

SIJABULISIWE HUNDA (NEE MKANDLA)

Versus

ESMAEL HUNDA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 24 MAY 2006

Ms Vundla for plaintiff
M Ncube for defendant

Court's ruling on the application for postponement

BERE J: After hearing counsel for both parties on the application for a postponement I handed down the following order:

“That case number 3142/04 proceeds to trial at 1415 hours on 23 May 2006.”

I indicated my reasons would follow. Here are the reasons.

The plaintiff instituted divorce proceedings in this court on 12 August 2004.

A pre-trial conference was held on 18 July 2005. The undisputed submissions made in court were that the defendant did not attend the pre-trial conference hearing. A perusal of the record shows that at the time the pre-trial conference was held the defendant had not even filed his own issues.

A further perusal of the record clearly shows that even as of today defendant has not filed his synopsis of the evidence despite the plaintiff having done so.

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On 14 February 2006 the acting Deputy Registrar of this court formally advised the parties of the hearing date of this matter. The matter was to spill over to 24 May 2006 in the event of all the evidence not having been collected on the day of set down.

On 18 May 2006, the defendant wrote to plaintiff's counsel seeking a postponement of this matter on 23 May 2006. It is important to refer to the letter in *extensio*. The letter reads as follows;

"We are instructed by Mr Hunda and the matter is due for trial next week but our client has problems precipitating a request for a postponement on these grounds:-

- a) Our client's two witnesses Tawanda Hunda and Joshua Gumede are not available. Tawanda Hunda is in South Africa and Joshua Gumede is in Gokwe on urgent business and will only come after the scheduled trial dates. The writer also has to interview further these witnesses before the start of the trial.
- b) Our client has just had a bereavement in his close family and he has to sort out some family issues.
- c) Our client is not averse to a round table meeting to try to sort out the issue as there are not so many triable issues in this case.

By copy of this letter the Registrar of the High Court is advised of this issue."

On the morning of the scheduled date for trial the defendant's counsel sent his fellow legal practitioner to apply for a postponement of the matter. The reasons advanced were that the defendant could not attend court because he had had a bereavement and that his legal practitioner Mr S S Mazibisa had

urgently left for Harare the day before the trial date. It was only when defendant's counsel was in Harare that he sent word to his fellow legal practitioner to take over the matter.

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At first, counsel for the plaintiff strenuously opposed the postponement sought arguing the postponement was not justified and emphasising the defendant did not appear to be interested in having this matter concluded. She pointed out to the court that it was apparent from the history of this case that the defendant has not been keen to have this matter concluded.

After it was suggested by defendant's stand in counsel that since both parties were agreed on the divorce itself and the distribution of movables the court could go ahead and grant the order for divorce and confirm the order for distribution of the movable assets as done by the parties, the plaintiff's counsel abruptly took instructions from the plaintiff and conceded to a postponement.

It was the court's view that that concession by the plaintiff's counsel was not properly made and despite that concession the court dismissed the application for a postponement and ordered the trial to proceed in the absence of the defendant.

The court record will show that both the defendant's counsel and the defendant himself have adopted a lackadaisical attitude in dealing with this matter.

In the first place, it was procedurally wrong for the defendant's counsel to advise the defendant not to attend court on 23 May 2006. Matters properly set down are not postponed through mere correspondence but it is imperative that a litigant personally presents himself/herself at court and if he has to be excused, that indulgence does

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not come from his legal counsel but from the court itself. An application for a postponement is not automatically granted. It can either be granted or refused. Once it is refused, the trial must proceed.

In paragraph (a) of counsel's letter requesting for a postponement, the defendant suggests that he wanted a postponement to *inter alia* deal with further interviewing of certain witness.

This cannot possibly be a genuine reason for postponement. Interviewing of witnesses must precede the filing of pleadings. It is the normal course of litigation for litigants to file their pleadings after gathering the necessary supportive data to their position. It is also the normal course in pleadings for both parties to have filed their respective synopsis of evidence prior to pre-trial conference.

The defendant also suggested in the same letter seeking postponement that he had just had a bereavement and had "to sort out family issues". This was countered by the plaintiff through her

counsel who advised that the bereavement alluded to had occurred about two weeks ago. The court's view is that if the defendant wanted to attend court he could have done that despite the bereavement. It is highly improbable in the court's view that the defendant was being candid with the court.

The cumulative effect of all the reasons advanced for postponement of this matter clearly confirmed the casual if not deliberate dilatory approach by the defendant in the handling of this matter. Despite the concession made by the plaintiff's counsel towards the sought

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postponement, the court was satisfied beyond doubt that the application for postponement was a ploy by the defendant to frustrate the plaintiff.

It was for these reasons that the court saw it appropriate to deal with this matter in the absence of the defendant.

Dube & Partners, plaintiff's legal practitioners
Cheda & Partners, defendant's legal practitioners