

CHRISTINE MUSANHU  
versus  
GEORGE MUSANHU

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 25 November 2019 & 12 December 2019

### **Chamber Application**

*N. Bvekwa*, for the applicant  
Respondent in person

MANZUNZU J: This is a chamber application which turned out to be opposed by the respondent.

The applicant seeks the following order; that

- “1 The bar operating against the applicant in HC 8921/15 be and is hereby lifted.
2. The applicant be and is hereby condoned for her failure to file heads on time.
3. The filing of the heads of argument on 21 May 2019 be and is hereby deemed to be a compliance with this order.
4. Each party bears its own costs.”

The parties have turned to be regular customers of the courts. The brief history relevant to this application is that a default judgment was granted on the divorce action against the respondent. The respondent then filed an application for rescission of the default judgment in HC 8961/15. It is in the application for rescission of judgment that the applicant failed to file heads and was then barred. The upliftment of the bar is the one being contested.

At the hearing of this application it turned out that the applicant had on 30 May 2019 filed applicant’s supplementary founding affidavit with the respondent filing supplementary notice of opposition on 27 June 2019. Both documents were irregular and the court expunged them from the record.

Counsel for the applicant deposed to a founding affidavit in support of the applicant's application for upliftment of bar. He explained the reasons behind his failure to file heads of argument in time. The reason being that the parties have been embroiled in several cases, he cited 7 cases, such that he acted under the mistaken belief that he had filed heads in the application for rescission of judgment. It has to do with human error and nothing more than that.

The respondent contested the application and raised 2 points *in limine*. He said there was no founding affidavit by the applicant hence application was fatally flawed. Secondly, that Mr *Bvekwa* who was applicant's lawyer was conflicted in that he was his lawyer who presided over all his commercial transactions. On the merits the respondent said the deponent of the founding affidavit had no authority from the applicant. Secondly that no cogent reasons were advanced as to why heads were not filed on time.

I need to turn to the preliminary points:

a) Founding affidavit

Respondent argued that there was no power of attorney authorising the deponent to depose to the founding affidavit. Mr *Bvekwa* (the deponent) is the one representing the applicant in the application for rescission. He is ceased with the facts as to why heads were not filed on time. There is nothing irregular in a legal practitioner deposing to the affidavit on behalf of the applicant where it is shown that the facts are within his knowledge. In any event the omission was on his part. Rule 227 (4) (a) also supports that position. The preliminary point must fail.

b) Recusal of Mr *Bvekwa*

Respondent said Mr *Bvekwa* was conflicted. He was his lawyer from 2001 to 2009. He was his lawyer on commercial transactions. It is not every representation which amounts to a conflict of interest. A party who alleges conflict of interest must adduce evidence in support of that. This is an application for upliftment of the bar, one may want to understand in what way is Mr *Bvekwa* conflicted in respect of this case. I do not see in what way. At least no such evidence has been shown. I therefore see no conflict of interest in respect to this application. The second point in limine must therefore fail.

On the merits, one must look at the requirements for condonation. In *Bessie Maheya v Independent African Church*, SC 58/07 the following were outlined as the requirements for condonation.

- The degree of non-compliance.
- The explanation for it
- The importance of the case
- The prospects of success
- The respondent's interest in the finality of the judgment.
- The convenience of the court
- The avoidance of unnecessary delay in the administration of justice.

These grounds must be collectively considered. The parties are fighting in a divorce matter in which the respondent seeks rescission of judgment. The case is very significant to the parties because its end result might affect the status of the parties. There is no doubt that Mr *Bvekwa* was not diligent enough to ensure that heads were filed on time. He was negligent in a way. There are several cases before this court by the same parties. The failure to file heads in that case, in my view, is not a sin to be visited upon the applicant. The application for rescission of judgment is an important case to both parties where justice demands that both parties be heard. The delayed heads have already been filed. The applicant has also raised valid resistance to the application for rescission. She must be afforded the opportunity to be heard by condoning her failure to file heads on time.

While courts are strict in ensuring that the parties comply with the rules, courts are not quick to lock out a party from being heard where heads missed the target time but with a reasonable explanation. This is a matter where, despite the success by the applicant, each party must bear its own costs.

Accordingly, I grant the order in terms of the draft as follows.

It is ordered that:

1. The bar operating against the applicant in HC 8921/15 be and is hereby lifted.
2. The applicant be and is hereby condoned for her failure to file heads on time.

3. The filing of the heads of argument on 21 May 2019 be and is hereby deemed to be a compliance with this order.
4. Each party bears its own costs.”

*Bvekwa Legal Practice*, applicant’s legal practitioners