 5 October 2018 but was postponed *sine die* according to the applicant. It is not in dispute that it was set down again for hearing on the first of April 2019 and applicant says that his lawyers who had renounced agency turned up and "courteously advised the court" that he has been unavailable. Respondent obtained a default judgment on 8 April 2019, which the applicant admits he learnt about that same April 2019 and even sent money to his lawyers pertaining to the divorce proceedings. Pursuant to the default order, respondent obtained an order of eviction of the applicant and those claiming occupation through him from Stand No 1127 Uplands Waterfalls Harare, and, in the event of noncompliance, the Sheriff's assistance in evicting the applicant. It was obtained on 17 November 2022.

Materially, he seeks to attack the property distribution that was ordered by the court in the default judgment and sees prospects of success in that regard. In essence, the order declared the respondent the sole owner of stand number 1127 Uplands Waterfalls and House No. 14208 Kuwadzana Extension, Harare as her sole and exclusive property. He was awarded three other immovable properties, an issue canvassed more fully in analyzing the prospects of success of this

application. Awarded to both parties were specified movables in particular vehicles. He averred that he found the minor child (now a major) alone when he returned to Zimbabwe in July 2021. Accordingly he seeks condonation to query the maintenance ordered for the child in the default judgment as unjust as he says that the child is being neglected by the respondent.

As for the delay in seeking condonation, whilst conceding that he got to know of the default judgment in April 2019, in the same breath he said that it was only after he saw the eviction order that that he realized that the respondent had obtained a default judgment. In other words, his statements were not consistent. He said he only became aware of the eviction order on 11 of January 2022.

He averred that he was not in willful default. He was in Portugal. According to him notice was short. He was unable to travel to Zimbabwe as he could not apply for leave from work. He had pursued his matter up until closure of pleadings evincing a clear intention to defend the matter. He further attributed his failure to travel for the trial at the time to the covid-19 outbreak outbreak and the global suspension of flights. When it was pointed out in the opposing affidavit that the trial was in April 2019 and that the covid-19 outbreak was in December 2019, he switched the focus of the circumstances that led to his non-appearance in his answering affidavit to his inability to get away from work and to obtain leave at short notice. He also said that his erstwhile lawyers had advised him that the respondent ought to have caused service of the default order on him which he claimed was not done.

The respondent was opposed to the application highlighting that the explanation for default was not as alleged. Additionally, the applicant was alleged to be telling lies as to when he got to know to of the default stating in one breath that it was at the time of the eviction and in another that he had learnt of it in April 2019. The applicant's lawyers were said to have attended to advise the court that he was uncooperative in contrast to the assertion that they had attended to advise the court that he was unavailable. His lawyers had in fact renounced agency due to his lack of cooperation in the divorce proceedings. Moreover, the applicant was said to have failed to attach an affidavit from his erstwhile lawyers to support his assertions. Further, the movable property subject to challenge had been sold removing the justification for reopening the case. Regarding the immovable property under dispute, the respondent averred that she had left the

property because the applicant had invaded the property and was sending threatening messages to her. In fact the eviction proceedings had been spurred by his unlawful occupation of the house.

LEGAL AND FACTUAL ANALYSIS

The case of *Govati Mhora v Emmaculata Mhora CCZ 5/22* succinctly lays out the applicable principles taken into consideration and relevant case law in applications such as this:

- “The extent of non-compliance with the Rules of the Court. See *Zhuwaki v The State SC 99/21* at p 4.
- The explanation for non-compliance with the Rules of the Court. See *Chikanga v The State SC 93/04* at p 2; *Zhuwaki v The State SC 99/21* at p 4.
- The balance of convenience. See *Synohydro Zimbabwe (Pvt) Ltd v Townsend Enterprises Pvt Ltd & Anor SC 27/19* at pp 9-10.
- The prospects of success. See *Prosecutor General v Intratek Zimbabwe (Pvt) Ltd & Anor SC 59/19* at p 13; *S v Tengende and Ors 1981 ZLR 445 (S)* at 446H–447A; *Kereke v Maramwidze & Anor SC 86/21* at p 10; *Undenge v The State SC 23/21* at p 5.”

The Extent of the delay

This application for condonation was made in January 2022 against a default judgment that was passed in April 2019. This was some two years and eight months after that order had been granted. There is absolutely no doubt that the delay was inordinate. As already pointed out in laying the factual basis, his excuse that the delay was due to covid-19 was rebutted as the decision was granted in April 2019 and the covid-19 outbreak occurred in December 2019. It may have prevented his travel in 2020 but certainly not in the year that the judgment was passed. There was therefore no link between covid-19 and the delay in seeking rescission of the default judgment which by his own admission he got to know of in April 2019.

The inordinate delay on his part in seeking rescission is not excusable even if one accepts that due to work pressure he may not have been able to travel for the trial. With regard to seeking rescission, he simply chose to let sleeping dogs lie for months on end thereafter, this being well before the covid-19 outbreak, only to resurrect the matter upon his return just because an order of eviction had been granted. If indeed he engaged lawyers to apply for the rescission of judgment as claimed in the heads of argument, it was still his duty to follow up with the lawyers on the progress of his own matter.

His averments were full of material contradictions. Whilst he averred that he was never served the default judgment, at the same time he said he got to know of it in April 2019. He

claimed to be unable to travel partly due to covid and yet covid-19 was not yet in existence at the time. As reiterated in *Govati Mhora v Emmaculata Mhora supra* citing *Moroney v Moroney SC 24/13* “a litigant’s lack of candour fatally impairs his argument. Further, it has also been held “that if a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide”. See *Leader Tread Zimbabwe (Pvt) Ltd v Smith HH-131-03*.

