

SHADRECK VERA
versus
IMPERIAL ASSET MANAGEMNT COMPANY

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 22 March and 26 April 2006

Opposed Application

Mr *Biti*, for applicant
Ms *Zvarevashe*, for respondent

MAKARAU J: Rule 238 (2a) of the High Court Rules 1971, provides that

“ Heads of argument referred to in subrule (2) shall be filed by the respondent’s legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1):

Provided that-

- (i) no period during which the court is on vacation shall be counted as part of the ten day period;*
- (ii) the respondent’s heads of argument shall be filed at least five days before the hearing.”*

The correct interpretation to be placed on the rule appears to have elude the respondent’s legal practitioner, resulting in its heads of argument being filed out of time and without an accompanying or preceding application for condonation.

The applicant filed and served his heads of argument on 8 December 2005, 6 days after the High Court rose on vacation. The High Court resumed sitting on 9 January 2006 and the 10 day period within which the respondent had to file its heads in terms of rule 238 (2a) (ii) expired on 20 January 2006. No heads were filed on or before this date on behalf of the respondent.

On 14 December 2006, the applicant applied for a set down date and the matter was set down before me on 22 March 2006. On 14 March, five days before the set down date, the respondent filed its heads without an accompanying or preceding application for condonation explaining the delay.

At the hearing of the matter, the issue of whether or not the respondent was barred was raised and Miss *Zvarevashe* for the respondent maintained that the respondent was not barred as its heads were filed five days before the set down date. It then became necessary for me to render my interpretation of the rule. This it is.

The operative part of the rule is not to be found in the proviso. It is in the main provision and is to the effect that the respondent is to file his or her heads of argument within 10 days of being served with the respondent's heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's heads close to the set down date, he or she shall not have the benefit of the full 10 day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule.

It appears to me that rule 238 (2a) has to be read in conjunction with rules 238 and 223 (2)(a) for the High Court sitting at Harare where an opposed matter is to be set down on not less than 6 days notice to the other side after the filing and service of heads of argument by the applicant. Thus, where a matter is set down on 6 days notice to the other side immediately after service of the applicant's heads or argument, the respondent only has one day within which to file and serve his or her heads an unlikely reality currently where it takes between 20 and 120 days for an opposed matter to be set down after heads of argument have been filed.

In view of the stance that she adopted, Miss *Zvarevashe* could not and did not make an application for condonation before the hearing of the matter. In terms of rule (2b), where heads of argument that are required to be filed in terms of rule (2) are not filed within the specified period, the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down on the unopposed roll. The rule is in my view peremptory and the court has no discretion to exercise whether to bar the respondent or not. The bar falls into place automatically and by operation of the rules of procedure. It is not an order of the court that bars the respondent.

It is my further view that as the bar against a respondent in such circumstances is automatic and brings about a technical default, a review of the merits of either case at this stage of the proceedings, though provided for in the rules, will unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by rule 4(c) in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant as follows:

It is ordered that:

1. the respondent shall, within 5 days of the date of service of this order sign all documents necessary to have the motor vehicle registration number 772-215N registered in the name of the applicant, failing which the Deputy Sheriff is hereby authorized to sign all such documents on behalf of the respondent.
2. the respondent shall pay the costs of this application.

Honey & Blankernberg, applicant's legal practitioners.

Sinyoro & Company, respondent's legal practitioners.