FRANCIS TENDAYI VIVIAN TARUMBWA

versus

TINNY TARUMBWA (NEE MUSUKA)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 7 December 2006 and 4 April 2007

Mr *Kawonde,* for the plaintiff

Unopposed Divorce Action

MAKONI J: On the 17th October 2006 plaintiff issued summons in this court claiming the following:-

(a) A decree of divorce

(b) An order dividing the movable property of the parties in terms of paragraph 8 of the declaration.

(c) That each party pays its own costs

Defendant was served personally with the summons on the 20th October 2006. She did not enter appearance to defend. The *dies induciea* expired and the matter was set down on the unopposed roll.

On the day of hearing. I directed that the defendant be served with a Notice to Plead in terms of rule 272.

Rule 272(1) (b) provides:- 272(1) In an action of restitution of conjugal rights, divorce, judicial separation or nullity of marriage where the defendant failed to enter appearance.

(a) ……..

(b) If the declaration has been served with the summons, the plaintiff wishing to obtain judgment shall file and deliver the aforesaid notice to the

defendant and after the dies induciae as calculated in the proviso to rule 119.

The notice referred to is a notice in accordance with Form 30 calling upon the defendant if he wishes to defend, to purge his failure to enter appearance and to plead, answer or except or make a claim in reconvention commonly referred to as the notice to Plead.

Mr Kawonde for the plaintiff contended/submitted that in terms of Rule 269A, service of Notice to Plead was not necessary as the defendant had been served with Form 30A summons. I requested that he files Heads of Argument in support of his contention.

In his heads of argument, he clearly sets out the position before and after the amendment of the rules by Statutory Instrument 80 of 2000.

Before the amendment to the rules, a party had an option to either issue ordinary summons or Form 30A summons. This was provided for in rule 269A which read as follows:-

> "The summons commencing an action mentioned in this order may, at the option o the plaintiff, be issued in Form 30A, in which case the provisions of rule 272 shall not apply to such action."

The then Form 30A had a provision for a set down date. The relevant section read:-

> "AND, FURTHER, require the defendant to take notice that, if he/she fails to enter appearance as aforesaid, the plaintiff's claims as set out in the declaration will be heard and adjudicated upon by the High Court of Zimbabwe sitting at ……on the day …… of 19 …… without further notice to the defendant."

If a party chose to issue form 30A summons, it follows logically, that there would be no need to serve the defendant with a notice of plead as the defendant would have been advised of the set down date.

Statutory Instrument 80 of 2000 introduced the following changes:-

(i) Rule 269A was amended to by the insertion after 30A of "to Which a copy of the plaintiff's declaration shall be annexed."

(ii) It repealed Form 30A and substituted it with the current Form 30A.

The main difference between the repealed and the current Form 30A is that the current Form 30A no longer has the set down date on the face of the summons. In effect there is, now, no difference between form 30A and the Form 2, which is the ordinary summons. The current Form 30A contains a clause to the effect that if you do not enter appearance to defend, the plaintiff's claims will be heard and dealt with by the High Court without further notice to you. What this means is that just as with the ordinary summons, if the defendant does not enter an appearance to defend in a matrimonial action, the plaintiff can obtain a default judgment.

I think it was an inadvertent error on the part drafters of the High Court Rules to omit the date from the face of Form 30A as the absurd result is that there is no distinction between the ordinary summons and the "special" Form 30A sought to be created by Rule 269A.

Further, it appears anomalous that the same court would be required under Rule 272 to ensure that a defendant in a divorce action instituted ordinarily, as opposed to a defendant served with form 30A summons, is given every opportunity to defend the action, including being given an opportunity to appear in court on the set down date and to defend the divorce action at that late hour yet not afford the same rights and protection to defendants served with Form 30A summons when such summons have no features safeguarding the protection afforded by Rule 272 as used to be the case.

The plaintiff can obtain a default judgment without the defendant being given an opportunity to purge his failure to enter appearance to defend, to plead or to exercise the other options provided by rule 272(1)(a). This would not have been the intention of the legislature considering that we are dealing with matters which have the effect of changing the status of the parties.

If that was the intention of the legislature they would have repealed rule 272. As the rules stand one would ask under which circumstances would rule 272 apply.

Such orders in default will also have the effect on the parties' future marital and proprietary rights and the legitimacy of the children born after such orders.

In ordinary cases a defendant can apply for rescission of the default judgment without any difficulty. Same cannot be said of matrimonial matters. A party would have moved on and maybe contracted another marriage. What then would be the effect of such a marriage when the other party applies for rescission of the default judgment.

It is clear that the amendment to Form 30A created an anomaly which needs rectification. It is my recommendation that the rules committee urgently addresses the anomaly by amending the current Form 30A to indicate the date of the set down on the fact of the summons.

Before the amendment to the Rules suggested, the court can fall back on its inherent powers to control its own procedures and fulfil its core mandate of doing justice to all> (See *Khunon & Ors vs Filrer & Scn* 1982 SA 353 (W) at 355 E-H).

> "Of course the Rules of court, like any set rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and appropriate to specific cases. Accordingly the superior courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if need be, the Rules of Court according to the circumstances" per SLOMOWITZ AJ.

It is trite that Rules of Court are here for the court and not the other way round,

See *Szedlacsek vs Szedlucsek* 2000(4) SA 147E at p 149 where it was held that:-

> "It is trite that Rules are there for the court, not the court for the Rules and this court must zealously guard against its rules being abused, particularly by the making of unnecessary procedural related applications which are not truly required in order for justice to be done or for the speedy resolution of of litigation but which appear to be designed mainly to inflate costs to the advantage of a practitioner's pocket" per LEACHJ.

The power of this court to issue directives in its quest to see that justice is done is beyond dispute. It is an inherent power that in reinforced by the rules. The rules are not an end to themselves and should not be obeyed slavishly and blindly especially where such observance will lead to an injustice in the form of differential treatment between the same class of litigants. The same observation was made by GILLESPIS J in *Zikiti v United Bottlers* 1998(1) ZLR 389 at 393G and 394A when he said:-

> "It might seem anomalous that the High Court should by an exercise of discretion, withhold jurisdiction form any party who on established authority, is entitled to claim relief. Although not expressed, the jurisprudential basis for such discretion is not hard to find. It is an instance of inherent jurisdiction of this court to regulate and control its own proceedings so as to prevent injustice or abuse of process. This equitable discretion underlies many recognized instances where the court will stay or dismiss proceedings."

In conclusion, I would do no better than borrow from GARDNE JP words in *Ncoweni v Bexuidenhout* 1927 CPD 130 where he said:-

> "The Rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where rules are deficient, I shall go so far as I can in granting orders which would help to further the administration of justice."

In view of the above, granting a default judgment in this case would be an injustice to the defendant.

In the result it is ordered that the plaintiff serves the defendant with a notice in terms of rule 272(1)(b).

Kawonde & Company, Plaintiff's Legal Practitioners