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Judgment No. SC.46/06
Civil Application No. 66/01

BARBRA MASIWA v DONALD NYASHA MASIWA

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 20 & OCTOBER 11 2006

H Nkomo, for the applicant

H. Zhou, for the respondent

Before: GWAUNZA JA, In Chambers, in terms of Rule 34(5) of the Supreme Court Rules.

This is an application filed on behalf of the applicant, for reinstatement of her appeal in case No 66/01, and for condonation of the late filing of her heads of argument.

It is common cause that the applicant was represented in case No 66/01, which is a divorce action, by Mrs Mtetwa, who was then a consultant with Messrs Kantor and Immerman, legal practitioners.

It is also common cause that Mrs Mtetwa left Messrs Kantor and Immerman to become a partner in the firm of Messrs Mtetwa and Nyambirai, which was established on 1 June 2006. Mrs Mtetwa deposed to the founding affidavit filed in support of this application.

The respondent has raised a point in *limine* which I propose to deal with first and, depending on my determination on this point, may then proceed to consider the merits of the application.

Point in *limine*

The respondent argues that this matter is not properly before the Court, since Messrs Kantor and Immerman, who were the applicant's legal practitioners in the main divorce action, have not renounced agency on her behalf. Nor, the respondent further argues, has the firm of Messrs Mtetwa and Nyambirai, who have filed this application on her behalf, filed a notice of assumption of agency. The contention is also made on behalf of the respondent, that the applicant herself has not deposed to an affidavit to support Mrs Mtetwa's assertion that the former had instructed the firm of Messrs Mtetwa and Nyambirai to take up the matter on her behalf.

These assertions are not, and cannot on the papers be, denied. Mrs Mtetwa's explanation, in so far as I can understand it, is that the present application is separate and distinct from the main divorce action, and therefore constitutes "fresh instructions in a new application". That being the case, it is argued, the firms of Messrs Kantor and Immerman and Messrs Mtetwa and Nyambirai can only renounce and assume agency, respectively, if the application is successful and the appeal is reinstated.

I have some difficulty in following this argument. The applicant noted an appeal against a High Court judgment in a divorce action. She failed, for whatever reason, to file her heads of argument and the appeal was deemed to have lapsed. A letter to this effect was sent to the applicant's legal practitioners of record, Messrs Kantor & Immerman, who held the applicant's brief to prosecute her appeal to the Supreme Court. The legal practitioner charged with the task left the firm of Messrs Kantor and Immerman to join another newly established firm. The applicant was invited, in writing, by Messrs Kantor and Immerman to indicate whether she preferred that firm to continue representing her, or whether she wished her particular legal practitioner, Mrs Mtetwa, to take the matter with her to the new firm. On the evidence before the Court, Mrs Mtetwa left before the applicant had made known her preference. As far as this court was concerned therefore, Messrs Kantor and Immerman remained the applicant's legal practitioners. That being the case, a notice of renunciation of agency sent to the court when this firm handed over the applicant's record (as it must have) to Messrs Mtetwa and Nyambirai, would not have been out of place. Nor would have been a notice from Messrs Mtetwa and Nyambirai to the effect that they had assumed agency on behalf of the applicant.

The Court, going by its Rules, normally accepts the notices of renunciation and assumption of agency, as indications of a litigant's choice of legal practitioner where a change happens in the process of prosecuting his/her case. This is for the convenience of the court and allows for order and efficiency in the prosecution of legal proceedings. I am not satisfied the present application is so divorced from the main divorce action, as to render the filing of these notices, unnecessary.

As it is, there is nothing in the papers before me to indicate that the applicant did indeed abandon Messrs Kantor and Immerman and took up with the firm of Messrs Mtetwa and Nyambirai. As argued for the respondent, the applicant could at the very least have deposed to an affidavit confirming Mrs Mtetwa's, assertion that she (the applicant) had indeed instructed Messrs Mtetwa and Nyambirai to represent her.

Be that as it may, I have been urged, in the alternative and in my discretion, to condone the failure by Messrs Mtetwa and Nyambirai to file a notice of assumption of agency in this matter.

It is true that the applicant herself is in no way to blame for the failure by Messrs Mtetwa and Nyambirai to file a notice of assumption of agency on her behalf, nor for that matter the failure by Messrs Kantor and Immerman to file a notice of renunciation of agency. Legal practitioners normally do not require specific instructions to that effect. All that the applicant was required to do was indicate her preference as to which of the two firms was to represent her in view of the changes that had taken place. It would therefore be an injustice to the applicant if the consequences of this default were visited on her. For this reason I will condone the non-filing of the notices in question.

Merits

It has been submitted and not seriously challenged that the failure to file the applicant's heads of argument was attributable in the main to the confusion that

attended on the movement of Mrs Mtetwa from Messrs Kantor and Immerman to the new firm. This explanation I find to be plausible under those circumstances. If any blame for the default is to be apportioned, it would in my view be between the applicant's erstwhile and present legal practitioners. While the courts have in some cases extended to the litigant the blame attributable to his or her legal practitioners for a default of this nature, I do not believe this is such a case.

As for the applicant's prospects of success on the merits, I am persuaded, among other submissions, by the contention made on her behalf that the court *a quo* may have misdirected itself in granting to the applicant a specific amount of money and not a percentage of the value of the property in question, as is normally done. The possibility of this court reaching a different decision on this and the other related arguments advanced on behalf of the applicant cannot, in my opinion, be discounted.

The application accordingly succeeds and an order in terms of the draft is hereby made.

Mtetwa & Nyambirai, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners