

THE ADDITIONAL SHERIFF CHIVHU  
and  
MEULLE CONSTRUCTION (PRIVATE) LIMITED  
versus  
CENTRAL ESTATES (PVT) LTD  
and  
PETER TARUVINGA & 37 OTHERS

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 24 March & 8 June 2016

### **Opposed Application**

*I Pasi*, for claimant  
*K Masasire*, for judgment creditors

TAGU J: This is an application in terms of Order 32 r 226 (2) (c) of the High Court Rules in which the Claimant is seeking the leave of this Honourable Court to file a further affidavit in HC 7900/13. This application is necessitated by the fact that the Claimant requires to file a supplementary opposing affidavit after the parties had already filed heads of argument. To facilitate this application, this court removed HC 7900/13 from the opposed roll to allow this present application to be filed.

At the hearing of the matter the Claimant's counsel raised a preliminary point that the judgment creditor was barred for failing to comply with r 238 (2a) of the High Court Rules 1971. He moved for a default judgment since the judgment creditors were barred for failure to file its heads of argument in terms of the rules. The judgment debtor relied on the case of *Shadreck Vera v Imperial Asset Management Company* HH50/2006.

The counsel for the judgment creditors opposed the preliminary point on two grounds. The first ground was that the judgment creditors were not barred because at the time the Claimant filed and served its heads of argument the court was on vacation. Secondly, the judgment creditors relied on the *proviso* to r 238 that said that heads can be filed 5 days before the date of hearing.

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."

*In casu* the Claimant filed its heads on 14 August 2015. The heads were served on the judgment creditors on 17 August 2015. The High Court had risen on vacation on 7 August 2015. The judgment creditors were expected to file its heads on 25 September 2015 because the High Court resumed sitting on 14 September 2015. Instead the judgment creditors filed their heads on 15 October 2015. The application for a set down date was made on 12 November 2015 and the matter was set down for hearing before me on 24 March 2016.

Clearly the judgment creditors filed their heads of argument out of time. It was far more than the 10 days stipulated in the rules. When they filed their heads out of time they had not applied for condonation. The 5 days before trial referred to in the *proviso* is only applicable where the applicant has filed and served his heads and goes on to apply for a set down date as soon as possible. In that scenario the 5 days are then calculated backwards from the date of set down.

In my view the counsel for the judgment creditors misinterpreted the provisions of r 238 (2a) and the *proviso*. I agree with the counsel for the Claimant that the judgment creditors were barred. I share the same sentiments by Makarau J (as she then was) in *Shadreck Vera v Imperial Asset Management Company supra* where she said that-

".....the rule is 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."

I will therefore treat this application as unopposed, and grant a default judgment in favour of the Claimant as follows:

It is ordered that:

1. Claimant is granted leave to file a supplementary opposing affidavit in HC 7900/13 within 10 days of the granting of this order.
2. The judgment creditors shall pay the costs of suit.

*Gill, Godlonton & Gerrans*, claimant's legal practitioners  
*Musoni Masasire Law Chambers*, judgment creditors' legal practitioners