

CITY OF HARARE
versus
SAMUEL CHAPARADZA
and
MARTIN WALTER CHINDOVE
and
TENSEN TIZAI NYAMBI
and
JOHN MAGWENZI

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 24 May 2021 & 23 June 2021

Opposed Court Application

K. P Kaseke, for the applicant
S Nyengere, for the respondent

MUZOFA J: On 24 May 2021, I granted a default order against the respondents. A request for reasons has been made for purposes of an appeal.

The applicant sought relief in terms of r 449 for the correction of an order granted by this court after a pre- trial conference between the parties. It was alleged that the issued order incorrectly captured the case number and the second, third and fourth respondents were not cited. The application was opposed. The respondents' opposing affidavits dedicated most of the response to the background of the matter. There was no discernible basis for opposing the application, in fact there was a veiled concession to the granting of the order sought.

On the date of hearing the matter, counsel for the applicant moved the court to grant a default order on the basis that the respondents were barred for failure to file heads of argument in terms of r 238(2a) of the Rules, 1971.

The pleadings show that the respondent's legal practitioners were served with the applicant's heads of argument on 16 March 2021. The certificate of service filed of record is testimony to this. Thereafter no heads of argument were filed for the respondents. Faced with this unassailable position Mr *Nyengere* had no option but to concede that the respondents were barred in terms of r 238(2b).

Rule 238 (2b) gives the court a discretion on how to proceed where the respondent is barred for want of filling heads of argument. The court has an option to either deal with the matter on the merits or direct that the matter be set down for hearing on the unopposed roll. Dealing with the matter on the merits is certainly an exercise in futility since the other party has not been heard and invariably a default order will be issued. It is trite that even if a court considers the merits of the case in the absence of the other party the resultant order remains a default order. See *Zvinavashe v Ndlovu* SC 40/06. A referral to the unopposed roll would result in a default order which can still be granted by this court. The effect is the same.

In the face of a bar operating against the respondents the court opted to grant the default order without hearing the merits of the matter. Accordingly, the following order was granted.

The application is granted with costs.

Laita & Partners, applicant's legal practitioners
Messrs Kanokanga & Partners, respondent legal practitioners