MARTHA NYATHI
Versus
ESTATE LATE CHEMIST NYATHI

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 08 February & 22 March, 2023

Civil Appeal

Kanoti and Partners;Public Interest Lawyers -for the Appellant
Messrs Ross Chavi,for the 1st and 2nd Respondents

ZISENGWE J: This is an appeal against the decision of the Magistrate Court sitting at Chiredzi dismissing appellant's application for rescission of a default judgment which was granted in 2009.

The brief background of the matter is that the appellant was married to one Chemist Nyathi under the the Customary Marriages Act, Chapter 236, the marriage having been solemnised in 1986. It is common cause that the said Chemist Nyathi passed away on 17th July 2021. Well before his death, however, in 2009 to be precise he commenced proceedings against the appellant before the Magistrate Court sitting at Chiredzi under cover GL 11/09, seeking divorce from appellant and ancillary relief. For ease of reference the late Chemist Nyathi will henceforth be referred to as the "deceased"

Ultimately, however, default judgment was granted against the appellant apparently on the basis of her failure to file her plea. Most importantly it is common cause that prior to his demise, the deceased contracted a monogamous civil marriage with the 2nd respondent. Their marriage having been solemnised in 2012.

The 1st and 3rd respondents are the Executor doctrine of Estate Late Chemist Nyathi and the Matter of the High Court N.o respectively. I briefly pause here to observe that the correct way of citing a deceased Estate is by reference to that executor thereof see

In the application for the reason of the default judgment the 2nd respondent was cited in her individual capacity as such presumably because she stood to be affected by any order that the court would make.

Be that as it may, the crux of the dispute both in the court of *a quo* and in this appeal is the appellant's averment which she puts quite forcefully that she was completely unaware of the fact the deceased had instituted divorce proceedings against he let alone that an order for divorce had been granted. She steadfastly mantains that both the notice of appearance to defend filed of record and the proof of service of the notice to plead the latter which led to the default judgment are the work of but fiction. She completely disowns the signature appended on the notice of appearance to defend and challenges the respondents to prove otherwise. She attributes both the notice of appearance to defend and the proof of service of the notice to plead to the deceased, crafty and wicked maclunations to fraudulently obtain judgment against her. Although she did not say in as many words, she branded the notice of appearance to defend and the proof as of no legal consequence as neither of then have any real connection with her.

She challenged the respondents to produce proof of service of the summons on her. She also averred that should the notice to plead ostensibly served upon a responsible person at Chaminuka Building- same was never brought to her attention.

As for her potential defence to the divorce proceedings, she appeared to suggest that although the deceased was an unrepentant philanderer, her marriage to the latte was alive and well- and further that the fake divorce proceedings prejudiced her as far as the matrimonial assets are concerned.

In opposing the application in the court *a quo* the 2nd respondent disputed virtually all the material averments made by the appellant. Most pertinently, she averred that the notice of appearance to defend entered by the appellant in respect of the divorce proceedings admitted of no doubt of her having received the summon and that the proof of service filed by the messenger of court showed that the appellant had been duly served. She therefore insisted that the appellant was in wilful default.

She raised as a preliminary point the question of the appellants failure to apply for condonation given that the default judgment she sought to have rescinded was given back in 2009. This preliminary proceed was dismissed by the court *a quo* which from that the appellant appeared to have only gotten wind of the default judgement at a special edict convened by the Master. It was at that meeting that the 2nd respondent apparently produced an order of divorce and ancillary relief granted in 2009.

The 2nd respondent also averred in her opposing affidavit that the appellant was clearly aware of the default judgement given that she received her share of the distribution of the matrimonial estate. She averred in this regard that one ..... delivered to the appellant her share of the said estate.

She also attached to her notice of opposition four supporting affidavits, all challenging the propriety and *bona fides* of the application for rescission. The first was deposed to by one Effort Mtombeni who averred that he was a friend to the deceased and knew the appellant to having been divorced from the deceased. He further averred that following the divorce between appellant and deceased, he is the one who áccompanied'(sic) appellant's share of matrimonial properties in terms of a court order. The in the course of which the property was delivered her farm in concession around the year 2010. He averred further that although the appellant initially refused to take the property she eventually relented and accepted the same.

