SITHEMBINKOSI DUBE

Versus

SIMANGELE DUBE

And

C.M. SIBANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 AUGUST & 20 SEPTEMBER 2012

R. Moyo-Majwabu for applicant
Miss Nkomo for 1st respondent

Judgment

NDOU J: That the 1st respondent ("Respondent") is barred is to me, beyond dispute in light of the provisions of Rule 238 (2a) of the High Court Rules, 1971. The 1st respondent's heads of argument were not filed timeously in accordance with Rule 238 (2a). The applicant filed her heads of argument on 19 June 2012 and served the same on the 1st respondent on the same date. The 1st respondent filed her heads of argument on 5 July 2012 i.e. eleven days later. The 1st respondent, therefore, filed her heads of argument outside of the ten day period allowed by Rule 238 (2a), *supra.* On account of the automatic bar, the applicant set down the matter on the unopposed roll without notice to the 1st respondent.

Fortuitously, when the matter was called, the respondent's legal practitioner was also present in the Motion Court. She contended that the respondent was not barred as her heads of argument were filed well before five days before the set down date. The issue raised by Ms *Nkomo* was dealt with MAKARAU J (as she then was) in *Vera* v *Imperial Asset Management Co.* 2006 (1) ZLR 436 (H). MAKARAU J rightly interpreted Rule 238 (2a) in the following manner. The

operative part of Rule 238 (2a), *supra*, 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/her heads of argument within ten days of being served with the applicant'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 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. The rule is peremptory and the court has no discretion to exercise whether to bar the respondent or not. It is for these reasons that I find that the respondent is automatically barred. But, in this case the respondent had filed an opposing affidavit. The application is, therefore, different from an application where no opposing affidavit was filed as no competing facts or conclusions at law are placed before the court or Judge. In the case where the respondent is simply barred, his or her opposing affidavit is before the court and it does constitute evidence before the court. It is on this basis that the court may resolve the matter on merit as provided for in Rule 238 (2b). The matter cannot be resolved on the merits in the case of an application to which no opposing papers have been bona fide – *Kaufman Brothers Trustees* v *Gruer* 2004 (1) ZLR 422 (H) at 424C – F. In this case the court rightly stated at 425F –

> "It is, therefore, strictly not correct to say that in an opposed application where the respondent has not filed heads, the application becomes unopposed. I prefer to hold that the application remains opposed but the respondent has lost the right to appear and move the court in his or her favour. This on its own will, however, in my view, not constitute a bar from setting the matter down on the unopposed roll as the respondent will not [be] prejudiced by so doing since the court will exercise the same powers that it will exercise when it sits as a court determining opposed applications."

Further at 425G – 426A the learned Judge stated –

> "The issue that has exercised my mind in this application is the fact that by practice of this court, matters set down on the opposed roll are always set down on notice to the respondent whether or not that respondent has been barred. By adopting this procedure, this court has granted respondents in the position of the respondent before me a chance to be heard before the matter is determined on the merits or is referred to the unopposed roll in terms of rule 238 (2b). This practice may have arisen when set-down of opposed matters were the duty of the registrar upon receipt of the applicant's heads or it may have some other origin. Whatever that origin, it has given respondents who are barred a procedural advantage to be served with a notice setting that matter down and I am reluctant to take away from the respondent before me. He was not served with a notice of set down and is therefore prejudiced by the enrolment of this mater on the unopposed roll." (Emphasis added)

I agree with the learned Judge. In this case the 1st respondent was equally prejudiced because she was not served with the notice of set down.

Accordingly, it is ordered that this application be set down with notice to the 1st respondent. There is no order as to costs.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Kenneth Lubimbi & Partners, 1st respondent's legal practitioners