MOSES PIKAI SHONIWA
versus
NYUKWA SHONIWA (NEE MAZENGEZA)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 December 2015

Unopposed Court Application

R Mataka, for the plaintiff
Defendant in person

CHITAPI J: This court application was dealt with by myself on the eve of christmas on the family court unopposed roll.

The brief background to the application is as follows:

1. The plaintiff sued the defendant (his wife of 30 years) for divorce. The marriage was blessed with 4 children, all adults and self-supporting.
2. There were no ancillary issues concerning maintenance and related issues except for the issue of property sharing in respect of which the plaintiff averred, that the parties had shared their property upon separation and sought an order that each party retains what was possessed by that party upon divorce.
3. When the defendant was served with summons, she did not enter appearance to defend. The plaintiff followed up on the non-appearance to defend by filing and serving the defendant with a "notice to plead and intention to bar". I do not know why the plaintiff refers to the notice as "Notice to Plead and Intention to Bar" because in terms of r 272 (1) (a) as read with Form No. 30 the notice is in the rules styled "Notice to Plead". The body of the notice to plead in terms of r 272 (1) (a) should put the defendant on terms to "plead, answer or except, or make a claim reconvention…" The plaintiff's notice in this case calls upon the defendant to file their (*sic*) plea. Although I did not take issue with the wording of the notice, I nonetheless remind legal practitioners and parties of the need to comply with the wording of the notice as provided for in the rules because the filing and service of the notices is a

peremptory requirement in terms of r 272 (1) (a). Since it is peremptory to file and serve it, such notice should be drafted in the wording as given in the rules.

4. After serving the notice which I have commented upon, the plaintiff in compliance with r 272 (2) (b) caused personal service of the notice of set down of the application for a final order of divorce.

5. Mr *Mataka* upon the matter being called stood up and submitted that the plaintiff's papers were in order. I was satisfied that save for the defective notice to plead which I could and did condone, the papers were in order. I accordingly granted a decree of divorce and other relief as set out in the draft order and proceeded to deal with the rest of the roll.

6. When the Registrar stood up and advised me that I had completed the roll, I noticed that there was a group of people comprising an elderly woman and three elderly men who were whispering to each other. The woman was making reference to some paper which she was holding as the parties whispered to each other.

7. I considered it prudent to make enquiry of the group as to whether they had any issues to do with the completed court roll because I had noticed their presence from the time the court commenced proceedings for the day. Upon enquiry by the Registrar, the elderly woman stood up and identified herself as the defendant in the instant matter. I advised the woman that I had already granted the divorce in the matter and ancillary relief. She indicated that she had thought that she would be called and given an opportunity to speak. I asked her whether she had advised the plaintiff's legal practitioner of her presence and she said that she had not done so as she did not know him.

8. I was faced with a situation in which I was *functus officio* but at the same time having power to use the provisions of r 449 to revisit my order. However, the powers provided to the court or judge under r 449 are exercisable on application. The rule refers to an application being made by the affected party. The rule does not refer to a "court application" being made. The distinction is material because a court application is referred to and defined in the rules but "an application" is not. I was inclined to interpret the rule as allowing an affected party to make application which could be made orally. I was also fortified in my reasoning that I could hear the defendant because r 449 is very

wide and allows the court or judge *mero motu* to revisit its/his order for purposes of correction, rescission or variation of the same for reasons set out in subpara(s) (a), (b) and (c) of the said rule.

9. I decided to hear what the defendant had to say, being mindful of r 272 (2) which provides that the judge or court should not vary, correct or rescind the order granted unless parties who may be affected have been given notice of the proposed order. I was satisfied that I would not offend the rule if I was to hear the defendant's application and then only if I was satisfied that there were good grounds to vary, rescind or correct my order, would I cause that notice of my intended order be given to affected parties before I alter my previously given order.

10. Happily, the granting of the indulgence to hear the defendant was a blessing in disguise. She wanted the court to explain to her the order which had been granted. The order as set out in the draft order which I had already endorsed was explained to her. She had no qualms with the order and was satisfied with it. She and other members in her group exchanged handshakes and were all smiles. When I enquired as to why she had appeared apprehensive initially, the defendant responded that she did not trust her husband and was afraid that the husband could have altered the order which he had prayed for in the summons which she had not defended. My order therefore remained extant.

11. I should perhaps mention in passing that it is good practice for legal practitioners acting for the plaintiff's in circumstances where they will have utilized r 272 (2) (b) and served the notice of set down personally upon the defendant to enquire prior to the hearing whether the defendant would be present and they can discuss any matters arising with the defendant beforehand. Another way of dealing with the scenario is to request that the defendant be called by the Registrar before applying for default judgment. The court will then be alerted to the presence or absence of the defendant. Whilst I considered that the court should be satisfied on the presence or absence of the defendant where the matter is dealt with in terms of r 272 (2) (b), I would think that in practice, it should be the plaintiff who will be seeking to utilize the rule to get a default order who should take the initiative to establish whether or not the defendant has attended court in answer to the notice of set

down whose service will have been effected at the instance of the plaintiff and not the court.

Accordingly, legal practitioners and self-acting plaintiffs should be directed accordingly. The order of this court therefore remains that:

The plaintiff is granted an order in terms of the Draft Order.

J Mambara & Partners, plaintiff's legal practitioners