The second supporting affidavit was by Mr Lazarus Singo who identified himself as the 2nd respondent's brother in law (he did not elaborate) and stated that he attended a meeting before the Master of the High Court in Harare on the 21st of October 2021. He confirmed that at that meeting the 2nd respondent produced both her marriage certificate and the divorce order showing dissolution of the marriage between the appellant and the deceased.

The third supporting affidavit was deposed to by the deceased's sister Matilda Ndlovu who *inter alia* confirmed that the 2nd respondent was indeed married to the deceased and that as far as she was aware the 2nd respondent is deceased's only surviving spouse. Most importantly, she indicated that by the time of his death, deceased had long since divorced the appellant. She further indicated that the 2nd respondent lived with the deceased "exclusively" since 2004. She expressed surprise at being summoned by that Master of the High Court for a meeting at the behest of the

appellant when she said she had not ..... with for more than twenty-five years. She was emphatic that appellant was not the deceased's surviving of spouse.

The fourth and final supporting affidavit was deposed to by one Joshua Manyanga who was as with Effort Mtombeni was a friend of the deceased. He averred not only that he was a witness at the occasion of selominisation action of the marriage between deceased and the appellant but also that the appellant was aware of the existence of the 2nd respondent. In this regard he referred to an incident when the 2nd respondent was introduced to the appellant.

The appellant filed an answering affidavit refuting virtually all the averments made by the 2nd respondent and in supporting thereto. She branded same as either irrelevant, merely self serving, or plainly false.

She insisted that she was not in wilful default as the never entered appearance to defend and challenged the 2nd respondent to furnish a copy of the return on service as proof of service of the summons in her. She equally insisted that she was served with neither the notice to plead, the notice of set down, nor the order of default judgement.

She also attacked the manner in which the 2nd respondent ended up being appointed executrix of the estate of the deceased. Most importantly she averred that she is the rightful beneficiary of the bulk of the estate of the late Chemist Nyathi as she contributed towards its acquisition. She further averred that the subject matter of the dispute exceeded the monetary jurisdiction of the Magistrates Court.

She similarly disputed the averments contained in each of the affidavits filed in support of the 2nd respondent's position. She denied any knowledge of Effort Mtombeni, let alone having received any property delivered by him ostensibly pursuant to the impugned divorce order. She equally denied any knowledge of Joshua Manyonga or of the contents of his supporting affidavit. Although appellant confirmed that Matilda Ndlovu nee Nyathi is the deceased's sister, she claimed that same has a motive to take sides with 2nd respondent because she has heard from the grapevine that she has been promised a portion of the estate. Finally she denied any knowledge of Lazarous Singo and desputed the contents of his supporting affidavit save to confirm that 2nd respondent produced her marriage certificate at the meeting held by the Master. In sits ruling dismissing the application for rescission of the default judgment referred to the provision of order 30 Rule (2) (1) of the Magistrate's Court (civil) Rules, 2019 (hereafter referred to as the rules and forms firstly

that the notice of appearance to defend filed of record obviated the need to file proof of service of the summons upon the appellant.

Regarding the disputed proof of service of the notice to plead, the court *a quo* found that same was insufficient to establish such service. Ultimately therefore the court found that the appellant was in wilful default and that that being the case that was the end of the enquiry.

Reliance was placed on a *dictum* from the case of *Mushuma v Mushonga* HH45/13 and *Fletcher v Three Edmunds (Pvt) Ltd, Vishram v Four Edmunds (Pvt) Ltd* 1988 (1) ZIR 257 (Sc)

In the final analysis the court *a quo* opted to exercise discretion by refusing the application for rescission.

Disgruntled by the said outcome, the appellant mounted appeal and raised eight separate grounds challenging the ruling