Prospects of success and balance of convenience

A default judgment is a precarious judgment in that one party can come to court seeking that it be reversed. However, in order to grant condonation there must be compelling reasons for doing so especially on the question of prospects of success. For obvious reasons relating to the need to do justice in divorce matters courts are loath to make default judgments final. At the same time the courts are also alive to the fact that where a default judgment is granted and no action is taken, parties move on, children grow and life begins to settle. Suffice it to say for instance that the child in question whom applicant averred was left home alone is no longer a minor and therefore all issues in the order pertaining to the minor do not need revisiting.

In assessing whether condonation is appropriate in this instance regarding prospects of success, it is also important to examine what the parties pleaded in the divorce case under the cross referenced case HC 4536/16, and what was granted in the default judgment and what the applicant now seeks in terms condonation in order to apply for rescission. I requested a print out of the pleadings from civil registry since the cross referenced file could not be located.

In her declaration the respondent had listed four immovable properties for distribution. These were as follows:

1. House no.1127 Uplands Waterfalls
2. House no. 4428 Budiriro 5, 74th Close Harare
3. House no. 14208-2 Kuwadzana Extension Harare
4. House no. 2044 Maridale, Norton.

Her proposal was that she be awarded 1127 Uplands Waterfalls, and, 14208-2 Kuwadzana properties and that the applicant be granted 4428 Budiriro 5, 74th Close and 2044 Maridale, Norton, properties. She had also proposed in the order sought that he be awarded 5 hectares of land in Shamva.

The applicant herein had filed a counter claim in which he proposed that plaintiff be granted the Norton and Uplands Waterfalls properties and that the Budiro and Kuwadzana properties be registered in the names of their three children. He had not addressed the distribution of the land in Shamva in the draft order which he had pleaded was state land.

The default order declared the respondent exclusive owner of 1127 Uplands Waterfalls Harare. Materially, this was in tandem with what both parties had pleaded in respect of this property. She was also awarded Stand 14208 Kuwadzana Extension Harare as sought in her declaration. The applicant on the other hand was awarded three immovable, namely:

- a) House No. 4428 Budiro
- b) House Number 2044 Maridale Norton
- c) Plot in Shamva 25 hectares.

Despite having sought that the Uplands Waterfalls property be awarded to the respondent in his own counter claim, the applicant now seeks to argue in the application for condonation that the respondent did not contribute towards its purchase save for her indirect contributions. He also now argues that the property has sentimental value and that the respondent abandoned home to satisfy her needs with boyfriends. Essentially, he sees prospects of success on the basis that she did not contribute financially to the acquisition any of the immovable properties and that the properties were meant to be for the benefit of the children.

The default order seems to have awarded him more than he sought for himself. In particular, the Uplands Waterfalls house which he now seeks to vehemently wrestle from the respondent by making this application, was not an issue of dispute in his counter-claim. He was prepared for that property, which is registered in both names, to be awarded to the respondent by relinquishing his half share to her. Condonation in order to obtain rescission of judgment would therefore not be in line with his own counterclaim with respect to the property in dispute. Granted he had wanted the Budiro and Kuwadzana properties to be registered in the name of the children. All are majors. The divorce is between him and his wife. There is no law which mandates parents to register their properties in the name of their children upon divorce. What is important in the absence of any such consent is that each of the divorcing adults in this case has to start a new life. The property distribution is between the two of them in relation to the

property acquired during their marriage. If he wants the properties awarded to him to be in the children's names then nothing stops him from doing so with regards to his own share.

It is evident from the applicant's affidavit that part of the motivation for seeking the rescission of the default judgment lies in his belief that the wife is at fault on the basis of her alleged affairs. Our jurisdiction is a no fault jurisdiction and the court will most certainly not let her walk away with nothing on the basis of boyfriend allegations.

On the argument that she contributed nothing and should not be awarded the property, this standpoint is in itself contrary to what he pleaded in his counterclaim where in fact he one hundred percent proposed that she be given the very property that he now wishes to take away from her. The applicant cannot seek condonation in order to rescind a judgment in order to gain more property which he had not even claimed in his pleadings. Women's indirect contributions are seriously considered and in any event she is the registered half owner of the Waterfalls property against a backdrop where the applicant was in fact in his plea willing to surrender the entire property well aware of those alleged affairs. There are no prospects of success based on what was pleaded.

Regarding the cars his main objection is with respect to a Ford ranger awarded to his wife and that the cars awarded to him were in fact disposed of with the consent of both parties. The respondent had pleaded in her declaration that there were six cars two of which two were in her name and the other four in the husband's name. The applicant in his answering affidavit does not dispute that these cars are no longer in existence. What is queried is whether some of the sales of the earlier vehicles were in fact with her knowledge. Also queried is whether she had a right to dispose of the remaining two vehicles. In essence, there are no vehicles to speak of for sharing between the parties as originally envisaged when summons were issued. As for the rural plot the dispute is as regards some livestock and movables the respondent is said to have sold. The case is said to have been reported to the police and is therefore a criminal case. There is no justification for reopening the case on account of the movable and livestock as this is a police case since she denies that she ever removed the items that are alleged which were *res litigious*.

The application for condonation for late of an application for rescission lacks merit.
The application is dismissed with costs.

Madotsa & Partners applicants, Legal Practitioners

Chinawa Law Chambers: respondents, Legal Practitioners