

PETER FREYMARK
versus
RICHARD MTANDWA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 16 July 2013

Opposed application

Adv. J.B Wood, for the applicant
P. Nhokwara, for the respondent

TAKUVA J: At the hearing of this matter, the issue of whether or not the respondent was barred was raised and Mr *Nhokwara* for the respondent submitted that the respondent was not barred as its heads were filed five days before the set down date.

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

“Heads of argument referred to in subr (2) shall be filed by the respondent’s legal practitioner not more than ten days after the heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subr (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 applicant filed and served his heads of argument on 25 July 2012. The respondent did not file his heads within the 10 days period. He only did so on 8 July 2013. The hearing was set for 16 July 2013.

It was conceded that respondent’s heads of argument were filed almost a year after receipt of the applicant’s heads. The sole argument presented was that the respondent would rely on the proviso to Rule 238 (2a) cited above.

The same issue came before MAKARAU J (as she then was) in *Vera v Imperial Asset Management Company* 2006 (1) ZLR 436 (H). The learned judge held that;

“The operative part of r 238 (2a) of the High Court Rules, 1971 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 heads of argument within ten days of being served with the applicants’ 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 shall not have the benefit of the full ten 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.

Where a respondent’s heads of argument are not filed timeously in accordance with r 238 (2a), the respondent concerned is automatically barred and the court may deal with the matter on the merits or direct that it be set down on the unopposed roll.” (my emphasis).

I associate myself with the above interpretation of the rule. Consequently, I find that respondent’s interpretation of r 238 (2a) is incorrect. The effect is that the respondent is automatically barred by operation of the rules of procedure as the rule is peremptory.

Accordingly, it is ordered that the matter be set down on the unopposed roll.

Matizanadzo & Warhurst, applicant’s legal practitioners
Messrs Mambosasa, respondent’s legal practitioners