The grounds of appeal were couched as follows,

1. *After accepting in its ruling on the 1st and 2nd respondents point in limine that appellant had knowledge of the default on 29 April 2023, the court a quo grossly erred and misdirected itself when it found on the merits that appellant was in wilful default and needed to have applied for condonation for rescission.*
2. *The court a quo erred and misdirected itself in coming to the conclusion that appellant was in wilful default by placing reliance on the messenger of courts return of service on a notice to plead, disregarding conclusive evidence by appellant that appellant was not on wilful default, in the form of the non-existence of a return of service from the messenger of court for the service of summons, as well as the non-existence of a return certificate of service for notice of set down.*
3. *The court a quo erred and misdirected itself in coming to the conclusion that Appellant was in wilful default by placing un due reliance on the messenger of court's return of service on a notice to plead, disregarding conclusive evidence by the appellant that the notice to plead was not brought to her attention by whosoever had been so served by the messenger of court.*
4. *The court a quo erred and misdirected itself in failing to exercise its discretion judiciously by failing to appreciate that it was imperative to hear the appellant first before dissolving the marriage in light of the duty imposed upon it by the provisions of the Matrimonial Causes Act.*
5. *The court a quo erred and misdirected itself in that it exercised its discretion capricously by refusing to hear appellant before a decision affecting her nights and rules in the Matrimonial property she contributes towards its acquisition was taken.*
6. *The court a quo erred and misdirected itself by shifting the onus, and therefore.wanting the appellant to prove, non-signing and failing filing of the fake appearance to defend, as well as the appalently non-knowledge of the messenger of courts service of the notice to plead, yet it was the 1st respondent's onus it dispose the appellants evidence in that regard.*

7. *The court a quo erred and misdirected itself by failing to consider or take judicial notice of the appellant's conclusive evidence that her husband had gone through three different law firm in a small town, Chiredzi to process the seemingly unopposed divorce action, thus conclusively indicating a high likelihood of the erasing by the hubour of his misleading trail of events indicating including of seeming appellant's documentation, filed of record of the court a quo.*
8. *Having found that the appellant was not wilful default, the court a quo further erred and misdirected itself in not proceeding to consider the appellants grounds of objection to the default judgement as provided from by the rules, erringly choosing to restore itself to wanting to consideronly the Appellants prospects of success in the main case, being the divorce action.*

In heads of argument filed on behalf of the respondents the appellant streamlined its grounds of appeal and identified the following as the real issues up for determination.

1. *Whether the court a quo grossly misdirected itself in ruling that Appellant had not given sufficient explanation for the default or the explanation was sufficiently rebutted in a balance probabilities [groinds1,2,3, and 6]*
2. *Whether the court a quo erred and misdirected itself in not affording the appellant an opportunity to be heard in the main case before a final decision affecting her rights and interest in the matrimonial property was taken [grounds 4 and5]*
3. *Whether the court a quo erred and misdirected itself by failing to take judicial notice of clear evidence in the record that the husband (sic) went through three law firms in a promptedly unopposed matter, thus eraising the trail of his fraudulent processing of the divorce action [ground7]*
4. *Whether the court a quo erred and grossly misdirected itself in not considering the appellants submitted grounds of objection to the default judgement [ground8]*.

When oral arguments were made during the hearing of the appeal, the 3rd issue above, namely the one relating to the deceased having engaged the services of 3 different legal practitioners in prosecuting his divorce from the appellant was abandoned. Its abandonment, however is not surprising given that not only was such a development one that the court *a quo* could not legitimately take judicial notice of, but also that every litigant has a right in terms of 69(4) to legal representation by a legal practitioner of his choice. Nothing precludes a litigant from abandoning one legal representative for another for whatever reason. For a judicial officer to purport to take judicial notice and draw adverse inferences from such a decision amounts at an untenable abridgement of such a right.

The second issue/ground above, identified by the appellant in his restructured'grounds of ,of appeal as ammounting to an irregulantly tainting the decision arrived at is without merit.

According to appellant this ties in with ground 4 and 5. The refusal by a court, upon a proper finding thereto, that an application for the rescision of default judgement is not meritorious necessarily implies that such an applicant would have lost his right to be heard. The rules in this regard do not discriminate between matrimonial as non-matrimonial matters. Viewed from a different angle, a party to a civil dispute loses his right to be heard by failing to asset his/her rights thereto in a manner prescribed by the rules (eg.by failing to enter appearance to defend or to file his plea etc) resulting in default judgment being entered against him/her. Such a party however still has a window of opportunity to be allowed to have such default judgement rescinded. This is however only possible when the requirements for such rescission of judgement have been satisfied. Where such an application for rescission has been refused, the party so affected cannot raise the consequent denial of the right to be heard as a ground of impugning the decision.

The loss of the right to be heard is a consequence of and not a reason for the dismissal of an application for rescission of a default judgement. What should be attacked is not the consequence of but the reason for arriving at the decision. It applies ex-lege by operation of order 30 rule (3) which provides that

> *"If an application in terms of rule 1 is dismissed the default judgement shall become a final judgement"*

This effectively leaves two proper grounds of appeal namely whether the court a quo erred in finding that the appellant was in wilful default justifying a dismissal of the application for the rescission of judgement and secondly whether the court a quo erred in failing to consider the grounds of objection to the default judgement

When oral arguments were presented in this appeal we posed a question to the parties on the efficacy of an order for the rescission of the default judgement given that the person who obtained that default judgement has since passed away. More particularly we requested parties to submit supplementary heads of argument on the progression and consequences of such a rescission given the nature of the original dispute and that had only gone as far as the issuance of summons by the deceased.

An application for the rescission of a default judgement is made in terms of order 30 (1) of the Magistrates Court (civil) Rules,2019 which reads;

1) *(1) A party against whom a default judgement is given may not later than one month after he/she has knowledge thereof apply to the court rescind or vary such judgement.*
2) *Any application in terms of sub rule (1) shall be on affidavit stating shortly:*
   a) *the reasons why the applicant did not appear or file, and*
   b) *the grounds of defence to the action or proceedings in which the judgement or objection to the judgement*

2. **Orders which the court may make**

(1) on hearing an application in terms of rule 1 and being satisfied that
   a) the application was not in wilful default, and
   b) there is good prospect that the proffered grounds of defence as the proffered objection may succeed in reversing the judgement; the court may
   c) rescind or vary the judgement in question ,and
   d) give such directions and extensions of time as necessary for the further conduct of the action as application

(2) .....

(3) If an application in terms of rule (1) is dismissed the default judgment shall become a final judgement.

A proper reading of the rule reveals that the reasons for the default and the prospect of the grounds of defence or objection must be considered conjunctively. In contradiction the old Magistrates court (civil) rules, 1980 which provided in Order 30 (2) (1) provided thus;

2. (1) *The court may on hearing of any application in terms of rule 1, <u>unless it is proved that the applicant was in wilfull default-</u>*

   a) rescind or vary judgement in question and
   b) give such directions and extension of time necessary for the further conduct of the action or application.

The underlined words are absent in the current rules Unlike the old rules, a finding of wilfull default does not necessarily mark the end of the road for the applicant in an application for the rescission of default judgement, the court is still enjoined to consider whether the grounds of defence as objection raised can potentially cause a reversal of the default judgement. To that end the Magistrates Court civil rules have been brought in tandem with the High Court rules,

which in rule 27 broadly require that such an appellant for rescission of a default judgement establish good and sufficient cause.

Whether applicant was in wilful default

The first question that falls for determination is whether the court *a quo* erred in making a finding that appellant was in wilful default. In interrogating this vexed question regard will be had to the abundant authorities on what is meant by usefulness. A few examples will suffice. In *Zimbabwe Banking Corporation Ltd v Masendeke* 1995 (2) ZLR 400 (SC) wilfulness was described on the following terms

> *" Wilful default occurs when a party with the full knowledge of the service as set down of the matter, and the risk attendant upon default takes in decision to to refrain from appearing."*

In Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd 1994 (3) SA 801 (e) at 803 H-I, the following was said

> *" More specifically, in the context of a default judgement, wilfulness connotes deliberateness in the sense of knowledge of the action and its consequences, i.e its legal consequences and a ... and freely taken decision to refrain from giving notice of to defend, whatever the motivation for this conduct might be"*

The root cause of the divergent views held by the appellant and the 2nd respondent with regards to the question of the wilfulness or otherwise of the default is not too far to find: whereas the appellant appears to hold the view that only direct evidence of such wilfulness would suffice, the 2nd respondent based her position on circumstantial evidence.

By insisting on the production of the Messenger of Court's return of service showing service of the summons in her, forensic handwriting evidence showing that the signature appearing on the notice of appearance to defend is actually her and direct proof that the notice to plead filed at workplace was handed or communicated to her, the appellant is merely pedantically.

The 2nd respondent on the other hand chiefly relies on circumstantial evidence demonstrative of the appellant having been in wilful default. I will soon demonstrate how.

Circumstantial evidence involves the drawing of inferences from a particular set of proven facts. It finds application in both civil and criminal proceedings the cause of the divergent views held by the parties is not too far to find.

The learned authors Scmkkard and Van der Merwe in their book "Principles of Evidence"4th edition pp 578 had this to say

> *"Circumstantial evidence is not necessarily weaker than direct evidence. In some Instances it may even be of more value than direct evidence inferences. In this process certain rules of logic must be followed on the difference between the standards of proof in criminal and civil cases may not be discarded"*

Further down the page 579 paragraph 30 53 of the same book the following is stated

> *" inferences in civil proceedings" In civil proceedings the inference to be drawn must be consistent with all the proved facts, but it need not be the only reasonable inference. It is sufficient when it is the most probable inference. For example in AA Ondelinge Assuransie-Associasie BPK v De Beer 1982 (2) SA 603 (A), it was held that a plaintiff who relies on circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof when he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences."*

The learned authors concluded on this topic thus

> *"The second rule as set out above (namely that the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn: Why these proved facts do not exclude all other reasonable inferences there must be doubt whether inference sought to be drawn is correct) does not apply to civil proceedings, namely, proof beyond reasonable doubt."*

As to the value of circumstantial evidence Davis AJA in *Rex v De Villers* 1944 AD 493 at

Refers to (Best, Evidence 5th edition, Se 298): where the following is said

> *"Not to speak of a greater number; even two articles of circumstantial evidence though each taken by itself weighs but on a feather- join them together, you will find them pressing on the delinquent with the weight of a milestone... It is of the utmost importance to bear in mind that, where a number of independent circumstances point to the same conclusion, the probability of justice of that is not the sum of the simple probabilities of those circumstances but it is the compound result of them."*

The court proceeded further to say;-

> "*See also Evans'Pothier in obligations (2.242), and Wills, Circumstantial Evidence,(7th Edition, p 46). The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn."*

I must hasten however, to add that those sentiments through stated in the context of a criminal trial find equal application in the context of civil proceedings subject to the difference, as earlier stated that the inference that is sought to be drawn in civil proceedings needs not be the only reasonable inference to be drain as the most probable inference suffices.

The use of circumstantial evidence in civil proceedings has been considered in several cases in this jurisdiction. See for example *Zimbabwe Mining Development Corporation v Edward Hambakachire SC 2/20, Samuel Mukozho v Standard Bank Zimbabwe Ltd SC 754/18, and Zimbabwe Banking Corporative Ltd v Thando Ndlovu Sc 61-04.*

Further it is possible to prove a fact through circumstantial evidence by evidence on affidavit as the respondent sought to do in case. In this regard *Malaba JA* (as he then was) said the following in *Zimbabwe Banking Corporative Ltd v Thando Ndlovu (Supra)*

> *"The first misdirection by the appeals board and the Tribunal is in the view that the form in which evidence is presented ,(whether affidavit or viva voce) and its charactes (circumstantial or direct) determines whether it is of probative value. The thinking was that because the evidence against the respondent was presented in affidavit form and circumstantial in character, it could not be relied upon as proof of respondents guilt.*
>
> *Needless to say, that thinking was wrong. It is the cogency of the evidence that matters and not the form in which it is presented. Evidence in affidavit form is evidence on oath. It can be relied upon Smith Chatara v ZESA Sc 83-01"*

We find upon an examination of the evidence in toto and an application of the principles of circumstantial evidence set out above, that the court *a quo* cannot be faulted in finding that the appellant was in wilful default. The position articulated by the appellant that her signature was forged on the notice of appearance to defend and that she was never served with the summons is untainable and unrealistic.

The appellant wants this court to believe that the deceased hatched and employed a devious and elaborate scheme to obtain default judgement against her without her involvement. This scheme so the theory goes, involved misleading the court personel not only that the appellant had been duly served with the summons commencing action but also that she had entered an appearance to defend.

If deceased's ; objective was to obtain default judgement ..... why would he... the scheme unnecessarily? Why not simply file a fictitious return of service and obtain default judgement for want of entry of appearance to defend. It would have been illogical and counter intuitive to then file a fake notice of appearance to defend.

This then brings as to the question of the notice to plead. The first thing that immediately springs to mind is related to the preceding paragraph. If the notice of appearance was a result of deceased's devious machinations towards obtaining default judgement against the appellant fraudulently, and clandesively serving the notice to plead at the headquarters of appellant's place of employment at Chaminuka Building in Harare would be disengenuons are counter intuitive. By doing so not only did he risk the appellant being notified of the existence of the notice to plead with the disastrous consequence of his scheme being unravelled something the deceased would obviously be keen on avoiding. Not only would the appellant then by virtue of that notice to plead...the litigation fray but also the forgery appearing ex face the notice of appearance to defend would be unearthed potentially with disastrous criminal consequences for him. Put simply having the notice to plead filed in the manner it was would be to invite potential calamity to deceased.

The corollary of the above is that the probabilities favour the conclusion that the signature on the notice of appearance to defend was not forged. We therefore find not fault in the court *a quo's* reasoning in rejecting appellant's contention that her signature was forged on the notice appearance to defend. Not every dispute regarding a signature is resolvable solely via handwriting evidence. Circumstantial evidence in appropriate circumstances such as the present may be capable of resolving the dispute.

When we posed the question to appellant's counsel on the logic of filing the notice to plead at the Headquarters of appellant's place of employment, counsel for the appellant couldn't offer any plausible response and resorted to suggesting that perhaps the recipient of the notice to plead was one of deceased's girlfriends who was part of the scheme. That application is rejected for being absurd and wildly speculative. If the appellant was plainly untruthful in claiming that she never received the summons commencing action and in distancing herself from the notice of appearance to defend, She can hardly be believed when she claims that she did not receive the notice to plead. At the risk of sounding cynical, perhaps appellant would have done herself a favour by accepting having been served until the summons but denying having been served with a notice to plead.

In addition to the documentation that shows that appellant was served not only the summons commencing action but also with the notice to plead we find on balance that the evidence availed by the 2nd respondent buttress the appellants knowledge of the divorce proceedings against he and the outcome thereof. The supporting affidavits attached to the 2nd respondent's notice of opposition in the proceedings *a quo* are indeed indicative of such knowledge.

To summarise and conclude this segment, therefore, we find that the court *a quo's* decision on wilfulness of the default on the part of the appellant cannot be faulted and we uphold the same.

THE PROPOSED DEFENCE AND OBJECTION TO THE JUDGEMENT

In this regard

The appellant attacked the decision of the court *a quo* on two bases.

i) *That the default judgement deprived of an equitable share of the deceased's estate towards which she had substantially contributed and in respect of which she was entitled a significant share in terms of Section 7 of the Matrimonial Causes Act, [Chapter 5:13]*
ii) *That the court a quo erred in neglecting to deal with the ground of objection to the judgement being that the court a quo had no territorial jurisdiction in relation to the dispute*

The ruling of the court a quo was quite brief in its address on the prospects of success of the defence to the main claim. The following brief remarks were said in this regard.

> *" The applicant in her papers made lengthy submissions in the aspect of wilful default and rather dismiss in brief the grounds of defence which may reverse the judgement in the main matter. In the oral submissions made in court counsel for the appellant told the court that they have discarded their submission on jurisdiction. Applicant in addressing her prospects of success in the main matter submits that she loved her husband dearly and she too was loved by him. She also adds on to that by stating that she contributed to the acquisition of the property. It's the court's view that when the rescission of default is granted the aspect of who contributed what will be ill-founded."*

Although the court *a quo's* did not give reasons why it held the view that the appellants defence to the claim was unlikely to succeed

Grounds of Objection

The appellant relying among others on the cases of *United Refineries Limited v The Mining Industry Pension Fund and Others SC63/14 and Barzem Enterprises (Pvt) Ltd v Golden Pambuka and Others* Sc60/2019 argued that as the court *a quo* erred in failing to consider the grounds of objection to the judgement. The grounds of objection referred to being the alleged absence of jurisdiction on the part of the court to entertain the divorce proceedings.

In its application for the rescission of judgement the appellant cited two bases for objection to the jurisdiction the Magistrates Court namely

a) *That the court a quo lacked the territorial jurisdiction to hear the matter as the cause of action, occurred outside Masvingo Province.*
b) *That court a quo lacked the monetary Jurisdiction to hear the matter in light of the high value of the matrimonial estate*

As observed earlier, the court *a quo* in its ruling stated that the appellant had abandoned its objection on the jurisdiction of Magistrate Court. However in the present appeal, it was submitted on behalf of the appellant that she had only abandoned the ground of objection to the monetary jurisdiction of the Magistrate's Court but had persisted on the ground of objection based on the territorial jurisdiction.

There would be no basis far as to assume that the Magistrate by reffering to appellants abandonment of the argument based on jurisdiction only referred to monetary jurisdiction.

Be that as it may the position held by the appellant in this regard that the court with jurisdiction is that where the marriage was contracted is erroneous.

The Magistrate's Court by virtue of S2 (1) (b) of the Matrimonial Causes Act [Chapter 5:13] enjoyed jurisdiction any action for divorce, judicial separation or nullity of marriage in respect of marriages solemnised in terms of the Customary Marriages Act [Chapter5:07] as read with Section 11 (1) (b) (11) of the Magistrates Court Act, [Chapter 7:10]

The appellant falls into error by assuming that the cause of action'in divorce proceedings refers to the solemnisation of the marriage. The deceased was ordinarly resident in Chiredzi.

The Court's discretion and the efficiency of granting rescission.

As stated earlier, the parties were requested to submit supplementary heads of argument on the efficacy of granting rescission of judgement in divorce proceedings where plaintiff is now deceased, and further where the deceased post the divorce had a constructed a civil Marriage under The Marriages Act,Chapter 5:11

The initial position by Mr Kanoti for the appellant was that when rescission of judgment were to be granted, the executor of the Estate would be substantiated for the deceased. However, he seems to have abandoned that position probably upon realising that a civil suit wherein is claimed a vindication of personal rights cannot be taken away by the executor of beneficiaries prior to *litis contestatio*. In a major climb down the appellant conceded that it was neither practicable nor legally feasible for the executor of the deceased's estate to take over the matter. She however urges the court to nevertheless find a feasible solution to the legal quagmire In this regard it was proposed that once rescission is granted the appellant's marriage to the deceased which had been buried by the default judgement would immediately spring back to life. That being the case, the 2nd respondents Chapter 5:11 marriage to the deceased would revert to being a potentially polygamous customary union. The net result would find both appellant and 2nd respondent reverting it a shared customary law union status with the deceased with appellant being the 1st wife and the 2nd respondent being the 2nd wife entitling both to inherit from the deceased's estate.

It is settled that in terms of the common law, the plaintiff's claim is only transmissible to his/her when he dies after the closure of pleadings lie, at *litis contestatio* and provided that the claim is not personal to the plaintiff. A claim for divorce is personal to the plaintiff. It is at the

closure of pleadings that result in *litis contestatio* which is the freezing the partie's rights See *Jankowlak & Another v Parity Insuarance Company* 1963 (2) SA286

Ultimately we find that the appellants'application for rescission was not bona fide and that the court *a quo* cannot be faulted rejecting it in the exercise of the discretion. Here are our main reasons

1) *The spirite attempt by the appellant to mislead the court that she was not served with the summons commencing action*
2) *The sheer period that has elapsed since the default judgment was granted.*
3) *The fact that not only were deceased living separately for many years prior to the divorce proceedings being instituted.*
4) *The fact that the deceased had once moved on with his life and got married to the 2nd Respondent in terms of the Chapter 5:11*
5) *The very fact that deceased has since died and no one can prompt to carry over divorce litigation on his part*

If this rather unusual application for the rescission of a default judgment sought were to be granted the appellant would obtain an untenable advantage not only over the deceased who is now unavailable to defend this present application and to prosecute the main claim to its logical conclusion, but also over the 2nd respondent who was not party to the original litigation. She has now to scramble around to pick up the pieces of what must have happened between appellant and the deceased in an attempt to ward off appellant's legal on slaught.

One might be tempted to say that the appellant with the advantage of life is practically waging a battle against a dead person. She is attempting to prosecute a cause against deceased post humously where she failed to prosecute during his life time.

We hold the firm new that the court *a quo* did not err in exercising its discretion in dismissing the application for the rescission of the default judgment.-
Accordingly theh appeal is hereby dismissed with costs.

Zisengwe J.....
Mawadze J Agrees.....

Kanoti and Partners; Public Interest Lawyers; Appellant's Legal Practitioners
Messrs Ross Chavi 1st and 2nd Respondents Legal Practitioners