HB 53-17
HC 3007-15
XREF HC 2403-14
XREF HC 869-15

WADZANAI MEMORY AZANGWE (nee CHIKOMO)
versus
GODFREY AZANGWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 FEBRUARY 2017 AND 16 MARCH 2017

Opposed Matter

D Kanokanga for the applicant
N Mazibuko for the respondent

MOYO J: This is an application for rescission of the judgment of this court granted in default to the plaintiff on 22 October 2015.

The plaintiff and defendant were husband and wife and the order of the 22nd of October 2015 was an order for divorce.

The applicant seeks the rescission of the judgment on the basis that firstly she was not in willful default and secondly that she has a *bona fide* defence on the merits of the case. Applicant's counsel submitted that he would not insist on the rescission of the decree itself.

The parties were locked in a matrimonial dispute concerning divorce and ancillary issues.

The respondent raised a preliminary point that the applicant should not be heard in this matter as she has not purged her contempt in relation to clause (b) of the divorce order which awarded the custody of the parties minor child namely Samantha Azangwe to the respondent.

The applicant's counsel submitted on this point that applicant was not in contempt of court as the respondent was aware that the child in question was based in the United Kingdom and that he did not make any effort to enforce that clause of the divorce order and therefore there could be no contempt where an order of court was never sought to be enforced by the respondent. I tend to agree with the assertion by the respondent's counsel in this regard for the simple reason that the respondent's opposing affidavit does not formulate the basis for the contempt allegations as he does not tell us what efforts he made to have the minor child placed in

his custody given the practical difficulty of the fact that the child was based in the United Kingdom and he is based in Zimbabwe.

I will therefore proceed to deal with the matter on the merits.

The history of this matter is that the applicant was served with summons. The summons and declaration were served on the defendant via email on 19 November 2014. She had 21 days within which to enter appearance to defend.

She did enter appearance to defend on 1 December 2014. The 21 days within which she was expected to enter appearance to defend is not clear *ex facie* the court order for substituted service, but that is what plaintiff's counsel advised her through an email sent to her on 19 November 2014, the email through which she was served with the summons. Such email is contained on page 9 of the plaintiff's consolidated index in the divorce matter that is, HC 2403/14. Thus the defendant did not subsequently file her plea until 7 January 2015 when the defendant's lawyers filed a request for further particulars. The plaintiff's lawyers did not supply the further particulars but instead filed a notice of intention to bar on 13 January 2015. This is where the problem began in my view.

Rule 137 provides for alternatives to pleading to merits. Rule 137 (1) (d) provides thus:

> "A party may, apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars."

Plaintiff's counsel did not supply the further particulars, but instead cited the case of *Russell Noach Pvt Ltd* v *Midsec North Pvt Ltd* 1999 (2) ZLR, at page 8.

Counsel for the plaintiff contended that the time had since elapsed for the defendant to do anything except to file their plea. I believe the plaintiff's counsel with due respect misread the import of rule 137 as juxtaposed with the facts in the *Russell Noach* case *(supra).* Rule 137 does not provide a maximum period within which a party can utilize the avenues open to it in terms of that rule in my view. Rule 137 gives a party those options and remains mum on the maximum period of time within which they should be taken. It therefore cannot be correct in my view that defendant could not between 1 December 2014 and 13 January 2015, explore any other option available to it. In fact order 12 rule 80 provides as follows:

"A party shall be entitled to give 5 days notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No 9 at the address for service of the party on default".

This rule stipulates that this option is available when the other party has not requested further particulars or pleaded, within the time prescribed in the rules I do not believe it can be used where further particulars have already been requested.

What I believe, the defendant could not do, which I believe is the import of the *Russell Noach* case, the defendant cannot, after having been served with a notice of intention to bar, which calls upon him to specifically file and deliver a plea, instead file a request for further particulars. The *Russell Noach* case is distinguishable from the facts herein because in that case the defendant filed a request for further and better particulars in response to a notice of intention to bar. That is not the case here. I believe the reason why the rules have no time limit on the avenues open to a defendant in terms of rule 137, is because that should be so, UNLESS where the plaintiff has taken it upon itself to kick start the next stage by requiring through a notice of intention to bar, that defendant files their plea. Once the plaintiff has done so, I agree as per the decision in the *Russell Noach* case, that indeed defendant would then have no other option except to file their plea, prior to that, defendant can still take whatever course is open to it in my view. Only upon being served with a notice of intention to bar do those options vanish. I hold the view that there is no automatic bar in both rule 119 and rule 137 which is why rule 80 provides for the procedure for barring.

The defendant was therefore within her rights to request for the further particulars at the time that she did. The default judgment was erroneously granted in my view. In any event even if it were not so, I also hold the same view that CHIWESHE J (as he then was), held in the *Togara* v *Togara* case HB 6/05, where he advocated for a liberal approach in matrimonial matters. I have seen the declaration by the plaintiff and I note that the matrimonial estate is quite sizeable and it would be just and equitable that the court hears both parties prior to coming up with a just and equitable redistribution of the matrimonial assets. I hold the view that in matrimonial cases,

due to the nature of the case, the courts should lean in favour of granting litigants audience prior to decisions that are in most cases life changing, being taken against them. In this matter an effort was made to request for further particulars and therefore I do not believe that applicant was in blatant disregard for the rules and the court, she sincerely believed that she had been wrongly barred. I will however, hasten to point out that the conduct of applicant's then legal practitioners was deplorable even if they believed they had rightly sought the further particulars. Their inaction in leaving the matter to be finalized to the detriment of the applicant's interests was a clear neglect of duty. I however, am reluctant to visit the sins of Mr Mukono on the applicant as I have already stated there is a lot at stake, including minor children's interests.

1) I accordingly grant the application for the rescission of paragraphs b – g of the court order in HC 2403/14.
2) Costs shall be in the cause.

Kanokanga and Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners